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1. MUNICIPAL CORPORATION—NO AUTHORITY TO MERGE POLICE AND FIRE DEPARTMENTS INTO COMMON UNIT TO PERFORM DUTIES OF BOTH.
2. MUNICIPALITY WITHOUT AUTHORITY TO PROVIDE FOR A DEPARTMENT WHERE MEMBERS PERFORM DUTIES OF POLICE AND FIRE DEPARTMENTS—MAY NOT INTERCHANGE ELIGIBLE LISTS AND TRANSFER PERSONNEL—SECTION 486-10d G. C., PROVIDES FOR SEPARATE CIVIL SERVICE REQUIREMENTS.
3. MUNICIPALITY FAILED TO SET UP POLICE DEPARTMENT AND FIRE DEPARTMENT—PENSION LAWS DO NOT APPLY TO MEMBERS OF UNAUTHORIZED DEPARTMENT PERFORMING DUTIES OF BOTH.
4. POLICE DEPARTMENT—FIRE DEPARTMENT—NOT SET UP BY MUNICIPALITY—LAWS ARE INOPERATIVE WHICH PROVIDE FOR LEVYING AND DISTRIBUTION OF TAXES TO SUPPORT PENSION FUNDS.

SYLLABUS:

1. A municipal corporation under the Constitution and laws of Ohio does not have the authority to merge the police and fire departments into a common unit performing the duties of both.

2. Since Section 486-10d, General Code, provides for separate civil service requirements for police and fire department applicants, and forbids the interchanging of eligible lists and the transfer of personnel from one department to the other, a municipality is without authority to provide for a department the members of which perform the duties of both departments.

3. Where a municipality fails to set up a police department and a fire department, as such, the laws providing for pensions for members of police departments and fire departments do not apply to members of an unauthorized department performing the duties of both.

4. Where a municipality fails to set up a police department and a fire department, as such, the laws providing for the levying and distribution of taxes for support of pension funds for members of those respective departments are inoperative.

Columbus, Ohio, November 7, 1951

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen :

I have before me your request for my opinion, which reads as follows :

“The current examination of the records of the City of O., a charter city, disclosed that the regular duties of the police and fire departments in said city have been merged into one, the department of safety.

“Said department consists of one uniformed chief of the department, two captains, one lieutenant, three corporals, sixteen wardens, and three telephone-radio operators.

“In view of the provisions of Sections 4372, 4374, 4376, 4377 and other statutes of the General Code pertaining to police and fire departments, Sections 17-1 and 17-1a pertaining to maximum working hours of firemen, Section 486-10d providing for separate civil service examinations and lists for police and firemen, as well as the provisions of Sections 4600 to 4615-1, General Code, and Sections 4616 to 4631-3, making it mandatory that separate pension funds be established for police officers and firemen, there would appear to be some doubt concerning the legality of merging the police and fire departments in a municipality.

“We are enclosing a copy of the letter received from R., State Examiner, setting forth certain facts and questions pertinent to the situation in O. We also enclose copies of several ordinances fixing compensation in the safety department for such combined departmental employes. Our records and files do not disclose a similar situation with reference to municipal fire and police protection in Ohio.

“Inasmuch as the courts have held that matters of public safety are of state-wide concern, and the state had adopted uniform pension and civil service laws governing both municipal police and fire department employes, we respectfully request that

you give consideration to the following questions, and furnish us with your formal opinion in answer thereto :

“1. Under the Constitution and laws of Ohio, does a municipal corporation have the power to adopt an ordinance merging the police and fire departments into one common unit designated the ‘Department of Safety?’

“2. Is it legal for members of the Department of Safety in the City of O. to perform both police and fire protection services in view of the provisions of Section 486-10d of the General Code?

“3. How shall the statutory provisions of law governing pensions for police officers and firemen be applied where such employes serve in the capacity of both police officers and firemen?

“4. How shall the tax provided under Sections 4605 and 4621 of the General Code for the payment of benefits and pensions be levied and distributed where the police and fire departments are merged into one Department of Safety?”

Reference is also made to your supplemental letter, in which you state that O. is not a charter city but that it has adopted one of the optional plans provided under Section 3515-1, General Code. The following opinion will be based on the information that O. is a city operating under the city manager plan, as provided in Section 3515-19 et seq., General Code.

In replying to your inquiry regarding the legality of the action of the City of O. in merging its police and fire departments into one organization, called the department of safety, we must consider the authority of municipalities to govern themselves in regard to police and fire departments.

This being a non-charter city, the rules and regulations regarding the powers and organization of the department of public safety are governed by Sections 4367 to 4383, General Code, and amendments thereto. These sections provide for a director of public safety, the general duties of the director of public safety, and contractual powers of his position, Section 4371. Chief among his duties is that he “shall be the executive head of the police and fire departments.”

Under the same chapter of the General Code, entitled “Public Safety,” and following in consecutive order, is the subtitle “Police Department.” Under this subtitle are the duties of a chief of police, Section 4372, the composition of a police department, Section 4374, and the control of other police employes by the director of public safety, Section 4375.

Under the next subtitle, "Fire Department", are the duties of the fire chief, Section 4376, the composition and control of the fire department, Section 4377, the general duties of the police and fire department, Section 4378, and the power of the chief of the police and fire departments regarding suspensions, Section 4379. Section 4600 et seq., provide for pensions and relief of police and firemen.

Nowhere in the General Code is there found provision for forming a "department of safety", as a substitute for the police and fire departments, with employes performing duties of both police and firemen.

Under Article XVIII of the Ohio Constitution, municipalities are granted certain broad powers of local self-government, and these cannot be abridged or taken away by the legislature. But in matters which are not strictly local and in which the state at large has an interest, the courts have held that the municipal powers are subservient to the dictates of the legislature.

In the case of *Cincinnati v. Gamble*, 138 Ohio St., 220, the court laid down the rule in the syllabus, as follows:

"* * * 3. In matters of state-wide concern the state is supreme over its municipalities and may in the exercise of its sovereignty impose duties and responsibilities upon them as arms or agencies of the state.

"4. In general, matters relating to police and fire protection are of state-wide concern and under the control of state sovereignty. * * *"

In the body of the opinion, Judge Williams further states, at page 231:

"The state, considered in relation to its subdivisions, is the *imperium* and as such by its very nature has state control in state affairs. Since the municipality is *imperium in imperio* only in the exercise of powers conferred upon it by the state Constitution, it must in all other respects be subordinate to state authority. If fire, police and health departments be deemed purely matters of local self-government, they could be abolished and the state would be unable to step in. Obviously the abolishment of any or all of them would affect state interests. *So would even impairment.* Indeed, police and fire protection and health preservation are essential to the administration of state government in such a way as to accomplish vital purposes expressed in its organic law. * * *"
(Emphasis added.)

To like effect is *State ex rel. Strain v. Huston*, 138 Ohio St., 203.

In the case of State, ex rel. Daly v. Toledo, 142 Ohio St., 123, the court in the syllabus lays down this rule :

“1. Matters relating to fire protection are of state-wide concern and are under the control of state sovereignty.”

In the case of State, ex rel. Arey v. Sherrill, 142 Ohio St., 574, the court held :

I. Section 3, Article XVIII of the Constitution, which grants to municipalities authority to exercise all powers of local self-government, including the power to adopt and enforce within their limits such local police, sanitary and other similar regulations as are *not in conflict with general laws*, has application to every city and village regardless of whether it has adopted a charter form of government. * * *

“4. In general, matters relating to the members of a police department are of state-wide concern and the under the control of state sovereignty. * * *

“5. The acts passed by the General Assembly which provide that in each city there shall be a department of public safety administered by a director of public safety who shall have all powers and duties connected with and incidental to the appointment, regulation and government of the police department, and the power to inquire into the cause of suspension of any police officer and to render judgment thereon, are ‘general laws’ within the meaning of Section 3, Article XVIII of the Constitution * * *”

In the opinion Judge Bell, on pages 580 and 581 states :

“The police department of a city is charged with the duty of protecting the lives and property of all persons therein, irrespective of their place of residence, and with enforcing all state laws as well as city ordinances.

“Those duties have a definite relation to the public safety and general welfare of society as a whole and are a matter of state-wide concern.”

However, it was further said in the course of the opinion :

“That the police department of a city is a matter of state-wide concern does not prevent the city from adopting any regulation in reference thereto so long as said regulation does not conflict with general law.”

Section 4374, General Code, provides :

“The police department of each city shall be composed of a chief of police and such other officers, patrolmen and employes as council shall, from time to time, provide by ordinance.”

Section 4377, General Code, reads as follows :

“The fire department of each city shall be composed of a chief of the fire department and such other officers, firemen and employes as are provided by ordinance of council. The director of public safety shall have the exclusive management and control of such other surgeons, secretaries, clerks, and employes as are provided by ordinance or resolution of council.”

Section 4378, General Code, provides for the general duties of police and fire departments, in the following language :

“The police force shall preserve the peace, protect persons and property and obey and enforce all ordinances of council and all criminal laws of the state and the United States. The fire department shall protect the lives and property of the people in case of fire, and both the police and fire departments shall perform such other duties, not inconsistent herewith, as council by ordinance prescribes. The police and fire departments in every city shall be maintained under the civil service system, as provided in this subdivision.”

I see nothing in the statutes or decisions above quoted that would forbid the employment of men for work both as policemen and firemen. The section last quoted, defining their respective duties, at once suggests how closely they are related. Nor would there seem to be any necessary physical difficulty in having a man carrying on the dual task. Manifestly, in a small city it would tend to economy.

I find the first real obstacle to such a plan in the laws relating to civil service. Even here, both departments are dealt with together in many of the sections ; the age requirements for each, 21 to 30 years are the same, Sections 486-10b and 486-10c. But Section 486-10d, General Code, appears to indicate an intention on the part of the legislature to keep the two departments separate. It reads as follows :

“Separate examinations shall be given and separate eligibility lists maintained by municipal civil service commissions for original appointments to and promotions in fire and police departments in such municipalities. No person may be transferred from one

list to the other. Appointments and promotions in both said departments shall be only from the separate eligible lists maintained for each of said departments. Transfers of personnel from one department to the other are hereby prohibited."

Even if it were found possible to comply with this section in making original appointments in a combined department, it appears that great confusion would result when it came to promotions and suspensions as provided in the civil service laws. Section 486-15, General Code, provides for promotion, based on conduct in office, seniority and examination. A man might be highly proficient in one line and weak in the other; and he might find himself advanced to the position of captain or even chief of the fire department while serving as a humble patrolman on the police side.

Still more perplexing problems would arise in connection with the organization and administration of the firemen's relief and pension fund and the police relief and pension fund. These are organized pursuant to Section 4600 et seq. of the General Code. The former under Section 4600, must be established "in all municipal corporations having fire departments supported in whole or in part at public expense, and employing two or more *full time regular members*." It is true that under the provisions of Section 4612-6, General Code, such a fund may be provided for a municipality which only employs part time firemen.

But in the case of the police fund, it is provided by Section 4816, General Code, that such fund must be established where there are two or more full time regular members, and there is no provision for the establishment of such fund for the benefit of part time policemen. However, it was held by a former Attorney General, Opinion No. 3893, Opinions of the Attorney General for 1948, that where a police fund has been duly established under said Section 4816, a part time police officer may become a member of such fund and be entitled to its benefits. It follows that a failure to organize the police department on the basis contemplated by the statutes may operate to deprive the police officers of the benefits of the pension system which they would otherwise enjoy.

Difficulties would also arise when it came to determining the pensions and disability allowances which each system affords. In each system, Section 4612-1 as to firemen, and 4628 as to police, a member of the fund who has completed 25 years of service and is 52 years of age, may retire and receive an annual pension equal to two percent of his average salary

for his last five years of service, multiplied by the number of his years of active service, but in no case less than \$1200.00 per annum. Obviously, if one had been serving in the dual capacity described in your letter, he would receive double benefits, which was certainly not within the contemplation of the general assembly in enacting the legislation. The same unintended result would ensue as to the allowances to be made to the dependents of a deceased member.

Another statute to which I call attention as offering an obstacle to the merger of these two departments is Section 17-1a, General Code, which provides in part as follows:

“It shall be the duty of the chief of the fire department of each city, unless said city is exempt from this provision as hereinafter stated, to divide the uniform force into not less than two platoons, and where the uniform force is so divided into two platoons the said chief shall keep a platoon of the uniform force on duty twenty-four consecutive hours, after which the platoon serving twenty-four hours shall be allowed to remain off duty for at least twenty-four consecutive hours, except in cases of extraordinary emergency. * * *”

The exemption referred to is conditioned on a city adopting “the eight hour regulation for its fire department.” It is obvious that if the two platoon system is adopted for the fire department, it would be difficult if not impossible to fit into it the part time police and fire alternating system described in your communication. At any rate this provision of law lends color to the conclusion that such a merger was not contemplated by the legislature.

A review of the ordinances of the City of O. submitted by your office reveals that as far back as 1932, when Ordinance No. 1095 was passed by the council of O., an attempt was made to combine the duties of police and firemen. These ordinances have provided for a department of safety with functional duties of both policemen and firemen. These ordinances do not provide for a police chief or fire chief, nor for a police department or a fire department. The more recent ordinances as shown in your communication provide for a “chief of the department of safety,” “captains,” a “lieutenant,” “corporals” and “wardens,” all of whom perform the combined duty of policemen and firemen, alternating between the two duties.

A search of Ohio case law has failed to produce a precedent for the action of the City of O. in abolishing its police and fire departments as such, and substituting a combined department called "department of safety."

I cannot reconcile the statutes above discussed with an attempt to merge the police and fire departments of a city into one new department. Even if it were attempted to maintain the identity of each of these departments, with employes giving part time to each, we would encounter the obstacles to which I have called attention. But when it is attempted, as in the case of the city of O. to substitute a new department by a new name, we would have a form of organization for which there is no legal basis and no guiding precedent.

I do not, however, wish to be understood as holding that the men who have in good faith qualified for the positions they are holding in this combined safety department of the city of O., should lose their standing or forfeit their rights in the combined pension fund which the city may have established. In the process of establishing a proper civil service regime and the organization of police and fire pension systems as contemplated by the statutes, adjustments can doubtless be made which will preserve their status and rights.

Accordingly, in answer to the questions which you have submitted, it is my opinion :

1. A municipal corporation under the Constitution and laws of Ohio does not have the authority to merge the police and fire departments into a common unit performing the duties of both.

2. Since Section 486-10d, General Code, provides for separate civil service requirements for police and fire department applicants and forbids the interchanging of eligible lists and the transfer of personnel from one department to the other, a municipality is without authority to provide for a department the members of which perform the duties of both departments.

3. Where a municipality fails to set up a police department and a fire department as such, the laws providing for pensions for members of police departments and fire departments do not apply to members of an unauthorized department performing the duties of both.

4. Where a municipality fails to set up a police department and a

fire department as such, the laws providing for the levying and distribution of taxes for support of pension funds for members of those respective departments are inoperative.

Respectfully,

C. WILLIAM O'NEILL

Attorney General