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1. FIRE PROTECTION BY USE OF MEN AND EQUIPMENT OF MUNICIPAL FIRE DEPARTMENT TO A STATE HOSPITAL LOCATED OUTSIDE BOUNDARIES OF SUCH MUNICIPALITY — MUNICIPALITY WITHOUT LEGAL AUTHORITY TO ENTER INTO CONTRACT WITH STATE FOR SUCH FIRE PROTECTION — SECTION 3298-60 G. C.

2. NO OFFICER OF STATE HAVING CUSTODY, MANAGEMENT OR SUPERVISION OF A STATE HOSPITAL LOCATED CONTIGUOUS OR NEAR TO BOUNDARIES OF MUNICIPALITY HAS LEGAL POWER TO CONTRACT FOR SERVICE OF FIRE DEPARTMENT TO PROTECT HOSPITAL OR INMATES FROM FIRE.

SYLLABUS:

1. A municipality is without authority by virtue of Section 3298-60 General Code, or any other provision of law, to enter into a contract with the state for the furnishing of fire protection by use of the men and equipment of the municipal fire department, to a state hospital located outside the boundaries of such municipality.

2. No officer of the state having the custody, management or supervision of a state hospital for the insane, located contiguous or near to the boundaries of a municipality, has the legal power to contract with such municipality for the service of its fire department in protecting such hospital or its inmates from danger of fire.

Columbus, Ohio, September 30, 1944

Hon. Frank L. Raschig, Director, Department of Public Works
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The Department of Public Welfare has requested this department to enter into a contract for and on behalf of the Department of Public Welfare with the City of Massillon. The purpose of the proposed agreement is to permit the fire department of the City of Massillon to furnish fire protection to the Massillon

State Hospital. The hospital adjoins the corporate limits of the muncipality.

The City has enacted an ordinance in conformity with Section 3298-60 of the General Code. However, authority to enter into contracts by virtue of this section for fire protection outside the corporate limits does not extend to the state.

The City of Massillon is raising the question as to its authority to respond to a fire in the absence of an agreement with the State of Ohio, to afford fire protection to the Massillon State Hospital.

Our queries are:

1. Under and by virtue of Section 154-40, subdivision 12, would this department vested with general custodial care of all real property of the state, be the proper state authority to enter into an agreement with the City of Massillon for and on behalf of the Department of Public Welfare?

2. Can the State of Ohio enter into an agreement with the City of Massillon for fire protection for the Massillon State Hospital?

3. May the Department of Public Welfare expend state funds to the City of Massillon for such fire protection?

4. Would this contract if entered into be a continuing one or would it have to be executed every biennium?"

A solution of the problems raised by your inquiry involves a consideration both as to the power of the City of Massillon to enter into a contract with the state for the purpose mentioned and also the authority of any of the officers of the state to enter into such contract with the city. Section 3298-60 of the General Code will have a bearing upon both of these propositions. That section as amended in 119 O. L. 315, reads as follows:

"Any township, village or city, in order to obtain fire protection or to obtain additional fire protection in times of emergency, shall have the authority to enter into a contract or contracts for a period not to exceed three years, with one or more townships, villages or cities, upon such terms as may be agreed upon, for services of fire departments or the use of fire apparatus or for the interchange of the service of fire departments or use of fire apparatus, within the several territories of the contracting subdivisions, if such contracts are first authorized by the respective boards of trustees, councils, or other legislative bodies.

Any municipal corporation shall have the authority to enter into a contract or contracts for a period not to exceed three years with any person, group of persons, firm or corporation, owning or having an interest in property outside the limits of such municipality, who desires to obtain fire protection for such property, upon such terms as may be agreed upon, for services of the fire department of such municipality, provided such contract or contracts be first authorized by the legislative body thereof. Twenty-five percent of the amount received by such municipality on any such contract shall be paid into the firemen's pension fund.

The provisions of section 3714-1 of the General Code so far as the same shall apply to the operation of fire departments, shall apply to the contracting political subdivisions and fire department members when said members are rendering service outside their own subdivision pursuant to such contracts.

Fire department members acting outside the subdivision in which they are employed, pursuant to such contracts, shall be entitled to participate in any pension or indemnity fund established by their employer to the same extent as while acting within the employing subdivision, if the rules of the board of trustees of the fiemen's pension or indemnity fund provide therefor; and shall be entitled to all the rights and benefits of the workmen's compensation act, to the same extent as while performing service within said subdivision.

Such contracts may provide for a fixed annual charge to be paid at the times agreed upon and stipulated therein, or for compensation based upon a stipulated price for each run, call or emergency, or the number of members or pieces of apparatus employed or the elapsed time of service required, in such run, call or emergency; and may provide for compensation for loss or damage to equipment or apparatus while engaged outside the limits of the subdivision owning and furnishing the same; and said contracts may provide for the reimbursement of the subdivision wherein the fire department members are employed for any pension or indemnity award or premium contribution assessed against the employing subdivision for workmen's compensation benefits, for injuries or death of its fire department members occurring while engaged in rendering service in pursuance thereof."

We will consider the matter first from the standpoint of the power of the city to enter into a contract with the state for the use of its fire department and apparatus outside of its municipal limits in the protection of the state hospital for the insane. According to information received from the officials of the city, it has been the practice for a long period of time for the fire department of the City of Massillon to answer calls to the hospital, and such service has been rendered without contract and

without remuneration. The city of Massillon has a population of something over 26,000 and the inmates and employes of the hospital are said to number between 3500 and 4000. The distance from the center of the city to the hospital is at least two miles. The city officials feel that in order to do justice to their primary obligation, to wit, the protection of the property and people of the city of Massillon, and at the same time to maintain a department sufficiently large to answer possible calls from the state hospital, they must increase the size of their force and equipment. They also raise the question of the possible risk to the city and the personal risk of their firemen in going outside of their territory without any contract.

Section 3298-60 General Code, as it stood prior to its last amendment, was the subject of an opinion which was rendered on April 3, 1940, found in 1940 Opinions, Attorney General, p. 325. As the statute then stood, the provision contained in the second paragraph authorizing the contracting with any person, group of persons, firm or corporation, etc., was not in the law and I held as disclosed by the syllabus, as follows:

> "A municipal corporation may not enter into a contract with an association comprised of citizens living in a certain portion of a township for the furnishing of fire protection to that portion of the township in which the citizens comprising the association live".

At the next session of the legislature the statute was amended to its present form. It will be noted that a municipal corporation now is given the authority to enter into a contract or contracts for a period of not to exceed three years "with any person, group of persons, firm or corporation owning or having an interest in property outside the limits of such municipality who desires to obtain fire protection for such property". It must be assumed that when this amendment was made, the legislature knew of the situation of the Massillon State Hospital outside of and adjacent to the city of Massillon and perhaps of other state institutions similarly situated. It is necessary, therefore, to conclude that the legislature did not intend to authorize a contract of that character to be made with the state for the protection of any of its institutions so located. Had it so intended it could have done so by adding the state or its officers in charge of these institutions to the list of those with whom the municipality was at that time authorized to make such contacts.

It might be argued that a municipality having been endowed by the Constitution with broad powers of home rule could, without the aid of this statute, enter into such contract, particularly when no expenditure on the part of the city is involved. It is given such power expressly by the Constitution in Article XVIII, Section 6, as to service or products of its utilities. But the fire department of a municipality can not in any sense be said to be one of its public utilities.

It was held by the Supreme Court in State, ex rel. Strain v. Houston, 138 O. S. 203:

> "Fire protection is a matter of concern to the people of the state generally, and when the Legislature enacts general laws to make more efficient the management of fire departments within the cities for the protection of persons and property against the hazards of fire, the cities of the state may be required within reasonable limits to provide funds for the purpose of carrying out such legislation."

It will be observed in the above case that the court declares that the legislature has power not only to enact laws controlling the management of such departments, but also to impose upon a city owning the same, financial burdens for which the city is not reimbursed by the state.

The same principle was enunciated in the case of Cincinnati v. Gamble, 138 O. S., 220, in which it was held:

> "3. In matters of state-wide concern the state is supreme over its municipalities and may in the exercise of its sovereignty impose duties and responsibilities upon them as arms or agencies of the state.
>
> 4. In general, matters relating to police and fire protection are of state-wide concern and under the control of state sovereignty."

In the language of Section 3298-60 supra, describing those persons or organizations with whom a municipality can make a contract, there is included the term "incorporation." The question then arises whether the state is a "corporation" within the meaning of this section. In a very broad sense, a state has been sometimes called by legal writers, a corporation. It is sometimes spoken of as an artificial person. A brief examination of many authorities, however, leads to the conclusion that a state does not

fall within the scope of laws relating to persons and corporations unless it is expressly brought within the scope of such law. Thus, in a statute setting out a list of corporate bodies and persons entitled to a measure of statutory damages for certain torts where the state was not specifically mentioned, it was held not to be within the provisions of the statute. People v. Bennett, 107 N. Y. S. 406. Likewise, under a statute making the property of any society, association or corporation the subject of embezzlement, it was held that the state was not a corporation. State v. Bancroft, 22 Kans. 170; State v. Taylor, 7 S. D. 533. To like effect see Lowenstein v. Evans, 69 F. 908.

In Ohio, ex rel. v. Board of Public Works, 36 O. S. 409, it was held:

> "The state is not bound by the terms of a general statute, unless it be so expressly enacted."

In this case the court said at page 414 of the opinion:

> "The doctrine seems to be, that a sovereign state, which can make and unmake laws, in prescribing general laws intends thereby to regulate the conduct of subjects only, and not its own conduct."

I think we are justified in giving to the word "corporation" in the statute under consideration its ordinary significance as used in the Constitution and statutes of the state, and nowhere, so far as I have been able to find, is there any use of this word in either the Constitution or the statutes which implies a reference to the state. Generally speaking, all references appear to be either to private corporations or to public corporations such as municipalities or other institutions which, by the terms of the law are endowed with corporate powers or character. This construction furthermore is in accord with the definitions as given in Bouvier's Law Dictionary, where a "corporation" is defined as follows:

> "Corporation. A body, consisting of one or more natural persons, established by law, usually for some specific purpose, and continued by a succession of members.
>
> An artificial being created by law and composed of individuals who subsist as a body politic under a special denomination with the capacity of perpetual succession and of acting within the scope of its charter as a natural person."

It seems to me clear, therefore, that the legislature did not, in wording the section under consideration, intend to include the state under the designation of a "corporation".

Accordingly, it follows that a city is without power to enter into a contract with the State of Ohio or any of its officers or boards in charge of hospitals or other institutions for furnishing fire protection to such institutions located contiguous to or near to such municipality.

Another reason to support this conclusion is evidenced by the following provision in Section 3298-60:

> "The provisions of Section 3714-1 of the General Code, so far as the same shall apply to the operation of fire departments shall apply to the contracting political subdivisions and fire department members when said members are rendering services outside of their own subdivision *pursuant to such contracts*". (Emphasis added.)

"Such contracts", evidently refers to the contracts authorized by the preceding paragraph.

The provision of Section 3714-1 to which reference is made and which is designed for the protection not only of the municipality but of the firemen personally, reads as follows:

> "Provided, however, that the defense that the officer, agent, or servant of the municipality was engaged in performing a governmental function, shall be a full defense as to the negligence of members of the police department engaged in police duties, and as to the negligence of members of the fire department while engaged in duty at a fire or while proceeding toward a place where a fire is in progress or is believed to be in progress or in answering any other emergency alarm. And provided, further, that a fireman shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle in the performance of a governmental function and provided further that a policeman shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call."

Obviously, the effect of this reference is that if the city should send its fire department outside of the municipality without the contract authorized by that section, both the city and the members of the fire depart-

ment might be answerable in damages in case of injury to persons or property, and would not have the protection of Section 3714-1. That assumption is further strengthened by the provisions of Section 3298-58 General Code, to the effect that said Section 3714-1 shall apply to the operation of fire fighting equipment when it is being operated in any other political subdivision *pursuant to a contract made under Section 3298-60.*

Again, it is provided that fire department members acting outside the subdivision in which they are employed, "pursuant to such contracts" shall be entitled to participate in any pension or indemnity fund to the same extent as while acting in the employing subdivision. The irresistible implication is that if they are so acting *outside* of their own municipal limits *without* such contract, they lose the benefits of such pension or indemnity fund.

By the further wording of the same paragraph they would maintain or lose their rights and benefits in the workmen's compensation act upon the same conditions, to wit, the existence or non-existence of "such contract".

I am not unmindful of the provisions of the State Council of Defense Act (Section 5285 et seq. General Code) relative to the use of fire fighting equipment outside of municipalities but those provisions are limited to actual or threatened air raids, and it is worthy of note that that act specifically provides that the rights and immunities of the members of the fire department and the municipalities are to be preserved while acting without the municipal limits.

Coming then, to the question of the power of any of the officers of the state to enter into a contract with a municipality for furnishing the services of a municipal fire department to a state institution such as the Massillon State Hospital, it is noted that by the terms of Section 154-57 General Code, the Director of Public Welfare is given all powers and is authorized to perform all duties vested in or imposed upon the Ohio Board of Administration, excepting the control of the State School for the Deaf and the State School for the Blind, and excepting the power to purchase supplies for the support and maintenance of state institutions which power is transferred to the Department of Finance, and said Director of Public Welfare is further endowed with all powers and duties vested in or imposed upon the Board of State Charities. The powers and duties of the

Ohio Board of Administration are found in Section 1832 et seq. General Code. Many of the sections formerly relating to the Ohio Board of Administration have been amended and have been made to refer expressly to the Director of Public Welfare.

In the opening section of the laws pertaining to the powers and duties of the Ohio Board of Administration, Section 1832 General Code, it is stated:

> "The intent and purpose of this act are to provide humane and scientific treatment and care and the highest attainable degree of individual development for the dependent wards of the state;
>
> To provide for the delinquent such wise conditions of modern education and training as will restore the largest possible portion of them to useful citizenship;
>
> To promote the study of the causes of dependency and delinquency, and of mental, moral and physical defects, with a view to cure and ultimate prevention;
>
> To secure, by uniform and systematic management, the highest attainable degree of economy in the administration of the state institutions consistent with the objects in view;
>
> This act (G. C. Sec. 1832 et seq.) shall be liberally construed to these ends."

By the terms of Section 1835, it is provided:

> "The director of public welfare shall appoint such employees as may be deemed necessary for the efficient conduct of the business of the department, prescribe their titles and duties and fix their compensation except as otherwise provided by law. The department of public welfare shall have full power to manage and govern the following institutions: * * *".

Here follows an enumeration of all the state hospitals for the insane, and various other state institutions.

Section 1838 General Code, reads as follows:

> "The board, in addition to the powers expressly conferred, shall have all power and authority necessary for the full and efficient exercise of the executive, administrative and fiscal supervision over all said institutions".

Many other provisions are contained in the law relative to the care and treatment of the patients who are committed to the hospitals for the insane and feeble-minded, and to persons who are committed to other institutions under the control of this department, but nowhere do I find any power or authority conferred upon the Department of Public Welfare or upon its Director to contract with a municipality or other body for furnishing fire protection to the buildings under their control or to the inmates thereof. Examination of the general appropriation act for the current biennium reveals no item in the appropriation for any of the state hospitals covering any such purpose.

The rules of law as applied by our courts are somewhat severe in requiring a strict construction of the powers of officers and of administrative boards created by law for the management of public business whether for the state or its subdivisions. As stated in 43 Amer. Juris. p. 68:

> "In general, the powers and duties of officers are prescribed by the Constitution or by statute, or both, and they are measured by the terms and *necessary* implication of the grant, and must be executed in the manner directed and by the offices specified. *If broader powers are desirable, they must be conferred by the proper authority.* They cannot be merely assumed by administrative officers, nor can they be created by the courts in the proper exercise of their judicial functions. *No consideration of public policy* can properly induce a court to reject the statutory definition of the powers of an officer".
>
> (Emphasis added.)

In 32 Oh. Juris. p. 934 the same general idea is stated with a further reference to what is embodied in the words "implied powers";

> "As a general rule public officers have only such duties as are expressly delegated to them by statute, and such as are *necessarily* implied from those so delegated.
>
> "The rule in respect of implied powers is that, in addition to the powers expressly given by statute to an officer or board of officers, he or it has, by implication such additional powers as are *necessary* for the due and efficient exercise of the power expressly granted, or as may be fairly implied, from the statute granting the express powers".
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> (Emphasis added.)

The principles as to construction of the powers of administrative boards have been frequently applied to such organizations as county com-

missioners and boards of education. In the case of Locher v. Menning, 95 O. S. 97, the court in the course of its opinion said:

> "The legal principle is settled in this state that county commissioners, in their financial transactions, are invested only with limited powers, and that they represent the county only in such transactions as they may be expressly authorized so to do by statute. The authority to act in financial transactions must be clearly and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county".

See also State, ex rel. Clark v. Cooke, 103 O. S. 465, where it was held:

> "Boards of education ,and other similar governmental bodies, are limited in the exercise of their powers to such as are clearly and distinctly granted. (State, ex rel. Locher, Pros. Atty. v. Menning, 95 O. S. 97, approved and followed.)"

A similar holding is found in Schwing v. McClure, 120 O. S. 335, the first branch of the syllabus of which reads:

> "Members of a board of education of a school district are public officers, whose duties are prescribed by law. Their contractural powers are defined by the statutory limitations existing thereon, and they have no power except such as is expressly given, or such as is necessarily implied from the powers that are expressly given".

In the case of State, ex rel. v. Pierce, 96 O. S. 44, it was held:

> "In case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power."

In the case of State, ex rel. v. Railway Company, 37 O. S. 157, it was held that the board of public works was not authorized by law to grant to a railway company the right to lay its tracks on the berme bank of a navigable canal. In its opinion at page 178, the court said:

> "This is not a question of what is expedient or beneficial to the public. It is a question of power. * * *

> It is for the legislature, and not its subordinate agents, the board of public works, to authorize such additional public use and to confer such authority."

It may well be argued that in the light of the humane policy evidenced by the legislature in its expressions contained in Section 1832 General Code, above quoted, it would be tragic if the state, through the governing boards or officers of these institutions could not make provision for protecting in case of fire the lives of persons who have been confined therein, in most cases against their will. The manifest propriety and desirability of having the power to provide such protection by contract with a municipality does not of itself however supply the power.

As indicated in the authorities above cited, powers that are not granted cannot be assumed by administrative officers, and the courts cannot read into them what manifestly ought to be therein, nor can considerations of public policy be allowed to influence the construction of the powers granted or to supply powers not granted, however desirable and proper.

I am therefore constrained to hold that the officers of the state in control of a state hospital located outside of a municipality are not empowered by law to contract with the municipality for the service of its fire department in protecting the property of such institution or the safety of the inmates therein.

This conclusion makes it unnecessary for me to determine whether, in the event such a contract could be made, it would be within the scope of your authority as Director of Public Works to make it. It appears to me, however, that the "custodial care of the real property of the state" which is committed to you by paragraph 12 of Section 154-40 General Code, relates to nothing more than the maintenance of the physical condition of the lands and buildings thereon. This, as I understand, has been the practical construction placed upon that provision of the law.

In conclusion, may I say that the officials and members of the Massillon fire department are to be commended for their public spirited attitude in rendering fire protection service to the hospital without a contract and without remuneration but the remedy for the present situation can be supplied only by the legislature.

Specifically answering your inquiries it is my opinion:

1. A municipality is without authority by virtue of Section 3298-60 General Code, or any other provision of law, to enter into a contract with the state for the furnishing of fire protection by use of the men and equipment of the municipal fire department, to a state hospital located outside the boundaries of such municipality.

2. No officer of the state having the custody, management or supervision of a state hopsital for the insane, located contiguous or near to the boundaries of a municipality has the legal power to contract with such municipality for the service of its fire department in protecting such hospital or its inmates from danger of fire.

Respectfully,

THOMAS J. HERBERT

Attorney General