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MUNICIPALITY — NO AUTHORITY TO EMPLOY EXPERT TAX CONSULTANT TO ADVISE AND EDUCATE OFFICIALS AND EMPLOYEES AS TO DUTIES — NO AUTHORITY TO EMPLOY LOBBYIST TO APPEAR BEFORE COUNTY BUDGET COMMISSION, GOVERNOR, COMMITTEES OF GENERAL ASSEMBLY — ANY COMPENSATION ILLEGALLY PAID SHOULD BE INCLUDED IN REPORT OF BUREAU.

SYLLABUS:

Officials and employes of a municipal corporation are presumably elected and appointed to their positions because of their fitness by experience and education to discharge their respective duties and in the absence of an express charter provision a municipality is without authority to employ an expert tax consultant whose duties are advising and educating such officials and employes in respect to their duties. The municipality is also without authority to employ a lobbyist to appear on its behalf before the county budget commission and before the Governor and committees of the General Assembly. The employment of such lobbyist and expert tax consultant in

such capacities being beyond the powers of the municipality, any compensation which has been paid to them has been illegally paid and should be included in the report of the Bureau of Inspection and Supervision of Public Offices.

Columbus, Ohio, August 3, 1940.

Bureau of Inspection and Supervision of Public Offices,
Columbus, Ohio.

Gentlemen :

This will acknowledge receipt of your request for my opinion on the following :

“We are inclosing a letter from one of our Examiners of the cities in the Cleveland area, that is similar to others we have received, concerning the employment of an Expert Tax Consultant or Lobbyist by said cities, at the public expense.

The duties of said employe appear to be those of advising with the county Budget Commission, or other county authorities, or with the State General Assembly, concerning the interests of said cities in various allocations of tax collections, including the intangible and sales taxes, and concerning the adoption of various measures that may be pending in committees of the General Assembly in which said cities are particularly interested. Other service may also be required of, or performed by, such Consultant, with which we are not familiar.

Since the duties that are apparently performed by the said employe are not of a nature as are ordinarily required of purely municipal officers and employes, may we request that you examine the inclosed correspondence and advise us in answer to the following questions :

Question 1. Is the City of Cleveland Heights authorized to employ an expert and tax consultant to assist in working out an intangible tax law, and also the allocation of the sales tax to Cleveland Heights, by the Budget Commission of Cuyahoga County, by favor of any provision of the City Charter or statutes of this State?

If the answer to our first question should be in the negative,

Question 2. Is our Examiner authorized or required to render findings for recovery for the moneys paid upon such illegal employment?”

All expenditures of public funds by municipalities must be for public and corporate purposes. Such expenditures must be for the benefit and advantage of all the public and in which all have a right to share. The

right to disburse public funds does not depend upon the value received, but upon the existence of adequate authority therefor. Any fair reasonable doubt concerning the existence of such authority must be resolved against the corporation. See *Crawford vs. Madigan*, 13 O. D. 494.

If then the services of the expert tax consultant and lobbyist were necessary public services for the benefit of all the public it appears that his office or position was rightfully created.

When the Cleveland council sent a lobbying committee to see the Governor and Legislature for the purpose of submitting a desired legislative program certain expenses were incurred by the committee. Suit was filed to recover the expenses. In the case entitled *City of Cleveland vs. Artl*, 62 O. App. 210, the Court of Appeals voiced its disapproval of the practice of municipalities employing lobbyists. In the opinion it is said:

“* * * If appellees’ arguments be sound, then council might, when a shortage of funds is in the offing, resolve that committees be sent to the state Legislature to induce it to enact measures which would make additional sums available for sewer extensions, all to be done out of tax monies. Councilmen could become lobbyists as well as legislators and remunerate themselves in their dual capacity.”

The right of a city to expend funds for membership in an association composed of Ohio municipalities was considered in 1929 Opinions of the Attorney General, Volume I, page 157. Membership in this association entitled its subscribers not only to certain periodicals devoted to city affairs, but also to the services of expert consultants at a reasonable cost to assist in solving various problems of local government. The conclusion reached is shown by the syllabus, which is as follows:

“In view of the holding in the case of *State, ex rel. vs. Semple*, 112 O. S. 559, a charter city may not legally expend its funds for services and periodicals of an association known as ‘Conference of Ohio Municipalities’ in the absence of specific charter provisions; whether or not such a charter provision could authorize such an expenditure is not decided.”

In the case of *State, ex rel. Thomas vs. Semple*, 112 O. S. 559, referred to in the 1929 opinion, the question of membership in “Conference of Ohio Municipalities” was also involved. The court there held that the city was without authority to expend its funds helping to support an organization entirely separate from the city.

In considering the allowance of traveling expenses of employes to conventions for the purpose of acquiring general education, it was held as shown in 1930 Opinions of the Attorney General, Volume II, page 1091:

"1. The payment from city funds, of the traveling expenses of a recreation director employed by a city recreation board when attending a convention of recreation officials for mere purposes of general education or the acquiring of general ideas pertaining to the duties of his position is unauthorized. If, however, attendance upon such convention is authorized by resolution of the city recreation board which in the exercise of a sound discretion finds it necessary to send its recreation director on a trip in furtherance of a definite, presently contemplated undertaking for the benefit of the municipality the city may lawfully pay the necessary traveling expenses of such recreation director. Fourth branch of syllabus of Opinion No. 1327, dated December 3, 1929, modified in conformity herewith.

2. The traveling expenses of a salaried police officer, incurred in investigating finger print systems, may or may not lawfully be paid from city funds, depending on whether or not such investigation is merely for the purpose of acquiring general information with respect to finger print systems, or whether it is for the purpose of determining the actual working of a system, with a view to its installation in the city department which the police officer serves.

3. The traveling expenses of municipal officers or employes, incurred in attending conventions of like municipal officers and employes can not be legally paid from public funds, even though authorized by the taxing authority of a municipal corporation, unless the attendance upon such convention is for the purpose of acquiring information relative to and necessary for the furtherance of a definite, presently contemplated undertaking for the benefit of the municipality in the performance of a duty enjoined by law."

In 1937 Opinions of the Attorney General, Volume II, page 1118, the first two branches of the syllabus read:

"1. In the absence of an express charter provision, a municipality operating under a charter form of government may not legally expend funds raised by taxation for the traveling expenses of a committee to lobby before the state legislature.

2. The legality of expending public funds for the payment of traveling expenses of a committee appointed by a municipality to study recreational facilities and transportation problems in other cities depends upon whether or not the work of the committee is in pursuance of a definite and presently contemplated undertaking for the benefit of the whole municipality. Opinions of the Attorney General for 1930, Vol. II, page 1091, approved and followed."

From your inquiry it appears that the expert tax consultant was em-

ployed for the purpose of spending only a limited period of time in enlightening and educating certain officials and employes of the City of Cleveland Heights. It was held in *State, ex rel. Marani vs. Wright*, 17 O. C. C. (N. S.) 396, that in the absence of any express statutory provision the test of the city's liability is whether the expenses incurred were necessarily implied in or reasonably and directly incident to the prescribed duties of the official. Holding that the municipality was not liable for traveling expenses of a building inspector incurred in acquiring information regarding the duties of his office, the court said at page 397:

“ * * * He was presumably appointed to his present position because of his fitness by experience and education to discharge the duties of the place, and the salary paid him is presumably adapted to secure the degree of efficiency in these respects which the city desires that its building inspector shall possess. If a person relatively uneducated, inexperienced and inefficient in the discharge of the duties of the position of building inspector were appointed at a salary proportioned to his fitness, it might as well be argued that his deficiencies may thereafter be supplemented at the charge of the municipality which he serves by directing him to attend an architectural school and to render his bills for board and tuition to the city.”

To the same effect it is said in the Annual Report of the Attorney General for 1910 and 1911 on page 942 that it must be conclusively presumed that public employes are qualified and will continue to be qualified for the position which they occupy and that:

“To say that the municipality is justified in expending its money for the purpose of permitting its employes and officers to acquire information of this sort, is to say that the public money may be expended for the education of public servants. This, it seems to me, is fallacious and the power to make such an expenditure must be denied.”

And again in the Annual Report of the Attorney General for 1912, at page 432:

“The acquirement of a knowledge of the general affairs and detailed workings of his office is a responsibility resting upon the officer himself, not upon the city; and the possession of requisite skill and information is to be presumed.”

It thus appears that no municipalities have the power to employ lobbyists and the power to employ an expert tax consultant is limited to his employment for the doing of some definite and necessary work for the city, for

example, being employed as a deputy or assistant in the office of the finance director. His employment solely for the purpose of instructing supposedly qualified employes in their duties, however, is not authorized by law.

There remains the question as to whether these rules apply with equal force to charter cities. Article XIV, Section 1 of the charter of the City of Cleveland Heights is in part as follows:

“All general laws of the State applicable to municipal corporations now in force or hereafter enacted, which are not in conflict with the provisions of this charter or with any ordinance enacted thereunder shall apply to the government of the City of Cleveland Heights; * * *.”

It is apparent that Cleveland Heights furnishes no exception to the rule generally applied to determine the rights of charter cities. It has the right to exercise local self-government so long as it adopts regulations that are not in conflict with general laws, but it may be generally stated that it is not competent for a municipality, by a charter provision, to authorize the expenditure of funds raised by taxation for any purpose other than that of a public nature. *State, ex rel. Toledo vs. Lynch*, 88 O. S. 71 and 28 O. J. 546.

In *State, ex rel. Thomas vs. Semple*, 112 O. S. 559, the court in discussing the powers of charter cities, said:

“It does not follow, from the broad powers of local self-government conferred by Article XVIII of the Constitution of the state, that a municipal council may expend public funds indiscriminately and for any purpose it may desire. The misapplication or misuse of public funds may still be enjoined, and certainly a proposed expenditure, which would amount to such misapplication or misuse, even though directed by a resolution of council, would not be required by a writ of mandamus.”

I have examined the charter of the City of Cleveland Heights which was submitted with your inquiry and have been unable to find any provision which expressly authorizes the city to employ a lobbyist and expert tax consultant and I am unaware of any general provision from which such authority might be inferred.

The extent to which implied powers may be invoked is discussed in the case of *City of Cleveland vs. Artl*, 62 O. App. 508, wherein it is said at page 510.

“Implied powers are in fact available courses that may be pursued by municipal legislative bodies towards the accomplishment of necessary but unenumerated objects whose ends are not susceptible of attainment without the aid and invocation of such implied powers.” ;

Article XV, Sections 1 to 4 inclusive of the charter you have submitted provide for the establishment of a department of finance, the appointment of a director thereof and other necessary employes. Salaries and the rate or amount of compensation of the employes are to be fixed by the council. Should the department of finance require the services of a tax expert having the qualifications of the person mentioned in your letter for the purpose of assisting in performing the work of the department there is no question but what such expert might lawfully be employed by the city. The mere fact that a person is an expert, extremely well qualified and capable of performing the duties of a public office or position surely does not disqualify him from holding such office or position. In the case of *Arnold vs. City of Akron*, 54 O. App, 382, an ordinance was approved which provided for the compensation of a financial consultant employed by the city to:

“ * * * assist in working out a sound permanent financial program, consult with and advise officials of said city on budgetary matters, negotiate for the arrangement, of new loans either temporary or permanent, and for the rearrangement of now outstanding indebtedness, and otherwise assist said city in the further restoration of its credit and finances, * * * .”

While the City of Akron has much broader charter powers than those shown in the attached charter of the City of Cleveland Heights, the principle remains the same. Certain definite work had to be done and an expert was lawfully employed to do it. If, however, the duties assigned to him had been to lobby for favorable legislation and to advise city officials and employes generally on matters of taxation and as to the performance of the duties of their respective offices and positions, his employment would have been unauthorized.

I assume that your inquiry concerns questions of the latter type, there being no question of the right of a city to employ persons to perform necessary and municipal functions.

Section 284, General Code, requires the Bureau of Inspection and Supervision of Public Offices to examine each public office, including municipalities, at least once a year. Section 286, General Code, provides for the

making of reports of such examinations and if their report sets forth that any public money has been illegally expended, provisions are made for the collection of such amounts. See *City of Cleveland vs. Artl*, 62 O. App. 508.

In specific answer to your inquiry, it is my opinion that officials and employes of a municipal corporation are presumably elected and appointed to their positions because of their fitness by experience and education to discharge their respective duties and in the absence of an express charter provision a municipality is without authority to employ an expert tax consultant whose duties are advising and educating such officials and employes in respect to their duties. The municipality is also without authority to employ a lobbyist to appear on its behalf before the county budget commission and before the Governor and committees of the General Assembly. The employment of such lobbyist and expert tax consultant in such capacities being beyond the powers of the municipality, any compensation which has been paid to them has been illegally paid and should be included in the report of the Bureau of Inspection and Supervision of Public Offices.

Respectfully,

THOMAS J. HERBERT,
Attorney General.