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A NON-CHARTER CITY MAY NOT PROVIDE A WEEKLY SUM OF MONEY FOR DISABLED AUXILIARY POLICEMEN EXCEPT THOSE APPOINTED UNDER SEC. 737.10, R.C. — A CHARTER CITY MAY ESTABLISH AUXILIARY POLICE FORCE AND PROVIDE WEEKLY SUM OF $ FOR DISABLED—AWARD PAID TO AUXILIARY POLICEMAN—CITY MAY PURCHASE GROUP INSURANCE AS PART OF COMPENSATION OF ITS EMPLOYEES. ART. XVIII, SEC. 3 O.C.; ART. XV, 10, O.C. §737.05, R.C. 737.10, R.C. 737.11, R.C. 737.14, R.C. OPINION 4685 OAG 1941, §3923.12, R.C.

SYLLABUS:

1. A non-charter city may not provide a weekly sum of money to be paid to disabled "auxiliary" policemen except those auxiliary policemen who are appointed under Section 737.10, Revised Code, and are disabled while acting as provided in said section.

2. A charter city may establish an "auxiliary police force" if the establishment of such force is provided for by its charter, and such municipality may provide a sum of money to be paid weekly to members of such force who are disabled in the performance of their duties.

3. Any award paid under a contract made pursuant to Section 4123.03, Revised Code, to an auxiliary policeman, is subject to the provisions of Section 4123.02, Revised Code, and under said latter statute, an award made under a contract executed pursuant to Section 4123.03, Revised Code, must be reduced by the amount of any weekly disablement payment made by a city to a disabled auxiliary policeman.

4. A city may, as part of the compensation of its employees, and in accord with Section 3923.12, Revised Code, purchase a policy of group sickness and accident insurance providing for indemnity payments to auxiliary policemen during a period of disability resulting from accident. (Opinion No. 4685, Opinions of the Attorney General for 1941, page 1091, modified.)

Columbus, Ohio, June 15, 1962

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

Dear Sir:

I have your request for my opinion which reads as follows:

"Several cities in Ohio have established what is known as an 'auxiliary police force.' In one of these municipalities the ordinance provides, in part, that such auxiliary policemen 'will have all police powers, and shall exercise the same only during an emergency and after call and under the orders of the Police Chief, and shall perform only such police duties as are assigned by the Police Chief, and shall act only when in the prescribed uniform, or portion of uniform.' Caps, maces, and identification cards are furnished by the city.

"The members of the auxiliary force serve for nominal compensation—usually one dollar per year.

"In the city in question a regularly assigned auxiliary force has been established with specific tours of duty; despite the ordinance which relates the services to emergency situations.

"The city involved operates under the statutory form of government, although others in which auxiliary police forces are in being are charter municipalities.

"As I understand the situation, these auxiliary policemen regularly accompany a full-time policeman on his rounds in a police cruiser. The auxiliary policemen, of course, are not appointed from an eligible list and are not members of the police relief and pension fund system.

"I find no provision in the statutes authorizing the establishment of such a police force. Commendable as the objective may be; that is, to furnish additional manpower, at very little cost to the city, by public-spirited citizens who volunteer their time and effort, a number of very serious questions arise which I believe are of statewide concern.

"1. In the event of injury to an auxiliary policeman while in the course of his so-called duties, may the city council provide a weekly sum of money to be paid to such auxiliary policeman in addition to any Workmen's Compensation which might be available?

"2. May the city purchase a group policy of insurance providing for a guaranteed periodic indemnity payment during the period of disability due to accident?"

Since your question refers to charter and non-charter cities, a distinction must first be made as to the authority of each. The basic law pertaining to the power of municipalities in connection with the operation of police departments was settled by the Supreme Court in *The State, ex rel., Canada* v. *Phillips,* 168 Ohio St., 191, wherein the first and third paragraphs of the syllabus read as follows:

"1. The appointment of officers in the police force of a city represents the exercise of a power of local self-government within the meaning of those words as used in Sections 3 and 7 of Article XVIII of the Ohio Constitution.

"* * * * * * * * *

"3. The authority of the General assembly, to enact laws applicable to cities pursuant to Section 10 of Article XV of the Constitution, is an authority to enact such laws to be applicable in cities only where and to the extent that such laws will not restrict the exercise by such cities of their power of local self-government."

Section 3 of Article XVIII, Ohio Constitution, provides:

"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. (Adopted September 3, 1912.)"

Section 7 of Article XVIII, Ohio Constitution, provides:

> "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. (Adopted September 3, 1912.)"

Section 10 of Article XV, Ohio Constitution, reads as follows:

> "Appointments and promotions in the civil service of the state, the several counties, and cities, and 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 the holding that the operation of a municipal police department is not a local police, sanitary or other similar regulation within the meaning of the language as used in Section 3 of Article XVIII, Ohio Constitution, the *Canada case, supra,* clearly places such operation in the hands of the municipality.

Even though the operation of a municipal police and fire department is now considered to be a power of local self-government, in a non-charter city the exercise of such power may not be contrary to the provisions of the state statutes dealing on the same subject. In this respect, your attention is called to the syllabus of the case of *The State, ex rel., Petet et.al.,* v. *Wagner,* 170 Ohio St., 297, which reads as follows:

> "A noncharter municipality is without authority under the provisions of Section 3, Article XVIII, Constitution, to prescribe by ordinance a method for the selection of a chief of police which is at variance with the provisions of Section 143.34, Revised Code."

Peck, J., speaking for the court in the *Wagner case, supra,* said, beginning at page 302 thereof:

> "Section 3 confers upon all municipalities 'authority to exercise all powers of local self-government' but, as pointed out in *Morris v. Roseman, supra,* does not state 'how and in what manner' such powers are to be exercised. Section 2 specifically authorizes 'general laws * * * to provide for the * * * government of' municipalities. It is apparent therefore that, by what they said, the people expressed an intention that, in the absence of the adoption of a charter pursuant to Section 7 or of the adoption of any 'additional laws * * * for the government of municipalities adopting the same' pursuant to Section 2, the 'general laws * * *

> for the * * * government of' municipalities authorized by Section 2 were to control a municipality in the *exercise* of the powers of local self-government conferred upon it by Section 3. Where a charter is adopted, then, under Section 7, the municipality 'may, subject to the provisions (*i.e.*, limitations) of Section 3 (not Sections 2 and 3) * * * exercise thereunder (*i.e.*, under the charter instead of under general laws) all powers of local self-government.' The only limiting provision then applicable is that specified in Section 3, that 'local police, sanitary and other similar regulations' shall 'not * * * conflict with general laws.' (Paragraph four of syllabus of *State, ex rel., Canada v. Phillips, supra.*)"

See also Opinion No. 819, Opinions of the Attorney General for 1959, page 513, for a similar reasoning and conclusion.

Considering the *Wagner case, supra,* and *Canada case, supra,* it is apparent that the operation of a municipal police department in a non-charter city is subject to the applicable provisions of the Revised Code, including those relating to civil service enacted pursuant to the authority of Section 10 of Article XV, Ohio Constitution, while the governmental organization and civil service requirements of a charter city may be controlled by the charter.

Considering the establishment and appointment of an "auxiliary police force" as described in your letter, in connection with the foregoing, it appears that a city operating under a provision of its charter could maintain such an organization. A non-charter city, however, being governed by the statutes relating to its internal operation, could only maintain such an organization if its establishment did not conflict with such statues.

Section 737.05, Revised Code, pertaining to the police department of a city, reads as follows:

> "The police department of each city shall be composed of a chief of police and such other officers, patrolmen, and employees as the legislative authority thereof provides by ordinance.
>
> "The director of public safety of such city shall have the exclusive management and control of all other officers, surgeons, secretaries, clerks, and employees in the police department as provided by ordinances or resolution of such legislative authority. He may commission private policemen, who may not be in the classified list of the department, under such rules and regulations as the legislative authority prescribes."

Section 737.10, Revised Code, reads as follows:

> "In case of riot or other like emergency, the mayor may appoint additional patrolmen and officers for temporary service in the police department, or additional firemen and officers for temporary service in the fire department, who need not be in the classified list of such department. Such additional persons shall be employed only for the time during which the emergency exists."

Section 737.11, Revised Code, reads as follows:

> "The police force of a municipal corporation shall preserve the peace, protect persons and property, and obey and enforce all ordinances of the legislative authority thereof, and all criminal laws of the state and the United States. The fire department shall protect the lives and property of the people in case of fire. Both the police and fire departments shall perform such other duties as are provided by ordinance. The police and fire departments in every city shall be maintained under the civil service system."

The ordinance quoted in your letter is clearly in conflict with Section 737.10, *supra,* in that it attempts to establish an auxiliary force to operate in emergencies. Under said Section 737.10, that power rests with the mayor and is limited to times of riot or other *like* emergencies. I note that such power was lawfully called upon in September, 1919, by the mayor of the city of Youngstown when "riot, disorder and bloodshed had already appeared and were daily threatening to extend the reign of anarchy and terror over the city and its industries." *Youngstown* v. *The First National Bank of Youngstown,* 106 Ohio St., 563.

Since no such emergency exists in the instant case, the authority set forth in Section 737.10, *supra,* must lie dormant. The General Assembly, in setting forth the powers to be used in the orderly operation of city government, granted such power expressly to the mayor and I believe, therefore, that the legislative authority of the municipality could not usurp it. However, even if the legislation in question was considered to be lawful, under Section 737.10, Revised Code, the practice followed by the municipality of using an "auxiliary" police force for other than emergency duty clearly violates Sections 737.05, 737.10, and 737.11, Revised Code. Accordingly, I am of the opinion that a non-charter city is without power to establish an "auxiliary police force" whose members are not

selected from a civil service list and who are given the authority of a regular police officer to act in non-emergency situations.

The authority of a non-charter city to provide for relief of its police officers is found in Section 737.14, Revised Code, which reads in part as follows:

> "The legislative authority of a municipal corporation may provide by general ordinance for relief, out of the police or fire funds, of members of either department temporarily or permanently disabled in the discharge of their duty. * * *

Section 737.14, *supra,* is clearly limited to police officers disabled in the discharge of their duty, and since temporary emergency officers may, by Section 737.10, *supra,* perform only during the time of an emergency as described in said statute, it must naturally follow that the legislative body in question could not, under the authority of Section 737.14, *supra,* grant relief to such individual for disability caused during other than emergency duty. I know of no other statute which would bear upon the payment as described in the first question of your letter. Any ordinance enacted by a non-charter municipality to provide such relief would of necessity be at variance with Section 737.14, *supra,* and in accordance with the rule set forth in the *Wagner case, supra,* would fail.

It should be noted, however, that if a charter city, under the terms of its charter, had lawfully established an "auxiliary police force" to act in other than emergency situations, such city could pay to members of such force a disability allowance under Section 737.14, Revised Code, or under the terms of its charter, if any, for the members of such force could be in the performance of duty at times other than during an emergency as set forth in Section 737.10, Revised Code.

Under Section 4123.03, Revised Code, a municipality may contract with the industrial commission for coverage under Sections 4123.01 to 4123.94 inclusive, Revised Code, for "auxiliary policemen and patrolmen," subject to the limitations contained in Section 4123.02, Revised Code. Said latter statute limits the award under Chapter 4123, Revised Code, to a policeman, eligible to participate in any policemen's pension fund established and maintained by a municipal corporation, who is otherwise entitled to a workmen's compensation award, to the amount of such award less the amount he receives from the pension funds provided by the municipal corporation through taxation. There can be no doubt that an

amount paid by a city under Section 737.14, *supra,* would be paid from funds received through taxation. Thus, if such amount is deemed to be a "pension" and if the auxiliary policeman who receives such amount is then considered to be eligible to participate in a pension fund established and maintained by a municipal corporation, such policeman could not receive said amount in addition to the amount of workmen's compensation.

As to the meaning of the word "pension," 42 Ohio Jurisprudence, 354, Pensions and Retirement Systems, Section 2, reads in part as follows:

> "The term 'pensions' has ordinarily been used to denote regular allowances paid to an individual by the government in consideration of services rendered, or in recognition of merit, civil or military. * * *"

A weekly allowance paid to an auxiliary policeman for disabling injury received in the discharge of his duty would clearly be a "pension" within the meaning of the word as set forth above. Since Section 737.14, Revised Code, requires that such amount be provided for by general ordinance of the legislative authority of the city from police and fire funds, the amounts so established must constitute a pension fund established and maintained by a municipal corporation. (See Opinion No. 483, Opinions of the Attorney General for 1915, Vol. 1, page 984, for an analogous conclusion.)

Accordingly, I am of the opinion that any duly appointed "auxiliary" policeman of a charter city who is receiving a weekly sum for disability while acting within the course of his employment under a general ordinance enacted pursuant to Section 737.14, Revised Code, or the city charter, could receive workmen's compensation only in an amount equal to the amount of workmen's compensation which he would otherwise be entitled to under Chapter 4123., Revised Code, less the amount received from the city for his disability.

Coming now to your second question as to whether a city may purchase a group accident policy to pay "auxiliary" policemen benefits during the period of disability, your attention is called to Opinion No. 4685, Opinions of the Attorney General for 1941, page 1091. The first paragraph of the syllabus of that opinion reads as follows:

> "A municipal corporation may as part of the compensation of its employes, pursuant to proper action by its legislative authority, authorize the payment of all or a portion of a premium of

group life insurance covering the lives of such employes, except members of the police and fire departments."

The exception as to members of the police and fire departments contained in the above quoted syllabus is by the ruling in the *Canada case, supra,* no longer applicable. While in non-charter cities, the so-called "auxiliary" policemen would not, in accordance with the answer to your first question, be entitled to benefits for disability under Section 737.14, Revised Code, such "auxiliary" policemen would nevertheless be employees of the municipality and as such the municipality could, as part of the compensation paid to such employee, authorize the payment for a group accident insurance policy.

Group sickness and accident insurance is defined by Section 3923.12, Revised Code, which reads in pertinent part as follows:

"(A) Group sickness and accident insurance is that form of sickness and accident insurance covering groups of persons, with or without one or more of their dependents and members of their immediate families, and issued upon one of the following bases:

"(1) Under a policy issued to an employer, who shall be deemed the policyholder, insuring at least ten employees of such employer, for the benefit of persons other than the employer:

"* * * * * * * * *

"(B) As used in this section:

"* * * * * * * * *

"(2) 'Employer' includes any municipal or governmental corporation, unit, agency, or department thereof, as well as private individuals, partnerships, and corporations.

"* * * * * * * * *"

I find no other provisions of Title 39, Revised Code, dealing with insurance, which would prevent the issuance of a group sickness and accident insurance policy to a municipality by an insurance company duly authorized to write such insurance in this state.

In conclusion, and in specific answer to your questions, I am of the opinion and you are advised:

1. A non-charter city may not provide a weekly sum of money to be paid to disabled "auxiliary" policemen except those auxiliary policemen who are appointed under Section 737.10, Revised Code, and are disabled while acting as provided in said section.

2. A charter city may establish an "auxiliary police force" if the establishment of such force is provided for by its charter, and such municipality may provide a sum of money to be paid weekly to members of such force who are disabled in the performance of their duties.

3. Any award paid under a contract made pursuant to Section 4123.03, Revised Code, to an auxiliary policeman, is subject to the provisions of Section 4123.02, Revised Code, and under said latter statute, an award made under a contract executed pursuant to Section 4123.03, Revised Code, must be reduced by the amount of any weekly disablement payment made by a city to a disabled auxiliary policeman.

4. A city may, as part of the compensation of its employees, and in accord with Section 3923.12, Revised Code, purchase a policy of group sickness and accident insurance providing for indemnity payments to auxiliary policemen during a period of disability resulting from accident. (Opinion No. 4685, Opinions of the Attorney General for 1941, page 1091, modified.)

Respectfully,
MARK MCELROY
Attorney General