

bonds issued under these proceedings constitute valid and legal obligations of said city.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1201.

BONDS—CITY OF AKRON, SUMMIT COUNTY, \$10,000.00.

COLUMBUS, OHIO, September 15, 1939.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of the City of Akron, Summit County,
Ohio, \$10,000.00.

I have examined two transcripts of proceedings relative to the above bonds purchased by you. These bonds comprise a part of one or two issues of waterworks extension bonds in the aggregate amounts of \$200,000 and \$300,000, respectively, dated April 1, 1928, and bearing interest at the rate of 4% per annum. Both issues are part of a \$6,000,000 authorization.

From this examination, in the light of the law under authority of which the above bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute valid and legal obligations of said city.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1202.

MUNICIPAL COURT—JUDGE—CITY CLEVELAND—CANDIDATE—DATE WHEN NOMINATING PETITION MAY LEGALLY BE FILED—CHARTER GOVERNS—PETITIONS MUST CONTAIN NOT LESS THAN THREE THOUSAND SIGNATURES, AS PROVIDED IN CLEVELAND CHARTER.

SYLLABUS:

1. *The latest date upon which a nominating petition of a candidate for the office of judge of the municipal court of the City of Cleveland*

could legally be filed is governed by the provisions of the charter of the City of Cleveland.

2. The nominating petitions of candidates for the office of judge of the municipal court of Cleveland, Ohio, must contain the signatures of at least three thousand electors as provided in the charter of the City of Cleveland.

COLUMBUS, OHIO, September 15, 1939.

HON. EARL GRIFFITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR: This is to acknowledge receipt of your communication of September 13, 1939, wherein you request my opinion as follows:

“We have a letter from the Board of Elections of Cuyahoga County wherein they state that ‘there is a wide difference of opinion as to the final filing date for petitions nominating candidates for the office of Judge of the Municipal Court of the City of Cleveland’. This difference of opinion, we are informed, is due to the fact that the provisions of Section 1579-5 G. C., which relate to the nomination of Judges of the Municipal Court by petition, and those of Section 8 of the charter of the City of Cleveland, relating to the same subject, seem to be in conflict to some extent.

Will you please advise us as to the latest date upon which a nominating petition of a candidate for the office of Judge of the Municipal Court of the City of Cleveland could be legally filed, and also advise us as to the number of signatures required to qualify such nominating petition.”

Article XVIII, Section 3 of the Constitution of the State of Ohio authorizes municipalities to exercise the power of local government in the following language:

“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.”

The manner of exercising this power of self-government may be through the adoption of a charter which is authorized in Article XVIII, Section 7 as follows:

“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.”

Accompanying your inquiry, you have submitted a copy of the amended charter of the City of Cleveland, Sections 4, 5 and 8 thereof being as follows:

“Sec. 4. Candidates for all offices to be voted for at any municipal election under the provisions of this charter shall be nominated at a non-partisan primary election to be held on the fifth Tuesday prior to such municipal election.

Sec. 5. The name of any elector of the city shall be printed upon the ballot, when a petition in the form hereinafter prescribed shall have been filed in his behalf with the election authorities. Such petition shall be signed by at least three thousand (3,000) electors of the city, if for the nomination of a candidate for an office filled by election from the city at large, and by at least two hundred (200) electors of the ward if the nomination of a candidate for an office to be filled by election from a ward.

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Sec. 8. All separate papers comprising a nominating petition shall be assembled and filed with the election authorities as one instrument at least forty days prior to the day of the primary election. Within ten days after the filing of a nominating petition the election authorities shall notify the person named therein as a candidate whether the petition is found to be signed by the required number of qualified electors. If insufficient, the person named therein as candidate may, amend said petition by filing, within five (5) days after notification of insufficiency by the election authorities, additional petition papers. Within five (5) days after the filing of the additional petition papers, the election authorities shall notify the person named therein as candidate whether the amended petition is found to be signed by the required number of qualified electors.”

The manner of electing the judges of the municipal court of Cleveland is set forth in Section 1579-5, General Code, which, in so far as pertinent to your inquiry, is as follows:

“The judges of the municipal court, including the chief justice, shall be nominated by petition. Such petition shall be signed by at least twenty-five hundred electors of the city of Cleveland. It shall be in the general form and shall be signed, verified and filed in the manner and within the time required by law for nominating petitions of other nominees for public office in the city of Cleveland. Each elector shall have the right to sign petitions for not more than one candidate for each term.

Such judges shall be elected by the electors of the city of Cleveland in the manner provided by law for the election of judges of the court of common pleas."

The general provisions for the filing of nominating petitions of candidates as found in Section 4785-92, General Code, are in part as follows:

"All separate petition papers comprising the nominating petition of a candidate shall be assembled and filed with the election authorities as one instrument; and shall be accompanied by the acceptance of such person whose name has been submitted as a candidate. In the absence of such acceptance, signed in person by the candidate, his name shall not appear on the ballot. Such nominating petitions of candidates shall be filed with the same election authorities as is provided for the filing of declarations of candidacy not later than 6:30 p. m. on the sixtieth day prior to the date of election."

If the provisions of the Code are followed, petitions of candidates for judges of the municipal court of Cleveland must contain the signatures of twenty-five hundred electors and be filed not later than 6:30 p. m. on the sixtieth day prior to the date of election. The amended charter requires signatures of at least three thousand electors on petitions of all candidates for the offices to be voted for at any municipal election and provides that such petitions be filed with the election authorities at least forty days prior to the day of the primary election.

Municipal courts in Ohio are established by virtue of Article IV, Section 1 of the Constitution of the State of Ohio, which provides for "a supreme court, courts of appeals, courts of common pleas, courts of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law".

In the case of *State, ex rel. vs. Hutsinpillar*, 112 O. S. 486, was held that:

"The municipalities of this state have no power, by charter or otherwise, to create courts and *appoint* judges thereof, such exercise of power being in violation of Sections 1 and 10, Article IV, of the Constitution of Ohio."

In commenting on the power of the state to create inferior courts, Judge Day, in the opinion, said:

"The judicial power of the state is distinct from the executive and the legislative, and as one of the highest elements of sovereign power can only be created in strict conformity to the

manner indicated by the rules laid down in the expression given to sovereignty by the people themselves, to wit, the Constitution. This judicial power has been cared for by the organic law, and is beyond the control of municipalities, which, after all, are only agents of the state for local governmental purposes. Section 1, Article IV, is a special provision of the Constitution that has to do with the creation of courts, and as such supersedes the general power of local self-government, as granted in Section 3, Article XVIII."

Even though municipalities have no power to create courts in Ohio, it does not necessarily follow that they also lack power to provide the manner of selecting judges for their municipal courts.

The first branch of the syllabus in the case of *State, ex rel. Frankenstein vs. Hillenbrand*, 100 O. S. 339, holds:

"Section 7 of Article XVIII of the Constitution of Ohio vests in cities adopting a charter the power to prescribe the manner of the selection of their own purely municipal officers."

If, then, judges of the municipal court of Cleveland are municipal officers, it would follow that the Cleveland charter could prescribe the manner of their selection.

It was held in the case of *State, ex rel. vs. Wall*, 17 N. P. (N. S.) 33, which case was affirmed by the Court of Appeals, that the judge of a municipal court is a municipal and not a state officer. This holding was quoted with approval in the case of *State, ex rel. vs. Bernon*, 127 O. S. 204, 208. In the latter case, the court considered almost the same question involved in the first part of your inquiry. The charter of the City of Cleveland Heights provided that candidates for any elective offices should be nominated by petitions only and that such nominating petitions should be filed with the election authorities not less than forty days prior to the date of election. Several candidates for the office of judge of police court filed their nominating petitions within the time prescribed in the charter but after the time prescribed in Section 4785-92, *supra*. In considering the rights of these candidates to have their names placed upon the ballot, the court held:

"2. Municipalities of this State have no power, by charter or otherwise, to create courts.

3. Under Sections 3 and 7 of Article XVIII of the Constitution of Ohio, municipalities have authority to provide by charter for the nomination of their elective officers.

4. A judge of the Police Court of the City of Cleveland Heights is an elective municipal officer, whose nomination is governed by the charter of that city."

In consideration, therefore, of your first inquiry, I must follow the holding of the Supreme Court and it is, therefore, my opinion that the latest date upon which a nominating petition of a candidate for the office of judge of the municipal court of the City of Cleveland could legally be filed is governed by the provisions of the charter of the City of Cleveland.

Coming now to a consideration of your question as to the number of signatures required upon the nominating petition of candidates for judge of the municipal court of Cleveland, it should be noted that the provisions of Section 5 of the charter provides that such petitions shall be signed by at least three thousand electors.

Touching on the effect of conflict between statutory and charter provisions in acts relating to municipal courts, Judge Powell said in *State, ex rel. vs. Culbertson*, 30 O. C. A. 117, 119:

“In a conflict between a municipal charter legally adopted and an act of the General Assembly on any subject provided for in said charter, the provisions of the charter ought to prevail within the territorial limits of the municipality on all matters within its authority and jurisdiction.”

The charter and the statutory provisions are not in conflict, however, for the provisions of Section 1579-5, *supra*, that the petition shall contain *at least* twenty-five hundred signatures is met by the charter provisions of three thousand signatures which obviously includes the smaller requirement. It is further provided in Section 1579-5, *supra*, that such petitions “shall be signed by at least twenty-five hundred electors of the city of Cleveland”.

Again referring to *State, ex rel. vs. Bernon*, *supra*, I call your attention to the third branch of the syllabus wherein it is held that “municipalities have authority to provide by charter for the nomination of their elective officers”. Since the charter of the City of Cleveland has provided for the nomination of its elective officers and it has been held in *State, ex rel. vs. Bernon*, *supra*, that judges of municipal courts are elective officers, I am required to hold that the nominating petitions of candidates for the office of judge of the municipal court of Cleveland, Ohio, must contain the signatures of at least three thousand electors as provided in the charter of the City of Cleveland.

Respectfully,

THOMAS J. HERBERT,
Attorney General.