796

1. HOSPITAL MUNICIPAL—OFFICERS OF MUNICIPALITY—HAVE CHARGE OF OPERATION OF SUCH HOSPITAL—HAVE AUTHORITY TO CONTRACT WITH NON-PROFIT HOSPITAL SERVICE CORPORATION FOR HOSPITAL CARE OF SUBSCRIBERS TO SERVICE, TO BE PAID FOR BY CORPORATION—SECTION 669 ET SEQ.—OPINION 1919, FEBRUARY 26, 1940, OPINIONS ATTORNEY GENERAL, PAGE 219, MODIFIED.

2. RATES SHOULD BE SAME AS CHARGED OTHER PATIENTS FOR LIKE SERVICE.

SYLLABUS:

1. The duly constituted officers of a municipality having charge of the operation of a hospital belonging to such municipality have authority to enter into a contract with a non-profit hospital service corporation organized under Section 669 et seq. General Code, for the care in such hospital of subscribers to such service corporation, to be paid for by such corporation. Opinion No. 1919 rendered February 26, 1940, Opinions Attorney General page 219, modified.

2. Rates to be charged for such service should be the same as those charged other patients for like service.

Columbus, Ohio, March 9, 1946

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

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

> "Inclosed herewith find copy of a contract submitted to the City of Bucyrus by the Central Hospital Service, Columbus, Ohio, and an agreement of similar nature entered into by the Lakewood City Hospital.
>
> We have also, requests for opinions concerning similar proposed agreements from other cities of the State.
>
> Will you kindly give us your opinion as to the legal authority of a municipality owning and operating a hospital to enter into a contract of this character?
>
> If such contracts are held to be legal, may they provide special rates, to be paid by the hospital service corporation for hospital service, that may be different from those rates paid by private patients for similar service?"

The Central Hospital Service is a non-profit hospital service corporation organized under the provisions of Section 669 et seq. of the General Code, is duly licensed by the Superintendent of Insurance as required by Section 669-2 General Code, and has contracts with a number of private hospitals known as participating hospitals, which underwrite the association and by the terms of their contracts agree to share in its profits and to pay its deficits, if any.

My understanding is that there are other similar associations in the state which are similarly underwritten by groups of private hospitals.

It would, of course, be wholly beyond the power of a hospital owned by a municipality or county to become a participating hospital under such an arrangement as above suggested, as that would clearly be in violation of the provisions of Article VIII, Section 6, of the Constition, which forbids any county, city or township to lend its credit to or in aid of any corporation or association. I do not understand that it is proposed that any municipal corporation become a participating member of a group under

any such arrangement. In the contracts to which my attention has been called, which are proposed to be made by these hospital associations with municipal hospitals, the municipal hospital is called a cooperating hospital and the gist of the contract is to the effect that such cooperating hospital will receive and furnish for a limited period the usual hospital care to persons and their families who have become subscribers to the hospital association and who, under the terms of their subscribers' contract, in consideration of the payment to the association of certain periodical dues, are entitled to the benefits of hospital care in any of the participating or cooperating hospitals which they may select. In consideration of the agreement of the cooperating hospital to receive such persons as patients and to render such service, the hospital association agrees to pay the cooperating hospital for such service at the rates and on the terms stated in the contract.

The question first to be considered is whether the municipally owned hospital has the legal authority to enter into a contract of this general nature. Municipalities are given abundant authority by statute to construct and operate hospitals. Section 3939, par. 15, General Code, expressly gives that right. It provides:

> "Each municipal corporation in addition to other powers conferred by law shall have power: * * *
>
> To construct hospitals and pest houses; * * *."

Section 3646 General Code, contains a like grant of power to purchase or lease property or buildings for hospitals and to erect, maintain and regulate the same. Section 4023 et seq. General Code, relate to the procedure to be followed in acquiring or erecting such hospitals.

Section 4035, General Code, places the control of a municipal hospital under the Director of Public Safety. That section reads:

> "The director of public safety shall have the entire management and control of such hospital, when completed and ready for use, and subject to the ordinances of council, shall establish such rules for its government, and the admission of persons to its privileges, as he deems expedient. Such director may also employ a superintendent, steward, physicians, nurses, and such other employes as he deems necessary, and fix the compensation of all persons so employed, which compensation shall be subject to the approval of the council."

It will be noted that the director is authorized, subject to ordinances of council, to establish such rules for the admission of persons to the privileges of the hospital as he deems expedient. Obviously, a charter adopted by a municipality may confer this power upon some other officer or make it subject to other conditions.

While the purposes of establishing such hospitals may in part be to provide hospitalization for charity patients, there is nothing in the law that confines them to that purpose. Plainly those who are able to pay for such service should pay for the same.

In an opinion found in 1933 Opinions Attorney General, page 788, it was held:

> "In the absence of any charter provision relating thereto, the director of public safety should fix the rates charged for services to patients in municipally owned hospitals if there be no municipal ordinance with reference thereto, but if there be ordinances in existence or if at any time the council passes ordinances regulating the rates to be charged, then such ordinances would be controlling."

The right of a public, charitable hospital to receive pay from patients who are able to pay appears not only to be sanctioned by general practice but to be recognized by the courts. In the case of O'Brien, Treasurer v. The Physicians Hospital Association, 96 O. S., 1, it was held:

> "A public charitable hospital may receive pay from patients who are able to pay for the hospital accommodations they receive, but the money received from such source becomes a part of the trust fund, and must be devoted to the same trust purposes and cannot be diverted to private profit. (Taylor, Admr., v. The Protestant Hospital Assn., 85 Ohio St., 90, approved and followed.)"

Wholly independent of the statutes above noted, a muncipality would appear to have abundant authority to establish and maintain hospitals and receive pay for services rendered to patients by reason of the broad home rule powers granted it by Article XVIII, Section 3 of the Constitution.

As to the broad effect of the powers thus conferred, see Billings v. Ry. Co., 92 O. S., 478; Perrysburg v. Ridgeway, 108 O. S., 245.

As to the general power to make contracts incident to the proper management of public enterprises and institutions it is said in 28 O. Juris. p. 905:

> "Where particular authorities are invested with the general power to control and manage particular subjects, they are generally held to possess the power to contract with respect to such incidental matters as are reasonably necessary for the purpose."

In ordinary dealings between a municipal hospital and a pay patient, it would appear that the act on the part of the patient in applying for admission and the rendition of service by the hospital would constitute a contract between the parties. Accordingly, under a contract properly drawn it appears to me that there is no essential difference when a municipal hospital agrees with an association to furnish hospital care to its members on terms agreed upon in consideration of the agreement of the association to pay for such service. The agreement on the part of the hospital is in both cases to furnish the requisite accommodations and care to the patient. In the one case the obligation to pay rests upon the patient and in the other it rests upon the association which brings in the patient and agrees to be responsible for the cost of his care.

Accordingly, I can see no reason why a municipally owned hospital, through its proper managing officer, should not have the power to make a contract of the general character proposed with the hospital association. While the General Assembly in providing for the organization of these associations did not see fit to grant in express terms to municipalities the authority to enter into such contracts, yet that authority appears to have been assumed in the statutes dealing with the matter. In Section 669-4, General Code, the following language is used:

> *"With the exception of contracts between the corporation and state, county and municipal hospitals,* all contracts issued by such corporation to the subscribers to the plan shall constitute direct obligations of the hospital or hospitals with which such corporation has contracted for hospital care, and such contracts may contain provisions rendering the corporation liable only for its own acts and omissions. Such contracts may provide for furnishing hospital service to subscribers in cases of emergency in hospitals which are not parties thereto. * * *"
>
> (Emphasis added.)

The first portion of the paragraph above quoted requires special consideration. Prior to its amendment by the 96th General Assembly that section did not contain the words, "with the exception of contracts between the corporation and state, county and municipal hospitals." The section started with the words: "All contracts issued by such corporation to the subscribers shall constitute direct obligations of the hospital or hospitals with which such corporation has contracted for hospital care." The section as it stood prior to that amendment, was the subject of an opinion by my immediate precedessor found in 1940 Opinions Attorney General, page 219, where it was held:

> "The authorities in charge of a municipally owned hospital may not enter into a contract with a non-profit hospital service association organized pursuant to the provisions of Sections 669, et seq., General Code, whereby the hospital is obligated to furnish hospital care at a stipulated price for a definite period of time to subscribers of the non-profit hospital service corporation."

In the opinion it was stated that the proposed contract itself did not violate Article VIII, Section 6 of the Constitution, but that when said Section 669-4 was read into the contract, it did contravene that provision of the Constitution. He then made the following statement as his conclusion:

> "If a municipally owned hospital could lawfully enter into a contract with a hospital service association organized under the provisions of Section 669, et seq., General Code, such hospital would be obligated by reason of the provisions of the statute above quoted to render hospital care to persons who have subscribed to the hospital service plan irrespective of the ability of the service association to pay for such service. * * *
>
> The proposed contract considered in connection with the provisions of Section 669-4, General Code, above set forth, would constitute a loan of the credit of the municipal corporation to the Service Association and would therefore be a violation of Section 6 of Article VIII of the Ohio Constitution."

The amendment in question by the recent General Assembly, appears to have been intended to remove whatever objection there was to the section as it formerly existed. The language of the section both before and after its amendment appears to me to be somewhat unclear, as does the conclusion of the former Attorney General. In so far as the syllabus

of that opinion would forbid any contract being made by a municipal hospital with a non-profit service hospital organization, I feel compelled to modify it, and confine it to the situation there presented in the light of the statute as it then existed.

Certainly, nothing should be written into such contract that would place any liability on the cooperating hospital except to render the service contemplated, such obligation to be not to the subscriber but to the hospital service corporation which is to make the payment; and there should be no provision in such contract which could be construed as authorizing the service corporation as agent for the hospital to bind it further in any respect.

I do not deem it within my province to pass upon the specific provisions of any particular contract. That should be a matter for the legal advisers of the several municipalities concerned. You do, however, raise a question whether rates to be paid by the hospital service corporation may be different from those rates paid by private patients for similar service.

The law has always recognized a difference between public and private callings respecting service and charges. Partiality or an unjust or unreasonable service or charge is permissible in the latter but not in the former. McQuillin Municipal Corporations, Section 1829. As to public utility corporations, statutes are found in most states forbidding discrimination not based on a fair classification. And it is said by McQuillin, Section 1837:

> "The law recognizes no distinction between municipal government and public service corporations in the service of the public. Municipal ownership imposes the duty on the city to treat all classes of citizens who become its patrons alike."

In Steel Company v. Cuyahoga Heights, 118 O. S., 544, it was held:

> "It is the duty of a municipality which undertakes to supply water to do so without discrimination. The duty arises out of such undertaking, regardless of the mode adopted to accomplish such purpose. The municipality cannot absolve itself of such duty by a contract to which the person sought to be discriminated against and to whom it owes the duty is not a party."

That holding and the opinion of the court supporting it, apply with equal force to the furnishing of hospital service.

Accordingly, in specific answer to your inquiries it is my opinion:

1. The duly constituted officers of a municipality having charge of the operation of a hospital belonging to such municipality have authority to enter into a contract with a non-profit hospital service corporation organized under Section 669 et seq. General Code for the care in such hospital of subscribers to such service corporation, to be paid for by such corporation. Opinion No. 1919 rendered February 26, 1940, Opinions Attorney General, page 219, modified.

2. Rates to be charged for such service should be the same as those charged other patients for like service.

Respectfully,

HUGH S. JENKINS,
Attorney General.