

452

PUBLIC UTILITIES, TRANSFER OF TO BOARD BY MUNICIPALITY — SECTION 735.03 MUST BE COMPLIED WITH — MUNICIPALITY, MAY REGAIN CONTROL OVER UTILITIES AT ANY TIME.

SYLLABUS:

1. If a city desires to avail itself of the authority conferred by Section 735.03, Revised Code, by the appointment of a board to manage and operate its public utilities, it must comply in all respects with the provisions of that section.
2. Under the provisions of Section 735.03, Revised Code, a city, if it deems it essential to transfer control of its utilities to a board, as therein authorized must include in such transfer all of its utilities.
3. Where a city has, pursuant to the authority of Section 735.03, Revised Code, transferred to a board the control of its utilities, it may at any time return such control to the director of public service.

Columbus, Ohio, May 13, 1959

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

Dear Sir :

I have before me your communication requesting my opinion and reading in part as follows :

“Several questions have been raised regarding the legal limitations within which the legislative authority of a non-charter city may provide for the administration of city-owned public utilities. Since most cities in the State are concerned with the administration of such facilities, I believe the problem to be of state-wide application. Therefore, your formal opinion on the subject is respectfully requested.

“The problem may be resolved into the following fundamental questions :—

1. In the establishment of a board for the management and operation of city-owned public utilities, is the legislative authority of a city bound to comply with the provisions of Section 735.03 of the Revised Code?

“If your answer to the first question is in the affirmative, two further questions are raised regarding the interpretation of the section of the Revised Code cited above. They are as follows :—

2. In the establishment of a Public Utilities Board under Section 735.03 of the Revised Code, can a city be selective as to which of several municipally-owned public utilities are placed under control of the Board, or is it mandatory that all such utilities owned by the city be placed under Board control?

3. When a Public Utilities Board has been established, pursuant to Section 735.03 of the Revised Code, can the legislative authority, at some future date, abolish such Board and again vest control and management of city-owned utilities in the Director of Public Service?”

Section 735.01, Revised Code, creates for each city a department of public service to be administered by a director of public service who is to be appointed by and hold his office at the pleasure of the mayor.

Section 735.02, Revised Code, places the management of all municipal public utilities in the hands of the director of public service. That section insofar as pertinent reads as follows :

“The director shall manage municipal water, lighting, heating, power, garbage, and other undertakings of the city, and parks, baths, playgrounds, market houses, cemeteries, crematories, sewage disposal plants, and farms, and shall make and preserve surveys, maps, plans, drawings, and estimates. * * *”

These provisions were enacted in substantially the same language in Sections 1536-674 and 1536-677 of the Revised Statutes (96 Ohio Laws, 66). In the Revision of 1910, they became Sections 4323 and 4326 of the General Code. They are among the many statutes which, upon the adoption of Article XVIII in 1912, were continued in force pursuant to the provisions of the schedule attached to that article.

Section 735.03, Revised Code, to which you refer, reads in part as follows:

“Whenever the legislative authority of any city, by ordinance, declares it essential to the best interests of such city, the duties relating to the management and operation of municipally owned public utilities conferred upon the director of public service by sections 735.02 and 743.03 of the Revised Code shall be vested in a board composed of three members. * * *”

It will be observed that this section is only permissive and a municipality is in no respect required to turn its utilities over to a board. Your inquiry is directed to the question whether the precise provisions of the statute must be observed and whether a municipality must place either all or none of its utilities under the control of such board if it sees fit to establish it. You further raise the question whether, having organized such board, a municipality could at a later date abolish the same and return the control of its utilities to its director of public service.

1. Underlying the powers of a municipality, we do well to keep in mind Section 3 of Article XVIII which reads:

“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.”

In addition to the broad powers granted by Section 3 of Article XVIII above quoted, the same Article XVIII proceeded in Sections 4, 5 and 6 to set out special powers which municipalities should enjoy relating to their public utilities. Section 4 reads in part as follows:

“Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such products or service. * * *”

Section 5 reads in part as follows :

“Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take affect until after thirty days from its passage. * * *”

Section 6 of the same article relates to the disposition of the products of such utilities.

The courts have frequently emphasized the proposition that these sections confer *plenary* powers upon the municipal corporation in all matters relating to their public utilities. *Dravo-Doyle v. Orville*, 93 Ohio St., 236; *State ex rel. Toledo v. Weiler*, 101 Ohio St., 123; *Board of Education v. Columbus*, 118 Ohio St., 295; *State ex rel. McCann v. Defiance*, 167 Ohio St., 313.

It has also been held that these powers so created are self-executing. *Link v. Utilities Commission*, 102 Ohio St., 336; *Local Telephone Co. v. Mutual Telephone Co.*, 102 Ohio St., 524; *Pfau v. Cincinnati*, 142 Ohio St., 101.

But the declaration by the courts that the powers thus granted to municipalities are “plenary” and that they are “self-executing” appears to require some modification, when we consider Section 2 of Article XVIII of the Constitution. There it is provided :

“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. * * *” (Emphasis added)

It might well be argued that the authority here given to the legislature to provide by general laws for the “government” of municipalities, was intended only to relate to those officers who should administer the *governmental* functions of the municipality, and not to subordinate officers who would conduct its *proprietary* functions such as the operation of municipal utilities. However, the laws in force at the time of the adoption of said

Article XVIII had established and defined the duties not only of the officers who should govern the municipality, but also the minor officers who should manage and operate its proprietary functions such as public utilities, and this latter, as I have already indicated, has been continued in the enactment of what is now Section 735.02, et seq., Revised Code.

In Opinion No. 1054, Opinions of the Attorney General for 1949, p. 669, the then attorney general had under consideration Section 4326 of the General Code relating to the powers and duties of the director of public service, and held :

“If a city has not adopted one of the optional plans of government and framed a charter or exercised its powers of local self government pursuant to the provisions of Article XVIII, Section 7, of the Constitution of Ohio, the provisions of Sections 4323 to 4334, inclusive, of the General Code, as they pertain to the powers and duties of the director of public service in the operation and maintenance of all municipally owned utilities, must be followed.

In the course of that opinion a quotation was made from Volume 28, Ohio Jurisprudence, page 233 as follows :

“The provisions of the Municipal Code as to the manner in which and the authorities by whom the powers of municipal corporations are to be exercised and administered, * * * and which are operative until superseded by the adoption of some other form of government by the electors of a municipality, may be termed the general plan or form of municipal government. This plan * * * calls for a council constituting the legislative authority, and certain other officers and departments, constituting the executive authority, of the municipality.”

In that opinion the point at issue was whether council of a non-charter municipality had authority to delegate the duties and powers of the director of public service to a chief utilities engineer whose office had been duly created by the council within the department of public service. The opinion in question denied the right of a municipal council to take such action. That opinion was confirmed by the same attorney general in Opinion No. 1604, Opinions of the Attorney General for 1950, p. 168, where it was held :

“If a city has not adopted one of the optional plans of government and framed a charter or exercised its powers of local self government pursuant to the provisions of Article XVIII, Section 7, of the Constitution of Ohio, the provisions of Sections 4323 to 4334, inclusive, of the General Code, as they pertain to the powers

and duties of the director of public service in the operation and maintenance of all municipally owned utilities, must be followed.”

Accordingly, I must conclude that a municipality is bound by the statutes in the management and operation of its public utilities, unless it frees itself by the adoption of a charter; and that if it sees fit to adopt the optional procedure provided in Section 735.03, Revised Code, it must comply strictly with its provisions.

2. Your second question is whether a city, in availing itself of the privilege conferred by Section 735.03, Revised Code, may transfer to the board therein provided for, the management of only part of its utilities, leaving the rest in the hands of the director of public service.

My answer to that question must be in the negative. Note the language of the statute. It is provided that the council must by ordinance declare that “it is *essential* to the best interests of the city,” to transfer “the duties of the director relating to the management and operation of municipally owned public utilities,” to a board of three members. It will be recalled that Section 735.02, *supra*, placed in the hands of the director the management and operation of the utilities named, “and other undertakings of the city.” The statute seems to me to fairly imply that the city has the option to leave the director in control, or to transfer “his duties” meaning all his duties in reference to municipal utilities, to a board. There is no suggestion of a divided control; and it is obvious that in some cases, the operation of one utility may be closely entwined with the operation of another, as for instance, water and sewage; and to a lesser extent, the electric plant.

3. Your third question is easily answered. Since recourse to the appointment of a board to take the place of the director of service is purely optional, there appears no reason why the city should not change back at will, and restore the control of its utilities to the director of public service. Certainly no vested rights of any one could have been created which could prevent such action.

Accordingly, in specific answer to the questions submitted, it is my opinion and you are advised:

1. If a city desires to avail itself of the authority conferred by Section 735.03, Revised Code, by the appointment of a board to manage and operate its public utilities, it must comply in all respects with the provisions of that section.

2. Under the provisions of Section 735.03, Revised Code, a city, if it deems it essential to transfer control of its utilities to a board, as therein authorized must include in such transfer all of its utilities.

3. Where a city has, pursuant to the authority of Section 735.03, Revised Code, transferred to a board the control of its utilities, it may at any time return such control to the director of public service.

Respectfully,

MARK McELROY
Attorney General