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1. MUNICIPAL UNIVERSITY, DIRECTORS—NOT REQUIRED TO ADVERTISE FOR AND RECEIVE COMPETITIVE BIDS AS CONDITION TO MAKING CONTRACTS IN BEHALF OF UNIVERSITY—NO SUCH PROVISION IN SECTION 4328 OR ANY OTHER SECTION OF GENERAL CODE.

2. UNDER ARTICLE XVIII, CONSTITUTION OF OHIO, MUNICIPALITY WOULD HAVE POWER TO REQUIRE ITS OFFICERS IN CHARGE OF MUNICIPAL UNIVERSITY TO ADVERTISE FOR COMPETITIVE BIDS IN CONNECTION WITH CONTRACTS.

SYLLABUS:

1. Neither the provisions of Section 4328 or of any other sections of the General Code, require the directors of a municipal university to advertise for and receive competitive bids as a condition to the making of contracts in behalf of such university.

2. By virtue of the provisions of Article XVIII of the Constitution a municipality would have power by provision in its charter to require the officers in charge of its municipal university to advertise for competitive bids in connection with contracts in behalf of such university.

Columbus, Ohio, August 5, 1947

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

"We are enclosing herewith letter from our City of Akron examiner and various data concerning contracts and expenditures involving more than $500.00 that are awarded by the University of Akron.

Will you kindly examine the enclosures and advise us in answer to the following question:

Are the provisions of Section 4328 and other pertinent sections of the General Code, or provisions of local city charters, applicable to contracts awarded by the Board of Directors of

municipal universities that is to require them to award such contracts through advertising and competitive bidding?"

There is no question as to the authority of the General Assembly to enact laws limiting the power of municipalities to incur debts for local purposes. This is the express provision of Section 13 of Article XVIII of the Constitution, providing for home rule for municipalities. A like power was given by Section 6 of Article XIII of the Constitution of 1851, which is still in force.

This authority reserved to the General Assembly, was held by our supreme court to apply to municipalities even though they may have adopted special charters pursuant to the authority given by Section 7 of Article XVIII. Phillips v. Hume, 122 O. S., 11. The second branch of the syllabus in that case, reads as follows:

> "The requirement for advertising provided in Section 4328, General Code, is one of the methods of limitation expressly imposed upon the debt incurring power of municipalities, when an expenditure exceeds five hundred dollars; and if the provisions of a city charter are in conflict with a state law upon that method they must yield to the requirements of the state law."

The above case arose upon a construction of Section 4328 of the General Code, and the provisions of a city charter which undertook to confer upon a purchasing agent substantially the same powers of contract that are conferred upon the director of public service by the provisions of the General Code. The court said, in the course of its opinion:

> "The Code section relating to advertising applies to all cities; and we are loath to hold that a municipality can, by indirection, absolve itself from the restrictions imposed by Section 4328, General Code, by adopting the expedient of casting the duty of advertising upon one whom the charter designates a purchasing agent instead of the director of public service."

The General Assembly, however, has not seen fit to pass any law of an all inclusive nature requiring advertisement for bids for all municipal contracts involving a stated amount. Section 4328, which was under discussion in the Hume case, relates solely to contracts which fall within the authority of the director of public service. That section, so far as pertinent, reads as follows:

> "The director of public service may make any contract or

> purchase supplies or material or provide labor for any work *under the supervision of that department* not involving more than five hundred dollars. When an expenditure *within the department,* other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council."
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> (Emphasis added.)

That provision has no force excepting as to contracts that are made by the director of public service, involving an expenditure *within his department* exceeding $500.00.

The General Assembly has seen fit to confer upon the director of public safety certain powers of contract and has made a like provision as to advertising on contracts for matters falling within his department. Likewise, in Section 4336, General Code, it is provided that the commissioners appointed pursuant to law to erect a city hall may contract only after advertisement for bids as provided by law for the making of other municipal contracts, no minimum amount of expenditure being mentioned.

Under Section 4031, General Code, a board of hospital commissioners authorized by law to erect a municipal hospital is required to advertise for bids for doing the work or furnishing the materials.

Under Section 4044, General Code, where a municipality has received funds by gift or bequest for the building of a hospital, the trustees charged with the construction or repair thereof are required, when the cost exceeds $1,000, to advertise for bids.

Under Section 4077, General Code, relating to municipal parks, it is provided that where money or property has been received for such purpose by gift or bequest, a board of trustees appointed to administer such gift, before making an improvement involving a cost exceeding $1,000, shall advertise for bids.

Not only is there no general requirement as to advertising for bids for municipal contracts, but it will be noted from the examples given, that there is no uniformity as to the minimum amount, where such requirements do exist.

The laws relating to the powers of the director of public service and the director of public safety give neither of those officers any control, powers or duties whatsoever relative to municipal universities. The stat-

utes relating to such universities are found in Section 4001 et seq. of the General Code. Section 4001 provides as follows:

> "In any municipal corporation having a university supported in whole or in part by municipal taxation all the authority, powers and control vested in or belonging to such corporation with respect to the management of the estate, property and funds given, transferred, covenanted or pledged to such corporation in trust or otherwise for such university, as well as the government, conduct and control of such university shall be vested in and exercised by a board of directors consisting of nine electors of the municipal corporation."

Section 4002, General Code, provides for the appointment by the mayor of the board of directors of such university.

In Sections 4003-1 to 4003-20, inclusive, which formed a part of the new school code of 1943, the substance of the two sections just referred to as well as the provisions contained in former Section 7902 et seq., General Code, were substantially restated and the powers of the board of directors of municipal universities further specified.

Section 4003-13 which is substantially the same as former Section 7910, reads as follows:

> "The taxing authority of a municipal corporation having a university supported in whole or in part by municipal taxation may provide for the construction, improvement, enlargement, equipping and furnishing of buildings for such municipal university. *In the use of funds provided for such purposes, whether from taxation or the issue of bonds, all power and control shall be vested in the board of directors* of the municipal university. Such board shall make *all contracts* necessary for the construction, improvement, enlarging, equipping and furnishing of the buildings specified and the equipment thereof; supervise their erection, completion and equipment and issue proper vouchers for the payment out of such fund of money due under such contracts and for any other expenses connected with the erection, completion and equipment of such building."
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> (Emphasis added.)

It will be noted that there is no provision in this section requiring any advertisement for bids, nor am I able to find any such provision in any of the statutes concerning the management of such universities. In view of the provisions to which I have called attention requiring advertisement for bids by certain municipal officers and municipal boards, in

the case of contracts involving various amounts, it appears to me that the conclusion is irresistible that the General Assembly intended to commit to the directors of municipal universities wide discretion in the making of contracts for the buildings and equipment considered necessary for the use of such universities, and that the General Assembly did not deem it necessary to require of them similar action with respect to advertisement for bids preliminary to making contracts.

Section 4003-6, General Code, particularly as amended by the recent General Assembly (S. B. 137) requires a liberal construction of the statutes relating to the powers conferred on municipal universities.

Your letter raises the further question as to the provisions of city charters relative to contracts of directors of municipal universities, which might require advertisement for bids. I have no doubt that it would be competent for a city in its charter to make provisions for the management of a university owned by such city, differing from the provisions of the statute in that respect. A university owned and supported by the city would be a municipal enterprise and its management and control would, in my opinion, be within the scope of local self-government contemplated by Section 3 of Article XVIII of the Constitution. We may note the provisions of Sections 2 and 3 of Article XVIII. Section 2 provides in part as follows:

> "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.)

Section 3 reads as follows:

> 3. "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."

It will be observed that Section 2 merely gives the General Assembly authority to provide by general laws for the *incorporation* of municipalities and for their *government*. Nothing is said about authority to limit their *powers*. Section 3, on the other hand, takes the question of *powers* out of the hands of the General Assembly and confers them directly on municipalities.

The effect of these provisions of the Constitution, which constituted a radical departure from the former rule as to municipal powers, is well stated in the very first case decided by the Supreme Court involving home rule, to wit, State ex rel. Toledo v. Lynch, 88 O. S., 71, where it was held:

> "The provisions of the eighteenth article of the Constitution as amended in September, 1912, continue in force the general laws for the government of cities and villages until the 15th day of November following, and thereafter *until changed* in one of the three modes following: (1) By the enactment of general laws for their amendment, (2) by additional laws to be ratified by the electors of the municipality to be affected thereby, (3) by *the adoption of a charter* by the electors of a municipality in the mode pointed out in the article." (Emphasis added.)

The plain inference from this statement, which has been frequently restated by our Supreme Court, was that whenever a municipality does see fit to adopt a charter, the statutes theretofore enacted by the legislature for the government of municipalities and the distribution of their powers must give way to the provisions of the charter.

This proposition was again stated and applied in the case of Fitzgerald v. Cleveland, 88 O. S., 338, where the court held:

> "The provisions of Section 7, Article XVIII of the Constitution as amended in September, 1912, authorize any city or village to frame and adopt or amend a charter for its government and it may prescribe therein the form of the government *and define the powers and duties of the different departments,* provided they do not exceed the powers granted in Section 3, Article XVIII, nor disregard the limitations imposed in that article or other provisions of the constitution." (Emphasis added.)

You have attached to your letter a copy of the opinion of the Court of Common Pleas of Summit County, in the unreported case of Underwood v. Thomas et al., Harvey, J., rendering a declaratory judgment on the question of whether the employes of the University of Akron were subject to the requirements of the civil service statutes or to the civil service provisions of the charter of said city of Akron, held that they were not so subject under either the statute or the charter. The court, in discussing the provisions of the Akron charter as originally adopted, said:

> "In the original charter as adopted by the City of Akron the only provision made with reference to municipal university

> was Section 98 of the Charter, which is still a provision of the charter. This section provides that, 'The government, conduct and control of the municipal university shall be vested in and exercised by a Board of Directors consisting of nine electors of the municipal corporation. The Board shall have all the powers and duties now or hereafter provided for by the State law.'
>
> Section 99 of the Charter provides that such directors shall be appointed by the Mayor for a term of six years as the terms of present members expire."

Further on in the opinion the court said:

> "Sections 98 and 99 clearly show that it was the intent of the people to not control or govern the municipal university by their charter, that that was a matter left solely to the law of Ohio."

Assuming that the provisions of the Akron charter quoted by the court in the opinion referred to are the only ones affecting Akron University, it would appear that the charter does not in any way affect the control of such university as set forth in the statutes above referred to or impose any new or different obligations upon the directors of such university in the matter of making contracts. However, not having the text of the charter before me, I do not consider that I should express a definite opinion as to its effect.

I note an opinion by one of my predecessors, found in 1927 Opinions of the Attorney General, page 949. Dealing with the University of Cincinnati and certain provisions of the charter of that city, it was held that full control of the funds of the university, including the proceeds of taxes therefor, is vested in the board of directors; that such funds are not subject to appropriation by the city council; and that the provision of the city charter as to placing legal advertising applied to the University of Cincinnati.

There was no suggestion in the opinion that legal advertising of any particular kind was required of the university, but merely that if any occasion arose to place any legal advertisement, it should be placed in the manner prescribed by the charter. This opinion in no way conflicts with my conclusions, but rather strengthens my opinion that it would be competent for a city, by charter provision to change the control and management of its university from that prescribed by the General Assembly.

Accordingly, in specific answer to your question, it is my opinion that neither the provisions of Section 4328 or of any other sections of the General Code, require the directors of a municipal university to advertise for and receive competitive bids as a condition to the making of contracts in behalf of such university.

I am further of the opinion that by virtue of the provisions of Article XVIII of the Constitution a municipality would have power by provision in its charter to require the officers in charge of its municipal university to advertise for competitive bids in connection with contracts in behalf of such university.

Respectfully,

HUGH S. JENKINS,
Attorney General.