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MUNICIPAL CORPORATION—WITHOUT AUTHORITY TO PURCHASE PUBLIC LIABILITY INSURANCE CONCERNING PHYSICIANS AND NURSES—§723.01, R.C.

SYLLABUS:

A municipal corporation is without authority to purchase public liability insurance covering physicians and nurses employed in the municipal department of health for liability arising out of such employment.

Columbus, Ohio, March 18, 1960

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

Your request for my opinion reads:

"During the course of our examination of the City of Akron, Ordinance No. 915-1959, recently enacted by the city council, came to the attention of our State Examiner. A copy of the full text of this ordinance is enclosed for your further reference.

"The pertinent part of this ordinance reads as follows:

> " 'BE IT ENACTED by the Council of the City of Akron:
>
> " '*Section 1.* That the Director of Health be and hereby is authorized to purchase such policies of public liability insurance as may be necessary to protect physicians and nurses employed in the Department of Public Health against liability in the course of their performance of their duties as such employees of the Department of Health . . . .'

"The apparent purpose of the ordinance is to authorize the purchase of liability insurance for the protection of professional medical personnel in the employ of the city against the risk of personal liability for malpractice arising out of acts performed as employees of the city. From the quoted language of the ordinance it can be fairly implied that the ordinance purports to grant to the Director of Health the authority to purchase such insurance out of public funds under his administrative control.

"The city has adopted a charter form of government. Article V, Section 27 of the city charter, relative to the creation of the city council, reads as follows:

> " 'There is hereby created a council which shall have full power and authority, except as otherwise herein provided, to exercise all the powers which now are or may be hereafter conferred upon municipalities by the constitution of Ohio, and all the powers conferred upon the city of Akron by this charter, and any additional powers which have been or may be conferred upon municipalities by the General Assembly.'

"The charter of the city appears to contain no other provision which purports to further limit the authority of the city or the council with respect to action such as that taken in the ordinance quoted above.

"In a recent decision *(Eversole v. City of Columbus,* 169 O.S. 205, decided May 6, 1959) the Supreme Court stated in the syllabus of its opinion the following general statements of pertinent law:

> " '1. Under the established law of Ohio, a municipality when in the exercise of governmental functions is immune from liability for torts . . . .

" '2. Generally, the powers of a municipality which are governmental are those which are exercised in the performance of activities incident to sovereignty, such as those pertaining to the making and enforcing of regulations . . . to preserve the public health . . . .'

"This decision appears to state that municipality cannot be held liable for injuries resulting from the tort of an employee engaged in the preservation of public health. Thus any liability which might arise out of such activity must attach to the employee and not to the employing municipality.

"The question for your consideration is whether a municipality has the authority to purchase, out of public funds derived from taxation, liability insurance for the sole protection of employees of the municipality against liability arising out of such employment."

Before proceeding with a discussion of the particular question raised by your inquiry, it should be noted that some of my predecessors, on similar fact situations, rendered opinions as to the tort liability of political subdivisions and segments of such political subdivisions with complete accord that there was no liability. A few supporting opinions and other authorities on this matter are quoted:

In *Turner v. The City of Toledo et al.*, 15 C.C., 627, (Lucas County), headnote 1 reads:

"1. An action cannot be maintained against a municipal corporation or its officers in their official capacity, based upon acts of negligence of its board of health or health officer, for damages claimed to have resulted therefrom."

The court in arriving at its decision said at page 632:

"* * *

"The health board is devised and designed by the legislature for the protection, so far as possible, of the public health. They are not liable if they fail to protect the public health, and the city is not liable for its acts even if it steps outside of and beyond the legitimate exercise of its true powers conferred upon it by statute and by ordinance. I cite a case on that subject from 33 Minn. 289, where it is held 'that the city was not liable for the acts or negligence of such board in the discharge of its duties, the same being public and governmental, and not corporate in their character.'

"* * *

In paragraphs 1 and 2 of the syllabus of Opinion No. 615, Opinions of the Attorney General for 1937, page 1083, one of my predecessors held:

> "1. A city has implied power to insure its public property and like power to enter into a contract for indemnity insurance in so far as its proprietary functions are concerned.
>
> "2. A city is not liable in tort to persons injured by it in the exercise of a governmental function, unless made so by statute, as in the case of the enactment of Section 3714, General Code. ***" (Now Section 723.01, Revised Code)

The most recent court case on the tort liability of a municipal corporation is that of *Eversole v. City of Columbus*, 169 Ohio St., 205 (1959), referred to in your communication, headnotes 1 and 2 reading:

> "1. Under the established law of Ohio, a municipality when in the exercise of governmental functions is immune from liability for torts, whereas, when it is engaged in undertakings which are proprietary or ministerial in nature, the contrary is true.
>
> "2. Generally, the powers of a municipality which are governmental are those which are exercised in the performance of activities incident to sovereignty, such as those pertaining to the making and enforcing of regulations to check crime and apprehend criminals, to preserve the public health, to prevent and extinguish fires, to care for the aged and indigent and to provide for the progressive and systematic education of the young."

In the case of *The Standard Insurance Company v. City of Fremont*, 164 Ohio St., 344, at page 346, it was held:

> "* * *
>
> "In the state except as provided by statute, municipal corporations enjoy immunity or freedom from liability for negligence in the performance or non-performance of their governmental functions. Of course, this common-law immunity has no application where the municipal functions are of a proprietary or private nature. * * *"

In accordance with the foregoing, I am of the opinion that an action cannot be maintained against the city of Akron based upon acts of negligence of its department of public health, director of health, or the physicians and nurses employed by said department in the performance of their duties as such employees.

In the case at hand, the council of the city of Akron has enacted an ordinance authorizing the director of health to purchase public liability insurance for the individual protection of physicians and nurses employed in the department of health against liability in the course of the performance of their duties as such employees, the question being whether public funds may be used for the purchase of such liability insurance.

As discussed above, the municipal corporation could not be held liable for torts of the employees to be covered by the insurance in the performance of their official duties. It appears to be well settled that a municipal corporation has no power to use its funds for the purchase of liability insurance where no liability exists. See Opinion No. 787, Opinions of the Attorney General for 1937; page 1451; Opinion No. 803, Opinions of the Attorney General for 1951, page 563, and Opinion No. 3154, Opinions of the Attorney General for 1958, page 745, at pages 746, 747. The two latter opinions both quoted with approval, the following from Opinion No. 787, *supra.*

> "* * *
>
> "As to property damage and public liability insurance, suffice it to say that this office has consistently held that a political subdivision cannot legally enter into a contract and expend public moneys for the payment of premiums on public liability or property damage insurance covering damages to property and injury to persons unless there is a liability created against the political subdivision by statute. Opinions of the Attorney General for 1934, Vol. 11, page 1120. * * *"
>
> "* * *

In Opinion No. 3154, *supra,* my predecessor discussed the question of whether under the broad grant of "all powers of local self-government" as contained in Section 3, Article XVIII, Ohio Constitution, a municipality may do as it pleases with its moneys. Answering this question, it was stated at page 749 of the opinion:

> "* * *
>
> "I do not consider that such a claim could have any sound basis. A municipality is just what it was before home rule, an agency of the state, the only difference being that it now gets powers *from the state by the will of citizens* of the state, where previously it got them by the *will of the general assembly.*
>
> "* * *"
>
> (Emphasis added)

On reviewing the case law of Ohio and the conclusions of my predecessors as noted above, I find that I am in accord with such conclusions and that the city in the instant case is without authority to purchase the insurance in question since no insurable statutory liability exists.

Answering your question, therefore, it is my opinion and you are advised that a municipal corporation is without authority to purchase public liability insurance covering physicians and nurses employed in the municipal department of health for liability arising out of such employment.

Respectfully,

MARK MCELROY
Attorney General