3846

VILLAGE OPERATED UNDER CHARTER — BECOMES CITY THROUGH INCREASE IN POPULATION — MAY IMMEDIATELY FUNCTION AS CITY UNDER CONSTITUTION OR STATE LAWS — APPOINTMENTS AND PROMOTIONS IN CIVIL SERVICE — ARTICLE XV, SECTION 10, CONSTITUTION OF OHIO — BOARD OF HEALTH — SECTION 4404 G.C. — POOR RELIEF, APPOINTMENT OF RELIEF DIRECTOR.

SYLLABUS:

1. *Where a village has adopted a charter prescribing its form of government and such village subsequently becomes a city by reason of increase in population, it may immediately commence to carry on city functions imposed upon it by the Constitution or laws of the state.*

2. *Where a city has adopted the charter plan of government and no provision is made in the charter to implement the provisions of Section* 10 *of Article* XV *of the Constitution of Ohio, the applicable provisions of the state laws will govern and control until such provision is made in the charter.*

3. *Where a city has adopted a charter prescribing its plan of government and such charter does not contain any provisions to implement the provisions of Section* 10 *of Article* XV *of the Constitution of Ohio and where such charter provides that the commission of such city shall exercise all executive authority vested in municipal officers by law, the power is vested in the municipal commission to appoint members of the civil service commission rather than in the president of the municipal commission who is also designated as mayor by the charter.*

4. *The power granted to the council of a city by Section* 4404, *General Code, to establish a board of health, may be exercised by the commission of a city operating under a charter plan of government where the charter vests in the commission all the legislative power of such city.*

5. *The power to appoint members of a board of health of a city health district established in a city operating under a charter plan of*

government is in the commission of such city where the charter specifically provides that such commission shall exercise all executive authority now or hereafter vested in municipal officers by law.

6. *The administration of poor relief in a city operating under a charter plan of government which has no director of public safety should be conducted under the supervision and direction of the commission of such city where the charter thereof provides that it shall exercise all executive power of the city, but such commission may provide for the appointment of a relief director and such other employes to administer poor relief as it may deem necessary and may prescribe their duties.*

Columbus, Ohio, June 6, 1941.

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

Gentlemen:

Your recent request for my opinion reads as follows:

"We are inclosing herewith a letter received from the Solicitor of Upper Arlington, together with a copy of his legal opinion to the City Commission and a copy of the municipal charter.

We are requested in said letter to seek your opinion and advice in answer to a question concerning possible changes in the operation of the local government resulting from the village passing to the status of a city by proclamation of the Secretary of State.

We are familiar with Section 3499 G.C., which provides that village officials shall continue in office until succeeded by proper city officials to be elected at the next regular municipal election, when the village has operated under the federal or statutory form of government. However, the municipality in question, and possibly others becoming cities, has operated under its home rule charter, as is shown by the inclosures. Accordingly the answer to the following question will be of general interest:

Question 1. In the case of a village advanced to a city in the manner provided by sections 3497 and 3498 of the General Code, which village has operated under a Home Rule charter, are such charter provisions competent to place into immediate effect such city activities as were not exercised by said munici-

pality as a village, such as civil service, local health regulation and poor relief administration?"

Sections 2 and 7 of Article XVIII of the Constitution of Ohio respectively provide:

Section 2.

"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; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law."

Section 7.

"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."

Pursuant to the grant of power contained in Section 2 of Article XVIII, supra, the General Assembly has enacted what is generally known as the Municipal Code in which the method of incorporation and the form of government of municipal corporations are prescribed in detail. These statutes provide a form of government different for villages than for cities. In addition to the so-called Municipal Code providing for the incorporation and government of municipal corporations generally, the General Assembly has also, pursuant to the authority granted it by Section 2 of Article XVIII, supra, authorized the establishment of three optional forms of government of municipal corporations, viz., the commission plan, the city manager plan and the federal plan. See Articles 1 to 7 of Section 3515-1, General Code, and also Sections 3515-23 to 3515-28, inclusive, and 3515-54, General Code.

In addition to the forms of municipal government authorized by statute, municipal corporations may adopt charters under authority of Section 7 of Article XVIII, supra, and a great many municipal corporations have adopted such charters.

It may therefore be said that there are five forms of government for cities and villages authorized in Ohio, viz., (1) the ordinary plan au-

thorized by statute, (2) the commission plan, (3) the city manager plan, (4) the federal plan, and (5) the charter plan.

In Ohio municipal corporations are classified as cities or villages and the General Assembly is given the power to determine the method of transition from one class to another. See Section 1 of Article XVIII of the Constitution of Ohio which provides:

> "Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law."

The General Assembly has exercised this grant of power by the enactment of Sections 3498 and 3499, General Code, which respectively provide:

Section 3498.

> "When the result of any future federal census is officially made known to the secretary of state, he forthwith shall issue a proclamation, stating the names of all municipal corporations having a population of five thousand or more, and the names of all municipal corporations having a population of less than five thousand, together with the population of all such corporations. A copy of the proclamation shall forthwith be sent to the mayor of each municipal corporation, which copy shall be forthwith transmitted to council, read therein and made a part of the records thereof. From and after thirty days after the issuance of such proclamation each municipal corporation shall be a city or village, in accordance with the provisions of this title."

Section 3499.

> "Officers of a village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new corporation at the next regular election, and the ordinances thereof not inconsistent with the laws relating to the new corporation shall continue in force until changed or repealed."

In my Opinion No. 3354 rendered to the Director of Health under date of January 21, 1941, I advised that where a village had increased in population so as to become a city, the change in classification did not increase or change the powers of the officers of such corporation until new officers were elected. This conclusion was based upon the decision of the

Supreme Court of Ohio in State, ex rel. Heffernan, v. Serp. 125 O.S., 87, the first paragraph of the syllabus of which reads as follows:

> "Section 1 of Article XVIII of the Constitution, in empowering the General Assembly to regulate 'the method of transition' from a village to a city, gives the General Assembly authority to make the distinctions between the forms of village and city government."

The Heffernan case involved a village, the form of government of which was that prescribed by the Municipal Code. The village had increased in population so as to become a city and the question involved was whether the village officers could then exercise the functions of city officers granted by the Municipal Code and this the Supreme Court held they could not do.

The question of the power of officers of a village operating under a charter plan of government was neither involved nor considered by the court and its decision therefore cannot be regarded as applicable to your question.

Where a municipality is operating under the ordinary provisions of the Municipal Code or has adopted the commission plan, the city manager plan or the federal plan for its government, it must, of course, in its operations follow the particular statutes applicable to the plan adopted, and its various officers have such powers only as are given to them by or pursuant to such applicable statutes or such as may be reasonably implied as necessary to carry out such powers so given.

A different rule, however, applies to those municipalities which have adopted charter plans of government, and it may be said as a general proposition that in so far as matters of local self-government are concerned, the provisions of the charter are controlling and supersede statutes to the extent of any conflict. See Dillon v. City of Cleveland, 117 O.S., 258, and cases cited at page 275 in the opinion of the court.

Since the officers of a municipal corporation which has adopted a charter derive their powers directly from such charter and since the provisions of the Municipal Code have no application as a general rule to such officers, it would seem that where a village which has adopted a charter becomes a city due to increase in population, such municipal

corporation may through its present officers at once commence to perform the functions granted and the duties imposed upon cities by the Constitution or statutes. The Constitution does not require a municipal corporation, be it village or city, to adopt any particular form of charter, and therefore the same charter may continue to be used by a village which has become a city until the people thereof see fit to amend it.

Your letter involves the question as to whether a village which has been operating under the charter plan of government and which has become a city due to increase in population, may immediately commence to carry on city functions, to wit, (1) appointments and promotions in the civil service according to merit and fitness, (2) establishment of a city health district, and (3) establishment of a poor relief area. These questions will now be considered in the order named.

Section 10 of Article XV of the Constitution provides:

> "Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

By reason of this constitutional provision, appointments and promotions in the civil service of cities must be made according to merit and fitness. For the reasons hereinbefore stated, it is believed that the case of State, ex rel. Heffernan, v. Serp, supra, has no application to a village operating under a charter plan which becomes a city due to increase in population and that such a municipal corporation may and should immediately make appointments and promotions in its civil service pursuant to the constittutional provision.

The Supreme Court on several occasions has held that the manner of regulating civil service is a matter of local self-government and that the provisions of a charter supersede the provisions of statutes with respect thereto. See State, ex rel. Lentz, v. Edwards, 90 O.S., 305, and Hile v. Cleveland, 118 O.S., 99. Other authorities to the same effect might be cited, but these are deemed sufficient for the purpose of this opinion.

An examination of the copy of the charter of Upper Arlington, which

you have submitted to me, discloses that it contains no provisions to implement the provisions of Section 10 of Article XV of the Constitution, supra. Under such circumstances, the rule appears to be that the applicable provisions of the state law apply until provision is made in the charter. Thus, in State, ex rel. Jackson, v. Dayton City Commission, 30 O.L. Abs., 378, 381, it was said in the per curiam:

> "We determine that under the law of Ohio the home rule charter provisions fixing the manner and method of promotions under the civil service law will control over state law.
>
> If no provision is made under the charter for examination, certification or promotion, then the corollary state law will apply."

Section 486-19, General Code, provides that the mayor or other chief appointing authority of each city shall appoint three persons who shall constitute the municipal civil service commission of such city and the city school district. Section III of the charter of Upper Arlington provides:

> "The government and control of the village shall be vested in a commission of five citizens who shall be elected at large in the manner provided by law for the election of municipal officers, nominated by petition and elected on a non-partisan ballot. The commission shall constitute the governing body of the said village, and shall have full power to pass ordinances, adopt resolutions and otherwise exercise all legislative power and executive authority now or hereafter vested in municipal officers by law, and in the commission by this Charter."

It would therefore seem that the chief appointing power of the city is the municipal commission. I am not unmindful of the provisions of Section VI of the charter which provides that the members of the commission shall elect one of their number president who shall also be mayor of the village. However, he is given no appointing power by the charter and seems to have no authority other than to preside over the meetings of the commission, to exercise judicial powers and perform judicial duties vested in and imposed upon mayors of villages by the laws of the state and to be recognized as head of the village for the purpose of serving civil processes and for ceremonial purposes.

I come now to the question of the establishment and function of a city health district. Section 1261-16, General Code, provides that each

city shall constitute a health district to be known as the city health district. Section 4404, General Code, provides:

> "The council of each city constituting a city health district, shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by the council, to serve without compensation, and a majority of whom shall be a quorum. The mayor shall be president by virute of his office. Provided that nothing in this act (G.C. §§1261-16 et seq., 4404, 4405, 4408, 4413) contained shall be construed as interfering with the authority of a municipality constituting a municipal health district, making provision by charter for health administration other than as in this section provided."

Section XI of the charter of Upper Arlington provides that "the commission shall have full power and authority to establish, administer and control departsments of * * * health * * * ." It does not appear that the commission has exercised the power so granted. By analogy, the same principle announced in State, ex rel. Jackson, v. Dayton City Commission, 30 O.L. Abs., 378, supra, with respect to civil service, should also apply to health administration, and the provisions of Section 4404, General Code, supra, therefore control in this instance.

It will be noted that Section 4404, General Code, provides that the council shall establish a board of health composed of five members to be appointed by the mayor, and that the mayor shall be president of such board of health by virtue of his office. Upper Arlington has no council, but for the present purposes the term "council," as used in Section 4404, General Code, supra, may be held also to include "commission." Section III of the charter of Upper Arlington, supra, provides that the commission shall constitute the governing body of the corporation and exercise all legislative power and executive authority now or hereafter vested in municipal officers by law. In Flotron v. Barringer, 94 O.S., 185, 187, it was said in the per curiam:

> "The charter of the city of Dayton, however, confers upon this commission further governing powers not possessed by the city council of other cities of the state and not coming within those powers recognized as legislative. These added powers do not necessarily distinguish that body from a city council, for this charter might have retained the statutory council and conferred upon it all the powers and duties in addition to its legislative authority that it conferred upon the commission. It is not the name, but the powers and duties, of the office, that determines its character.

> This commission is the legislative authority of the city of Dayton, and that fact, and not the fact that it has further governmental powers, fixes and determines the nature of the office. In this important respect it corresponds to the council in other cities and is to all intents and purposes the council of the city of Dayton."

See also State, ex rel. Baden, v. Gibbons, 17 O.L.Abs., 341, where it is stated in the first paragraph of the headnotes:

> "It is a well settled principle that the terms 'council' and 'commission' are synonymous when they relate to municipal corporations and refer to the legislative authority of any city without designating that authority by any name."

It therefore seems clear that the commission of Upper Arlington may pass an ordinance establishing a board of health.

Section 4404, General Code, supra, further provides that the members of the board of health shall be appointed by the mayor and confirmed by the council. While Section VI of the charter of Upper Arlington provides that the members of the commmission shall elect one of their number president who shall also be mayor of the corporation, as has been hereinbefore noted, such mayor is given no appointing power by the charter and has no authority other than to preside over the meetings of the commission, to exercise judicial powers and perform judicial duties vested in and imposed upon mayors of villages by the laws of the state, and to be recognized as head of the village for the purpose of serving civil process and for ceremonial purposes. It seems to me that when the General Assembly used the word "mayor" in Section 4404, General Code, it meant a mayor of a city organized and operating under the ordinary plan of city government authorized by statute and did not contemplate an officer who, while he bears the title of mayor, possesses little of the authority or powers of such office as commonly understood.

Section III of the charter of Upper Arlington, supra, grants to the commission all the executive power now or hereafter vested in municipal officers by law. The mayor of a city operating under the ordinary plan of city government exercises executive power and it seems clear that the power to appoint members of the board of health vested in the mayor by Section 4404, General Code, supra, is executive power. Such being the case, I am of the opinion that this power to appoint members of the

board of health is in the commission and not in its president.

I will now discuss the last question raised by your letter, viz., the administration of poor relief. Section 3391-1, General Code, in part provides:

> " * * * each city shall be a local relief area, the local relief authority for which shall be the proper board or officer of the city. * * * "

Sections 4089 and 4368, General Code, provide that poor relief in cities shall be administered under the direction of the director of public safety. It does not appear that Upper Arlington has such an officer as the director of public safety, and no provision is made in the charter for the administration of poor relief. Consequently, this function must be held to be in the commission because of the grant of executive authority to it by Section III of the charter. In this connection, however, attention is directed to the provisions of Section 3391-7, General Code, which provides that each local relief authority may appoint a relief director and such additional employes as it may deem necessary and prescribe their duties and authority. If the commission deems it necessary or desirable, it could appoint a relief director under authority of this section and prescribe his functions.

I am therefore of the opinion:

1. Where a village has adopted a charter prescribing its form of government and such village subsequently becomes a city by reason of increase in population, it may immediately commence to carry on city functions imposed upon it by the Constitution or laws of the state.

2. Where a city has adopted the charter plan of government and no provision is made in the charter to implement the provisions of Section 10 of Article XV of the Constitution of Ohio, the applicable provisions of the state laws will govern and control until such provision is made in the charter.

3. Where a city has adopted a charter prescribing its plan of government and such charter does not contain any provisions to implement the provisions of Section 10 of Article XV of the Constitution of Ohio and

where such charter provides that the commission of such city shall exercise all executive authority vested in municipal officers by law, the power is vested in the municipal commission to appoint members of the civil service commission rather than in the president of the municipal commission who is also designated as mayor by the charter.

4. The power granted to the council of a city by Section 4404, General Code, to establish a board of health, may be exercised by the commission of a city operating under a charter plan of government where the charter vests in the commission all the legislative power of such city.

5. The power to appoint members of a board of health of a city health district established in a city operating under a charter plan of government is in the commission of such city where the charter specifically provides that such commission shall exercise all executive authority now or hereafter vested in municipal officers by law.

6. The administration of poor relief in a city operating under a charter plan of government which has no director of public safety should be conducted under the supervision and direction of the commission of such city where the charter thereof provides that it shall exercise all executive power of the city, but such commission may provide for the appointment of a relief director and such other employes to administer poor relief as it may deem necessary and may prescribe their duties.

Respectfully,

THOMAS J. HERBERT,

Attorney General.