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1. RELIEF, COMMISSIONER OF—CITY OF CLEVELAND—CREATED UNDER SECTION 172 MUNICIPAL CODE—VALID EXERCISE OF MUNICIPAL LEGISLATIVE AUTHORITY—VALID GRANT OF POWER IN CITY CHARTER.
2. DIRECTOR OF PUBLIC HEALTH AND WELFARE—SHOULD BE HELD PERSONALLY LIABLE FOR ILLEGAL EXPENDITURES OF PUBLIC FUNDS BY SUBORDINATE, COMMISSIONER OF RELIEF—PROVISO, DIRECTOR WAS NEGLIGENT IN APPOINTMENT OF OFFICER OR IN SUPERVISION OF HIS OFFICIAL ACTS—LIABILITY IF DIRECTOR PERSONALLY DIRECTED ILLEGAL EXPENDITURES, OR COOPERATED IN NEGLIGENCE WHICH PERMITTED THE EXPENDITURES.

SYLLABUS:

1. The creation of the office of commissioner of relief of the City of Cleveland by Section 172 of the municipal code of that city is a valid exercise of municipal legislative authority under a valid grant of power in the charter of the city.

2. The director of public health and welfare of the city of Cleveland should be held personally liable for illegal expenditures of public funds by his subordinate, the commissioner of relief, only in the event that such director was negligent either in appointing that officer or in supervising his official acts, or in the event that the director personally directed such illegal expenditures or personally cooperated in the negligence which permitted them to be made.

Columbus, Ohio, September 6, 1950

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

“The current examination of the records of the City of Cleveland, Division of Relief, disclosed expenditures in excess of the 12% limitation fixed for administrative expense by Section 3391-6 of the General Code. The City of Cleveland is governed under a home rule Charter which provides for the Mayor to be the only elected executive officer. Said Charter further provides in part as follows:

'Section 67: The executive and administrative powers of the City shall be vested in the mayor, directors of departments and other administrative offices provided for in this charter or by ordinance.

'Section 68: The mayor shall be the chief executive officer of the city * * *.

'Section 77: There shall be a department of law, a department of finance, a department of public utilities and such other departments and offices as may be established by ordinance with the concurrence of the board of control. The council may by ordinance with the concurrence of the board of control discontinue any department or office established by ordinance, and may prescribe, combine, distribute or abolish the functions and duties of departments and offices; but no function or duty assigned by this charter to a particular department or office shall be abolished or assigned to any other department or office. * * *

'Section 78: A director for each department shall be appointed by the mayor and shall serve until removed by the mayor or until his successor is appointed and qualified. The director of each department shall have the supervision and control of the department. He shall have power to prescribe rules and regulations, not inconsistent with the charter, for the conduct of the officers and employes of his department for the distribution and performance of its business; and for the custody and preservation of the books, records, papers and property under its control.

'Section 79: The work of the several departments shall be distributed among the divisions thereof as are established by this charter or as may be established by the council by ordinance, with the concurrence of the board of control. There shall be a commissioner or chief in charge of each division who shall be appointed, and may be removed by the director of the department in conformity with the civil service provisions of this charter. Each commissioner shall, with the approval of the director of his department, appoint all officers and employes in his division and have supervision and control of its affairs.

'Section 94: The director of finance shall have charge of the department of finance and the administration of the financial affairs of the city, including the keeping and supervision of all accounts; the making and collection of special assessments; the issuance of licenses; the collection of license fees; the control over expenditures; the purchase, storage and distribution of supplies needed by the city; and such other duties as the council may by ordinance require.

'Section 97: There shall be in the department of finance a division of accounts at the head of which shall be a commissioner of accounts. The commissioner of accounts shall be the chief accounting officer of the city. He shall under the supervision of the director of finance, install and maintain accounting procedures in conformity with section 95 of this charter. He shall appoint all bookkeepers and other employes charged with keeping books of financial account in all departments and offices of the city; and whenever practicable, such books and accounts shall be kept in his office. * * *'

"Section 167 of the Municipal Code of the City of Cleveland provides that:

'There shall be and there is hereby established a department of public health and welfare of the City of Cleveland to be controlled and administered by a director of public health and welfare subject to the provisions of the charter and ordinance of the City of Cleveland and to the direction of the city manager (now the mayor). The director of public health and welfare may appoint and employ a secretary who may be in the unclassified service and such other officers and employes as may be necessary for the operation of his office and the several divisions and activities comprising the department of public health and welfare, except officers and employes appointed by the commissioners of the several divisions in accordance with the provisions of section 40 of the charter of the City of Cleveland. * * *'

"Section 168 of the Municipal Code of the City of Cleveland provides that:

'The director of public health and welfare shall have charge of and general supervision and control over divisions and bureaus established in the department of public health and welfare. * * * He shall have such additional power and shall perform such additional duties as may be required by ordinance.'

"Section 172 of the Municipal Code of the City of Cleveland provides as follows, in part:

'That, upon the concurrence of the board of control as required by Section 77 of the charter of the City of Cleveland, there shall be and there is hereby established in the department of public health and welfare a division of relief to be *administered and controlled* by a commissioner of relief, subject to the charter and ordinance of the City of Cleveland, and to the *supervision and direction of the director of public health and welfare*. The commissioner of relief *shall be responsible for the general supervision of the*

*division of relief; shall exercise control over the expenditures and shall perform such other related duties as are necessary for the proper functioning of such division. He shall give general supervision to the administration of relief; give direction to the personnel; prepare monthly budgets and correlate the work of the division with that of other social agencies and governmental relief instrumentalities, and direct and carry out relief policies in a humane, efficient and economical manner * * **

“The results of our examination disclosed expenditures for administrative costs in excess of the 12% limitation in the years 1944 and 1945 as follows :

Year 1944—excess cost	\$12,989.72
Year 1945—excess cost	8,939.79
	\$21,929.51

“In order to fix the responsibility for such overspending of relief funds, contrary to law, it is necessary to determine the chain of authority under the provisions of the City Charter which govern the administration of the division of relief. After reviewing all of the facts involved, and considering the provisions of the city Charter pertaining thereto, we are in doubt as to the proper value and weight to be given the respective sections of the Charter and the Municipal Code hereinafter listed: Sections 78, 79, 94 and 97 of the city Charter; Sections 167, 168 and 172 of the Municipal Code.

“As an aid in the consideration of the question of the extent of authority legally conferred upon the Commissioner of Relief, we are submitting a specimen of the Recapitulation sheet which is attached to each semi-monthly payroll of each division or department of the city government. It may be noted that the signature of the Commissioner of the division is attached to Certificate No. 2, and the Director of the department signs Certificate No. 3. This is significant in the matter at hand, in view of the fact that a major portion of the cost of administration is represented by the salaries and wages of the officers and employes of the Division of Relief, and that the Director of Public Health and Welfare, by signing Certificate No. 3, signifies that all employments were made with his knowledge and concurrence.

“In this connection it may be noted that Section 79 of the home rule Charter provides in part that :

* * * Each commissioner shall with the approval of the director of the department, appoint all officers and employes in his division and have supervision and control of its affairs.’

“In view of the foregoing, we are submitting the following questions for your consideration and respectfully request that you give us your formal Opinion in answer thereto :

"1. May the Council of the city of Cleveland lawfully enact an ordinance which purports to place in a commissioner of a division the extent of authority given to the Commissioner of Relief through Section 172 of the Municipal Code?

"2. If the Council by the enactment of such legislation may legally confer upon the Commissioner of Relief the broad powers enumerated in Section 172 of the Municipal Code, is the Director of Public Health and Welfare thereby relieved of liability under the law for the conduct of matters under his supervision and control as director of the department in so far as the Division of Relief is concerned?

"3. Whether or not the Council may legally confer upon the Commissioner of Relief such broad powers as those enumerated in Section 172 of the Municipal Code, should such Director of Public Health and Welfare be held jointly with the Commissioner of Relief for such sums as may have been expended for administration expenses in excess of twelve percent as prescribed by Section 3391-6 of the General Code?

"4. If the Director of Public Health and Welfare should be joined in the finding as described in Question No. 3, should he also be joined in a finding where certain revenue received by the Division of Relief was diverted to personal use by employes of the Division through a 'flower fund' with the knowledge and consent of the Commissioner of Relief but without the knowledge of the said Director?"

Since your first question is concerned with the authority of the City of Cleveland to create the office of Commissioner of Relief with the powers and duties described in Section 172 of the Municipal Code of Cleveland quoted in part in your letter, it is appropriate first to examine the nature of the powers and functions of charter cities generally.

So-called charter cities in Ohio are those municipalities which have adopted a charter for local self-government under Article XVIII of the Constitution of Ohio. See Section 2293-1(b), General Code. Article XVIII of the Ohio Constitution reads in part, as follows:

"Section 2. General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law."

"Section 3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. * * *

"Section 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

As a general rule, a municipality has no inherent right or power to create a municipal office but may do so under authority of an express or implied provision in the Constitution, statute or charter. See *Lesem v. Getty et al.*, 23 Cal. App. 2d, 57. Where the power is so delegated the exercise of the power to create a city office is ordinarily a legislative function. See *Blinn et al. v. Hassman*, 162 Okla. 1.

The extent of the powers granted to charter cities under Article XVIII of the Ohio Constitution was the subject of the discussion in *Fitzgerald et al. v. City of Cleveland*, 88 O. S. 338. The syllabi in that case are as follows :

"1. The provisions of Section 7, Article XVIII of the Constitution as amended in September, 1912, authorize any city or village to frame and adopt or amend a charter for its government and it may prescribe therein the form of the government and define the powers and duties of the different departments, provided they do not exceed the powers granted in Section 3, Article XVIII, nor disregard the limitations imposed in that article or other provisions of the constitution.

"2. Under Sections 3 and 7, Article XVIII, as so amended, municipalities are authorized to determine what officers shall administer their government, which shall be appointed and which elected, that the nomination of elective officers shall be made by petition by a method prescribed and elections shall be conducted by the election authorities prescribed by general laws."

It is not to be supposed that the provisions in a charter establishing particular departments within a municipal government are the exclusive means by which such department and offices can be established. Particularly is this so where the charter itself makes provision for the creation of additional departments and offices from time to time by the exercise of the legislative authority of the municipality. In the case at hand, the charter of the City of Cleveland did provide, in Section 77 thereof as noted in your letter, for the establishment and discontinuance of departments

and offices. I find nothing in the Constitution or the general laws of the state which indicates that this particular charter provision is in conflict with any general laws within the meaning of Section 3 of Article XVIII of the Ohio Constitution; and I therefore conclude that Section 77 of the charter of the City of Cleveland is a valid grant of power by the state to the municipality.

It follows as a corollary to this proposition, I think, that the legislative authority of the city which creates an office under such grant of power may define the powers and duties of the departments and offices so created. In this connection your attention is invited to the second branch of the syllabus of *State, ex rel. Hackley, v. Edmonds*, 50 O. S. 203, which reads as follows:

“The wisdom or desirability of the provisions of a municipal charter, adopted pursuant to Section 7, Article XVIII of the Constitution, so far as such provisions are of a strictly local nature and are not in conflict with the general laws of the state, is not a subject for judicial inquiry.”

Because I find nothing in the general laws of the state with which the act of the City of Cleveland in creating the office of commissioner of relief is in conflict, and because there appears to be no reason for considering this act anything other than one of a strictly local nature, I must conclude that it is a valid exercise of the municipal legislative authority under the city charter. Accordingly, the answer to your first question must be in the affirmative.

As to your second question, regarding the possible liability of the director of public health and welfare for illegal expenditures made by the commissioner of relief, the answer will depend, I think, upon the actual extent to which the director of public health and welfare has exercised supervision and direction over the commissioner of relief in the operation of his office. As pointed out in your letter of inquiry, Section 172 of the Municipal Code of Cleveland requires that the division of relief is “to be administered and controlled by a commissioner of relief, subject to the charter and ordinances of the City of Cleveland, and to the supervision and direction of the director of public health and welfare.”

This language of the ordinance certainly does impose some duty of supervision and direction upon the director of public health and welfare, although it cannot be supposed that he was intended to be thoroughly

cognizant of every administrative detail of the operation of the commissioner's office.

The question, therefore, becomes one of ascertaining by what criterion his actions in "supervising and directing" his subordinate shall be judged in determining whether he is liable for illegal expenditures made by such subordinate.

Public officers may be considered responsible in any of several capacities in the safekeeping and use of public funds. The case which is probably the most familiar is that of the custodian of public funds. Such officers are held liable as insurers, the Ohio rule with respect to them being expressed in *State ex rel Bolsinger v. Swing et al.*, 54 Ohio App. 251, in part, as follows :

"* * * officers intrusted with public funds are liable as insurers for the loss of such funds except where caused by act of God or the public enemy, * * *"

A second class is that of legislators, such as members of a municipal council, who enact an ordinance authorizing the expenditure of funds. Even though such ordinance be invalid, the members who have voted for it are exempt from liability for illegal expenditures made thereunder. See *Hicksville v. Blake et al.*, 103 O. S. 508.

A third class is that of the executive or administrative officer who, although not a custodian of funds, directs their expenditure. The rules with respect to the liability of such officers for illegal expenditures are stated in 43 Am. Jur. III, Sec. 306, in part as follows :

"Public officers who have charge of public funds and public money are charged with the duty, as trustees, to disburse and expend the money for the purposes and in the manner prescribed by law. They are liable if they divert the trust funds from the governmental purposes for which they were collected. Mere good faith in making an improper payment of public funds is not recognized as any excuse whatever. Nor is it material that in other respects the duties of the officer may be discretionary or legislative if in respect of disbursement they are merely ministerial. Where, however, an officer disburses public money on warrants or orders, fair on their face, in good faith, and without knowledge of the facts, showing the illegality of the claims on which the order or warrant purports to have been issued, he is not necessarily liable for a return of the money on a showing that the claim was not in fact a legal charge against the municipality

he represents, although it is otherwise if he knows that the warrants are drawn for illegal claims.”

A fourth class is that of the executive whose subordinate officer directs the expenditure of funds. The rule with respect to the liability of such an officer for the illegal acts of his subordinate officer is stated in 43 Am. Jur. 94, Sec. 281, in part as follows :

“It is settled, subject, however, to a number of exceptions, that in the absence of a statute imposing liability, or of negligence on his part in appointing or supervising his assistants, an officer is not liable for the default or misfeasance of subordinates and assistants, whether appointed by him or not, providing the subordinates or assistants, by virtue of the law and of the appointment, become in a sense officers themselves, or servants of the public, as distinguished from servants of the officer, and providing the officer does not direct the act complained of, or personally cooperate in the negligence from which the injury results. * * *”

The leading Ohio case on the subject of illegal disbursement of funds by public officers is *Crane Township v. Secoy et al.*, 103 O. S. 258. In that case the court in a per curiam opinion said at pages 260-261 :

“The evidence unmistakably shows, even in the majority opinion of the court of appeals, that there was a plain failure of the clear duty on the part of the board of trustees. The majority opinion uses this language :

“‘In this case the township clerk misappropriated various sums of money belonging to the township. His misappropriation was accomplished by procuring the signature of the township trustees to orders upon the treasurer, which orders were left in blank both as to amount and as to payee. This method he had pursued over a considerable space of time, and had been able to conceal from the eyes of the state inspectors his wrongs, until the last examination.’

“To say that this is negligence does violence to the simplest forms of English. It is malfeasance in office, undoubted dereliction of a clear public duty; and the fact that it had been going on for years does not make it any less culpable so far as the public interests are concerned.”

As between the rule in this case and that expressed in 43 Am. Jur. 94, as quoted above, I perceive no conflict since liability of the trustees in the *Crane Township* case was based on a finding of malfeasance; and malfeasance is clearly included in the rule stated in 43 Am. Jur. 94, when it

excepts the instance in which "the officer (directs) the act complained of."

Having in mind the extent of the authority conferred upon the commissioner of relief by Section 172, Municipal Code of Cleveland, I have no difficulty in concluding that the commissioner of relief is himself a public officer within the meaning of this rule. Accordingly, I conclude that the liability of the director of public health and welfare would depend upon whether or not (a) he was negligent in appointing the commissioner of relief, (b) he was negligent in supervising and directing the official acts of such commissioner, (c) he personally directed the illegal expenditures, or (d) he personally cooperated in the negligence from which the injury, i. e., the illegal expenditures, resulted.

I do not, of course, possess sufficient factual information upon which to base an opinion as to the director's ultimate liability since I am not informed as to the extent to which the director was active in the matter of supervision and direction of his subordinate officer. In this connection I may say that in my opinion the mere fact that the director accomplished a certificate on the semi-monthly payroll of administrative employes is not conclusive. This certificate specifically indicates that it is based upon certain preceding certificates. Moreover, it purports to certify chiefly to the regularity of the hiring of the employes listed therein rather than to the legal availability of funds to pay such employes. Accordingly, it is my opinion that you should join the director of public health and welfare in a finding for illegal expenditures of the commissioner of relief only in the event that a review of all the facts in your possession, and such further facts as may be developed in your investigation, should indicate that the director has either been negligent in the discharge of his duty or an active participant in making such illegal expenditures within the meaning of the rules above stated.

The same reasoning and the same rules stated above would apply also, in my opinion, to your remaining questions so that individual consideration of them is not necessary.

Accordingly, in specific answer to your questions, it is my opinion that :

1. The creation of the office of commissioner of relief of the City of Cleveland by Section 172 of the municipal code of that city is a valid exercise of municipal legislative authority under a valid grant of power in the charter of the city.

2. The director of public health and welfare of the city of Cleveland should be held personally liable for illegal expenditures of public funds by his subordinate, the commissioner of relief, only in the event that such director was negligent either in appointing that officer or in supervising his official acts, or in the event that the director personally directed such illegal expenditures or personally cooperated in the negligence which permitted them to be made.

Respectfully,

HERBERT S. DUFFY,
Attorney General.