

Note from the Attorney General's Office:

1925 Op. Att'y Gen. No. 25-2308 was overruled by
1937 Op. Att'y Gen. No. 37-244.

Therefore the *salary* of a chief of police could be increased at any time there was money for its payment.

Section 4214, General Code, uses the words "*salaries and compensation*," and it was not for the inhibition of section 4213 and 4270 council might perhaps allow a chief of police to retain his fees as compensation in addition to his salary; but in view of the inhibitions in these sections and in view of the holding in the case of *Struthers vs. Sokol*, No. 17776 in our supreme court, the second syllabus of which reads:

"In determining whether an ordinance is in conflict with the general laws, the test is whether the ordinance '*permits or licenses* that which the *statute forbids or prohibits*,' and vice versa,"

I am of the opinion that an ordinance permitting the chief of police to keep his fees in ordinance cases would be prohibited. And this seems to have been the holding of this department heretofore, for in Opinions of the Attorney General for 1914, Vol. 2, page 1246, I find the following syllabus:

"Policemen, which likewise include chief of police, are permitted to retain fees received for service in state cases. The rule is otherwise relative to ordinance cases by reason of section 4213 General Code."

In the Nolte case, the supreme court said:

"As to all ordinance cases, the fees taxed in favor of a mayor or marshal must be paid into the village or city treasury."

Hence, a chief of police would be a wholly salaried officer, as far as his fees under ordinances are concerned, and would be entitled to his expenses from the city treasury, as provided in section 3017, General Code.

Respectfully,

C. C. CRABBE,

Attorney General.

2308.

AUTHORITY OF BOARD OF HEALTH TO ADOPT RULES AND REGULATIONS DISCUSSED—SECTION 1261-42 CONSTRUED.

SYLLABUS:

- *Whether or not a board of health is justified in making regulations under the provisions of section 1261-42, requiring the muzzling of dogs, and the killing thereof when not muzzled, to prevent the spread of rabies, is a question of fact to be determined in the first instance by the board of health. Under such circumstances such a regulation will not be disturbed unless in a proper judicial proceeding the court has found the same to be an abuse of the power and discretion of the board.*

COLUMBUS, OHIO, March 23, 1925.

HON. BRITTON S. JOHNSON, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date in which you request my opinion on the following:

"With reference to district boards of health, section 1261-42 of the General Code provides that the board of health of a general health district may adopt rules and regulations as follows:

"The board of health of a general health district may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. All orders and regulations not for the government of the board, but intended for the general public, shall be adopted, recorded and certified as are ordinances of municipalities and record thereof shall be given in all courts of the state the same force and effect as is given such ordinances, but the advertisements of such orders and regulations shall be by publication in one newspaper published and of general circulation within the general health district. Publication shall be made once a week for two consecutive weeks and such orders and regulations shall take effect and be in force ten days from date of first publication. Provided, however, that in case of emergency caused by epidemics of contagious or infectious diseases, or conditions or events endangering the public health, such boards may declare such orders and regulations to be emergency measures, and such orders and regulations shall become immediately effective without such advertising, recording and certifying."

"My inquiry is, can a board of health for a general district adopt a regulation for the public health requiring all dogs to be muzzled and if not, such unmuzzled dogs may be killed and disposed of by proper officers as a part of the regulation?"

"Just at present this county is bothered by a large number of dogs running loose unmuzzled and having rabies and there is a spread of rabies resulting from dogs biting persons, to such character, that almost amounts to an epidemic."

The section to which you refer is an exercise of the police power. It specifically authorizes the board to make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances.

In connection with this section, it may be noted that section 1261-26 makes it the mandatory duty of the district board of health to study and record the prevalence of disease, and provide for the prompt diagnosis and control thereof. It further specifically authorizes that the board may provide for the abatement of nuisances which are dangerous to public health and comfort and may take such steps as are necessary to protect the public health and to prevent diseases.

The power of boards of health in exercising the police power is a subject upon which there are many judicial interpretations involving analogous statutes. It may be stated that the laws are more liberally construed in reference to the authority undertaking to exercise the police power in respect to the public health than any other field which has come under my observation.

It may be noted in the case of *Board of Health vs. Greenville*, 86 O. S., 1, that sections 1249 to 1261 of the General Code were held to be a valid and constitutional exercise of the police power.

In *Board of Health vs. Columbus*, 12 O. D. N. P. 553, it was held that boards of health have powers of a legislative, executive and quasi-judicial character; and these powers may in some cases be exercised in a summary manner.

In *Carr vs. Board of Education*, 1 O. N. P. (N. S.) 602, it was intimated that if the board of education has adopted an order of the board of health, which prohibits children attending school without being vaccinated for smallpox will be up-

held if justified by public necessity and by the prevalence of smallpox in the community.

In *Cincinnati vs. Allison*, 12 O. D. N. P. 376, it was held that a board of health may require all known women of immorality to submit to a physical examination.

There are other numerous cases in which certain powers of boards of health have been upheld, such as the confiscation of milk under certain conditions, and regulation of the sale thereof. Likewise, the power of quarantine and the establishment of pest houses, etc., has been upheld.

From the foregoing, it would appear that it is a question of fact in each case to be determined in the first instance by the board of health as to what measures are necessary to properly protect the public against the spreading of disease. As the courts have said, the extent of the police power in a given case is measured only by the needs of the community. If the condition which you describe is such that only the contemplated action will properly protect the public against the spread of this dangerous disease, then, of course, in view of the holdings heretofore referred to, such an order will be upheld.

On the other hand, if such an order is unnecessary, and should amount to an abuse of discretion on the part of the board of health, then, of course, the courts would set the same aside in the event that the question should be judicially raised. It is generally known that rabies is a disease which has its origin in most cases, if not all, in dogs, and is transmitted by them to other animals and human beings. In view of the known powers of boards of health to quarantine human beings and control their associations in order to prevent the spread of disease, it would seem a much less exercise of the police power to regulate the movements of dogs, when the same is necessary in order to prevent the spread of disease.

However, as above indicated, it is not within the power of this department to specifically state in what instances such a power may be exercised; neither is it within its power to state that the action contemplated by the board of health is a reasonable exercise of the power. This is a question of fact to be determined in the first instance by the board of health, and the determination of the board of health will not be disturbed unless it should be found by the courts to be an abuse of discretion.

Respectfully,
C. C. CRABBE,
Attorney General.

2309.

ELECTIONS—UNDER PROVISIONS OF SECTION 3396 G. C. ALL VOTES MUST BE CONSIDERED IN DETERMINING A MAJORITY OF THE VOTES CAST.

SYLLABUS:

Where an election was held to vote upon a town hall, in counting the ballots, under the provisions of section 3396 G. C., all the votes must be considered in determining a majority of the votes cast, in order to ascertain the result of the election.

COLUMBUS, OHIO, March 23, 1925.

HON. HENRY C. ASHCRAFT, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent communication, which is as follows: