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FIRE FIGHTERS—MOVEMENT OF FIRE COMPANIES IN OHIO—POWER OF OHIO STATE COUNCIL OF DEFENSE—WAR EMERGENCIES.

SYLLABUS:

Power of Ohio State Council of Defense in relation to fire fighters and movement of fire companies in Ohio in case of war emergencies discussed.

Columbus, Ohio, September 5, 1942.

Mr. Ralph Stone, Executive Director,  
Ohio State Council of Defense,  
Columbus, Ohio.

Dear Sir:

I have received your letter of recent date with copy of letter from Dan T. Moore, Regional Director of the O.C.D, by A. D. Patterson, Lt. Col. Inf., Assistant Director in Charge, dated August 10, 1942, to you, and a letter of J. M. Landis, Director O.C.D., Washington, D. C., to Mr. Dan T. Moore, in which you ask for my opinion on the legal points involved in the matters referred to in these letters and having to do more particularly with the status of fire fighters and the movement of fire companies in Ohio in case of war emergencies.

The questions involved are embraced in Director Landis' letter of August 4th, the material portions reading as follows:

*"Kinds of Fire Companies Included:* All kinds of fire companies should be considered, whether paid or volunteer, regular or auxiliary, public or private, such as:

(a) Companies of a local governmental unit such as city, town, township, fire district or county.

(b) State operated fire companies such as those in rural or forest service.

(c) Privately operated fire companies such as those of an industrial plant if these have suitable equipment and personnel.

(d) Companies operated by a Federal, State or Local governmental agency such as those at Army camps and institutions.

(e) Any other fire companies with suitable equipment and personnel.

The report should cover two main headings:

1. *Status of Fire Fighters*: A statement should be presented by each State on the status of firemen, regular or auxiliary, paid or volunteer, under current laws or emergency directives, including:

(a) Digests or outlines of the significant sections of statutes, ordinances, regulations or Executive Orders which apply.

(b) Digests or outlines of proposed orders to be issued under emergency powers of the Governor, or of bills for proposed legislation, to definitely establish the status of regular and auxiliary firemen in accordance with the wishes of each State.

Points to be considered include such things as:

(a) Legal liability of cities and towns for payment in event of injury or death of firemen, particularly their status if outside their usual territory.

(b) Workmen's compensation laws and their application to firemen.

(c) Pension plans, death or injury benefit plans and where auxiliary firemen come in, if they do.

2. *Movement of Fire Companies*: Even in peace time, few cities have so many fire companies that the city can be self-sufficient. On the other hand, strong outside aid is available in many cases if all the fire companies in a region are taken into account. A city with twenty fire companies of its own might well be able to concentrate aid, if under attack, of twenty or more additional companies from nearby towns or a fire force of forty companies in all. If there is proper control of the movements of these companies, no section of the entire area need be left wholly unprotected and the entire area is protected by the maximum of forty companies.

Beneficial results are being obtained in a few metropolitan or county areas where steps have been taken by mutual agreements among fire departments to effect some form of control of fire company movement.

To enable us to determine how far such efforts have al-

ready gone, a brief statement should be presented by each State as to:

(a) The present situation, documented by digests or outlines of the significant sections of statutes, ordinances, regulations, contract provisions or executive orders which apply.

(b) Digests or outlines of proposed orders to be issued under emergency powers of the Governor, or of bills for proposed legislation, to properly control fire company movement throughout the entire State.

The information and recommendations should, as a minimum, cover the following points:

(a) General authority of the Governor or the State defense council to control fire company movements.

(b) The line of command from state civilian defense officials through state fire coordinator, to fire chiefs assigned as regional chiefs, to local chiefs. A clear outline of command, according to British experience in air raids, is absolutely essential. Points to be considered may include establishment of defense districts, zones or control area, running schedules (peace time fires show it is often more necessary to insist a fire company stay where it is, than that it move to a big fire), and coordination of fire company movements, through control centers, with the movements of other defense services.

(c) Provisions for reimbursement for use of and damage to equipment and for salaries of personnel called in under mutual aid plans.

(d) Provisions for immunity of lending community from liability resulting from acts of loaned equipment and personnel."

This opinion will not be concerned with any fire companies operated by a federal governmental agency, but shall cover all other types of fire companies referred to in Director Landis' letter.

Attention will be paid to the questions in the order outlined in the letter of Director Landis in so far as possible, considering, first, the status of fire fighters and, second, the movement of fire companies. It should be noted, however, that there will be a certain overlapping of these two questions so that they cannot always be clearly separated.

Attention is first called to the fact that the State of Ohio has enacted no legislation since the actual declaration of war, as our legislature has not been in session. There is, however, a short but reason-

ably comprehensive act, creating the Ohio State Council of Defense, to which reference will be made later.

There has been no comprehensive collation of city or village ordinances having to do with the present emergency, particularly the use and mutual interchange of fire fighting crews and apparatus. Our attention has been called unofficially to several ordinances which have been passed and others which are in process of enactment, more particularly those authorizing village and city officials to contract with each other for the interchange of fire companies and apparatus, in accordance with Sections 3298-60 and 3615-1 of the General Code, to which further reference will be made. Because of this, no attempt will be made to prepare a digest or outline of village or city ordinances on these matters except, for a matter of information and convenient reference, to call your attention to Ordinance No. 2271-41, passed by the Council of the City of Cleveland February 23, 1942, and effective as of March 2, 1942, published in the City Record of Cleveland March 4, 1942; and to Ordinance No. 272-42 of the City of Toledo, passed by its Council on August 5, 1942, and published in the Toledo City Journal August 8, 1942. These two ordinances fall in the category above mentioned.

Furthermore, before considering specifically the status of fire fighters and the movement of fire companies, it is well to direct attention to certain specific provisions of the Constitution of Ohio and the Act of the legislature creating the State Council of Defense, Sections 5285 to 5290 of the General Code, effective August 20, 1941.

Section 19, Article I, Constitution of Ohio, provides in part:

“Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure \* \* \* a compensation shall be made to the owner, in money \* \* \*; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.”

Sections 1 and 3, Article XVIII, Constitution of Ohio, provide:

Section 1.

“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."

Section 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."

For your convenience in preparing your report to Director Landis, there are also attached hereto appendices as follows:

1. Copy of the State Council of Defense Act, Sections 5282 to 5290, General Code of Ohio.

2. My Opinion No. 5302 under date of July 11, 1942, which has already answered some of the questions raised by the letter of Director Landis.

3. A digest of and excerpts from various sections of the General Code of Ohio, having to do with *municipal corporations* and the organization and maintenance of fire departments therein, embracing Sections 3615, 3615-1, 3617, 3714-1, 4214, 4367 to 4371, inclusive, 4373 to 4378, inclusive, and 4383 of the General Code of Ohio.

4. A digest of the Ohio statutes covering the creation and maintenance of fire departments in *villages*, embracing Sections 4389 to 4393, inclusive, 4396 and 4397, General Code of Ohio.

5. A digest of the Ohio statutes covering the organization and maintenance of fire departments by *townships*, covered by Sections 3298-54 and 3298-54a, 3298-55 to 3298-63, inclusive, of the General Code of Ohio.

6. A digest of Ohio statutes governing the firemen's pension fund, embracing Sections 4600, 4600-1 to 4605, inclusive, 4607 to 4612, inclusive, 4612-1 to 4612-4, inclusive, and 4612-6 of the General Code of Ohio.

7. A digest of the statutes of the State of Ohio, relating to the

*firemen's indemnity fund*, embracing Sections 4647-1 to 4647-9, inclusive, of the General Code of Ohio.

8. Statutes of Ohio covering the *state foresters and fire wardens* — appointment, supervision, duties, remuneration and liability — being Sections 1177-10e to 1177-10m, inclusive, 1177-10bb and 1177-10ee of the General Code of Ohio.

9. Ohio statutes covering applicability of workmen's compensation laws to firemen, embracing Sections 1465-60 and 1465-61 of the General Code of Ohio.

10. Section 2271-41, Ordinance of the City of Cleveland, Ohio, enacted February 23, 1942.

11. Section 272-42, Ordinance of the City of Toledo, Ohio, enacted August 5, 1942.

Specifically considering first the status of the fire fighters and second the movement of fire companies, we find that the actual status of fire fighters is governed by the action of the city, village or township under the existing statutes and laws of the State of Ohio, and that auxiliary and volunteer firemen may be made by ordinance or other official action of the council or board of trustees of the city, village or township, volunteer employes of their respective fire departments, so that they will be protected by the workmen's compensation laws of the state, the firemen's pension fund or indemnity fund provisions. There are no statutes, regulations or executive orders making them in any way employes of the state or of state governmental agencies, excepting those employed or authorized and commissioned by the state forester as state forest fire wardens. Unless such volunteer or auxiliary fire fighters are accepted by the local governmental agency in accordance with statute, there is no liability on behalf of the local governmental agencies in the event of injury or death. The statutes covered in the appendices hereto attached and above referred to sufficiently authorize the local governmental agencies to provide, however, for their enrollment on such a basis that they may be covered by the workmen's compensation laws, firemen's pension funds or firemen's indemnity funds.

If volunteer or auxiliary firemen or fire fighters are so accepted, they are then entitled to the protection of the workmen's compensation

laws, firemen's pension fund or firemen's indemnity fund, in accordance with the statutes provided therefor and the ordinances and regulations of the local governmental agency governing the same. This applies while the fire fighter is engaged in the performance of his duties outside of the territorial limits of the subdivision listing or employing him, as well as while he is engaged in the performance of his duties in said governmental subdivision.

There are, however, no existing statutes, regulations or executive orders of the state agencies which protect a volunteer or auxiliary fire fighter unless the local governmental agency in either the city, village or township has taken the necessary action or made the requisite order under existing statutes.

Under the present defense act, effective August 20, 1941, Sections 5285 to 5290, General Code, it is provided that the Ohio State Council of Defense, of which the Governor is the Chairman, has the power and also the duty to require when necessary the cooperation and assistance of all governmental agencies and officials in all phases of the civilian defense effort in the state, and in accordance therewith is directed to "utilize the services and facilities of existing officers, offices, departments, commissions, boards, institutions, bureaus, and other agencies of the state and of the political subdivisions thereof," and it is further provided in said act that such agencies "shall cooperate with and extend their services and facilities to the council as it shall request."

Accordingly, it is my opinion that the State Council of Defense has full power and authority to require the movement of any fire company, including volunteer companies, and their equipment, whenever needed. See Section 19, Article I, Constitution of the State of Ohio, and Sections 5288 and 5289, General Code of Ohio; Opinions of the Attorney General, 1942, No. 5302, July 11, 1942 (Appendix No. 2 attached hereto).

The powers of the State Council of Defense, with respect to the seizure of privately owned fire equipment, will be discussed later herein.

Attention is directed, however, to the fact that, while the power is there, no enforcement provisions were enacted and that the statute prescribes no penalty for non-compliance therewith by any local governmental agency.

It should be further noted that neither the Governor nor the Ohio State Council of Defense has the power or authority to require local governmental agencies, or privately operated or volunteer fire companies, to enter into contracts for mutual aid and exchange of fire fighting crews and equipment.

In my Opinion No. 5302 hereto attached as Appendix No. 2, it is pointed out that, under the provisions of Section 3298-60 of the General Code, municipal corporations and townships, in order to obtain additional fire protection in times of emergency, are authorized to enter into contracts with other subdivisions for the services of fire departments and the use of fire apparatus belonging to such latter subdivisions and in such contracts provide for compensation to be paid for the use of such fire apparatus. In view of the provisions of said section, it would appear that unless a contract as prescribed therein is entered into between the subdivisions, there could be no compensation paid to the subdivision owning such fire apparatus for the use thereof, and it is consequently my opinion that should the State Council of Defense in an emergency, order a movement of fire apparatus from one subdivision to another, between which two subdivisions no such contract exists, compensation for the use of such equipment and reimbursement for the salaries of personnel used in such emergency may not be made to the subdivision owning such fire equipment, nor would such subdivision be immune from liability resulting from acts of the loaned personnel in the use of such fire equipment. Under the present laws, the subdivision owning such equipment and employing such personnel would be liable for any damage inflicted while moving such equipment at a time when the same is not being used in the discharge of a governmental function. For a more elaborate discussion of this question, see Opinion No. 5302, *supra*.

In the absence of contract, there is no provision for reimbursement to political subdivisions from the state or the municipality benefiting, for the use of and damage to the equipment and for the salaries of the personnel. This is a matter which you might very well bring to the attention and consideration of the General Assembly when it convenes in January.

I come now to a consideration of the question raised by your communication concerning the powers of either the Governor or the State



Council of Defense with respect to privately owned fire equipment.

In regard thereto, it should be pointed out at the outset that in time of war the chief executive is clothed with the broadest powers in all matters relating to defense.

In this connection, it is stated in 37 C.J., 374:

“In time of war, by virtue of the constitution, and usually by statutory enactments of congress, comprehensive powers reside in the president, as commander in chief of the army and navy, to requisition and appropriate property needed for the prosecution of the war or the maintenance or transportation of troops and munitions of war, and every presumption is in favor of the legality of his act, or the acts of those exercising his authority. \* \* \* ”

In the same volume, on page 373, it is said:

“The power to requisition private property for war purposes is an essential attribute of sovereignty; but since it is even more sheer and abrupt than the power of eminent domain, and is clearly arbitrary in character, and subversive of private rights, it should be resorted to only where the necessity is urgent, or public danger is immediate, imminent, and impending, the emergency being the foundation of the right. \* \* \* ”

It will be noted that Section 19 of Article I of the Constitution of Ohio provides that:

“Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure \* \* \*, a compensation shall be made to the owner, in money.”

While the above section does not in express terms declare that private property may be taken in time of war or public exigency, it will be noted that the same provides “when taken in time of war,” thereby impliedly granting the power to take at such time and under the circumstances named.

In addition thereto, your attention is directed to Section 5288 of the General Code, which defines the powers and duties of the State Council of Defense. It will be noted therefrom that the Council has power

“to do all acts and things, not inconsistent with law, for the furtherance of defense activities.” It is difficult to perceive how the General Assembly could have conferred any broader powers upon the State Council of Defense than it did by the use of the above language. In the exercise of the powers conferred upon it, the State Council of Defense is limited only to the extent that all acts and things done by it must be in furtherance of defense activities and not inconsistent with the law.

Obyiously, the seizure of privately owned fire equipment during an air attack or great conflagration resulting therefrom would be in furtherance of defense activities and under such circumstances of necessity the taking of such privately owned equipment would certainly not be inconsistent with the constitutional provisions above quoted.

Your attention is, however, directed to the language of the above section of the Constitution which requires compensation to be made to the owner in cases where private property is taken in time of war. In view of the above, you are advised that in my opinion privately owned fire equipment may be summarily requisitioned and seized by the State Council of Defense during an actual air raid or fire resulting therefrom when the attendant circumstances are such as to require the immediate need of such equipment to avert a general conflagration.

I have not in this opinion attempted to cover the question referred to in Director Landis' letter as consideration of “the line of command from state civilian defense officials through state fire coordinator, to fire chiefs assigned as regional chiefs, to local chiefs,” etc., for the reason that this appears to be an administrative function to be exercised through executive orders of the State Council of Defense as authorized by present legislation.

In this opinion it is not my endeavor to consider the effect of any pending federal legislation which may be enacted providing for compensation benefits for injury and death to volunteers in the protective services of civilian defense, nor shall I herein attempt to outline any suggested state legislation at this time, other than to comment that a number of states, whose legislatures were in session during this year, have passed fairly complete and comprehensive state war emergency measures specifically providing on the state level for the various matters herein discussed.

As I have stated heretofore, there has been no session of the General Assembly of Ohio since the declaration of war and you may find it advisable to make recommendations to that body when it convenes, with respect to legislation necessary and proper to implement a successful war effort.

Appendices on file — Office Attorney General.

Respectfully,

THOMAS J. HERBERT  
Attorney General.