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DISTINCTION BETWEEN CIVIL DEFENSE AUXILIARY POLICE AND UNCHARTERED MUNICIPAL AUXILIARY POLICE —OPINION 3071 OAG 1962.

SYLLABUS:

Opinion No. 3071, Opinions of the Attorney General for 1962, issued June 15, 1962, dealt with the operation of a police force by an Ohio city and in no way was intended to affect the operation of local civil defense units organized and operating under Chapter 5915., Revised Code.

Columbus, Ohio, October 25, 1962

Hon. Earl W. Allison, Prosecuting Attorney
Franklin County, Columbus, Ohio

Dear Sir:

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

"Our office received a channelled request from Russell E. Pennell, Director of Columbus and Franklin County Civil Defense Organization, asking for a certification of his request to your office for a clarification of Opinion No. 3071, dated June 15, 1962.

"In the interest of minimizing the danger of rephrasing Mr. Pennell's legal questions, we will copy verbatim his request:

" 'Recently I have had called to my attention some questions regarding our Civil Defense "Auxiliary Police", brought about through Attorney General McElroy's Opinion 3071, dated June 15, 1962. Since as you know, I am not a lawyer, or being familiar with legal protocol or procedures, I will simply ask the questions I have on my mind regarding certain points expressed in the aforementioned opinion.

" '1. Is not the term, name and connotation of the words auxiliary and volunteer generally accepted as being synonymous and inferring those persons that may be recruited, trained, and utilized as aides in assisting those persons regularly necessary for the fulfillment of specified responsibilities?

" '2. As I read and interpret section 4123.03 and associated sections 4123.031 and section 4123.033, I believe that I have been right in carrying out my responsibility as Director of the Columbus and Franklin County Civil Defense, in the practice of recruiting, screening, basically training and providing a perpetual training program for our auxiliary or volunteer personnel who have met any and all of the other established criteria required by law in sections 4123.01-4123.94. The term that we have used in our county, and I have personal knowledge it is widely used throughout the country for our volunteer law enforcement service, is "Auxiliary Police". It has been called to my attention that in some municipalities, within Franklin County that have a non-chartered form of government, they cannot legally have an "Auxiliary Police Force", the opinion being based on 737.10 because as the Attorney General points out in his opinion, since no such emergency exists in the instant case, the authority set forth within 737.10 *supra* must lie dormant.

" 'The following thoughts crossed my mind: while we are not in this instant case in a declared "hot war", are we not aware of the critical world situation to the extent, whereby, for all practical intents and purposes we are in fact on a National, State, and those political subdivision within the state, considered to be in a state of preparedness for an emergency? Through this preparedness, both militarily and non-militarily it is hoped it in itself might be a deterrent to any possible aggression on this country, but should it not be a sufficient deterrent and we find ourselves in a world conflict, would we not need all of the resources at our command, including those volunteers or auxiliaries which having been recruited and trained, and in a state of perpetual training to help alleviate the loss of life, suffering of those injured as well as protecting the property and resources of our community?

" 'Have we been, and are we wrong in trying to recruit, train and keep as many auxiliaries active and prepared for their mission, or should we wait for the declaration of war before trying to accomplish the task mentioned above?

" 'The thought also comes to my mind, having been in the Civil Defense program for some nine years, both as a volunteer as well as a professional Civil Defense staff member, that I have experienced the problem of recruiting and training volunteers, however, seeing them in many cases fall by the wayside in their interest because there was no comparable day to day activity whereby they could continue to use and expand on the training they have received. Therefore, for sometime the Auxiliary Police Service has been envied by many volunteers, and one service where most Directors didn't have to worry about the loss or lack of interest on the part of these volunteers because of their opportunity to serve in this program of perpetual or on the job training, and performing a service to their community.

" 'Since this opinion has already created much confusion in some nonchartered governmental entities within Franklin County and they are considering doing away with their auxiliary police service, I am quite concerned since it has been a long up-hill battle to bring the county-wide auxiliary police service to its present high level status. Also, in some cases, supplies such as shoulder patches, badges, billy clubs, guns and so forth have been purchased with Federal, State and/or local funds and the question of whether or not they can legally retain same, comes up. I hope you will see fit to ask the Attorney General for a review of this opinion, whereby the interpretation of 737.10 might be more in keeping with the current emergency as it exists today, and the political subdivisions within this county, regardless of their form of government, may continue our county-wide program of readiness for the citizens of their respective communities as well as the county as a whole.'

> "Because these questions are ones which may well affect other county and municipal defense organizations throughout the State and is, therefore, of state-wide interest, we respectfully request that you review and clarify your Opinion No. 3071, dated June 15, 1962, as to the inquiries submitted by Mr. Pennell in his request."

Your request seeks a review of Opinion No. 2071, Opinions of the Attorney General for 1962, issued June 15, 1962. You will note from a reading of said opinion that the auditor of state was primarily interested in determining whether a municipality could pay a weekly sum of money to disabled "auxiliary" policemen in addition to other benefits payable under the laws generally known as the Workmen's Compensation Act. The question of the auditor of state was obviously prompted by the fact that, as stated in his request, he was unable to find any statutory authorization for the establishment of an auxiliary police force. In order to answer the auditor of state's question, it became necessary to examine the statutes of Ohio relating to municipalities and to again ascertain the effect that said statutes have upon the so-called home rule powers which are granted to municipalities by the Ohio Constitution, particularly Article XVIII, Sections 3 and 7 thereof, including a determination as to the binding nature of such statutes upon Ohio municipalities. Therefore, Opinion No. 3071, *supra,* begins with an examination of the most recent Ohio Supreme Court pronouncements with regard to said constitutional provisions. I can see no benefit to this opinion in repeating said examination herein. I may point out, that, as you are undoubtedly aware, the court's decisions had for many years presented a confusing picture with regard to the meaning of Sections 3 and 7, Article XVIII of the Ohio Constitution with regard to local police and fire departments. As stated by Judge Taft, at page 198 of *State ex rel., Canada* v. *Phillips,* 168 Ohio St., 191:

> "It is apparently with those decisions in mind that Weygandt, C. J., stated in *State, ex rel., Lynch,* v. *City of Cleveland, supra,* (164 Ohio St., 437): '* * * It is not surprising * * * that, with the changing personnel of the court during the 44 years these provisions (Sections 3 and 7 of Article XVIII) have been in effect, it has been no easy task to maintain something even remotely resembling consistency, and it would serve no useful purpose to indulge in a discussion of the details of each of the numerous decided cases.'

> "Apparently, however, we are confronted with two lines of our own decisions which cannot be fully reconciled on any reasonable basis. * * *"

I believe that the above mentioned lack of consistency has been cleared away by the supreme court in its decisions in *State ex rel., Canada* v. *Phillips, supra,* and *State ex rel., Petet et al.,* v. *Wagner,* 170 Ohio St., 297. You will note that my answer to the above stated basic question in Opinion No. 3071, *supra,* was predicated upon said decisions.

Simply stated, said decisions hold that, in the absence of the adoption of a charter, a municipality is limited in exercising its power of self-government by the general laws adopted by the General Assembly pursuant to Article XVIII, Section 2 of the Ohio Constitution. Thus, when a non-charter city enacts an ordinance providing for a method or mode of exercising its powers which is in conflict with the statutes of the state dealing with that subject, the ordinance must fail. I have followed this interpretation as will be seen by Opinion No. 819, Opinions of the Attorney General for 1959, page 513; Opinion No. 262, Opinions of the Attorney General for 1960, page 262; Opinion No. 3071, *supra;* Opinion No. 3103, Opinions of the Attorney General for 1962, issued June 28, 1962, as well as others not here mentioned.

Stated again, Opinion No. 3071, *supra,* dealt with cities and considered the requirements of the general law governing the operations of non-charter cities, specifically Sections 737.05, 737.10, and 737.11, Revised Code. Applying these sections to the action taken by the cities as described by the auditor of state in his request, I was then and am now of the opinion that such action was in conflict with the general law and therefore invalid.

Now, your letter of request sets forth the questions, thoughts, and comments of the director of the Columbus and Franklin County Civil Defense. I have no quarrel with the director's statement as to the difficulties connected with his duties or with his right to interpret the world scene. Nor do I believe that my responsibility to give legal opinions to the prosecuting attorneys of this state can in any way be fulfilled by commenting upon his remarks in these respects as found in your letter of request. I specifically make no comment thereon, and no statement made in this opinion is intended to be directed thereto.

The "auxiliary police" activities considered in Opinion No. 3071, *supra,* were those activities required of the police force of a city by Section 737.11, Revised Code, and not those performed by local civil defense organizations established pursuant to Section 5915.05, Revised Code, and operating under the authority primarily found in Chapter 5915., Revised Code.

The activities of a local civil defense unit, both before and after the declaration of an emergency as provided by Chapter 5915., Revised Code, were treated in Opinion No. 780, Opinions of the Attorney General for 1959, page 489, wherein the first three paragraphs of the syllabus read as follows:

> "1. In case of attack or other disaster a civil defense organization may go into action upon the request or order of the appropriate official of the respective city or county prior to a declaration of an emergency; but such organization can exercise the emergency powers granted by Section 5915.06, Revised Code, or other sections of law, or by regulations of the governor, only when a state of emergency has been declared by the president or the congress of the United States, or by the governor.
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> "2. Upon declaration of an emergency by the president or congress of the United States or by the governor an emergency for the purposes of Chapter 5915., Revised Code, then exists and there is no requirement that local officials must also declare an emergency.
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> "3. Under the authority of Section 5915.06, Revised Code, if the regulations adopted by the governor pursuant to Section 5915.05, Revised Code, allow a local civil defense organization to operate in another political subdivision, such organization may operate in such other subdivision on the order of the appropriate official of such organization, but such operations are subject to authority granted by said regulations of the governor."

In your request, you are apparently also concerned with the meaning of the word "auxiliary." That word when used as an adjective is defined by Webster's Third New International Dictionary, unabridged, as meaning:

> "* * * offering or providing help or assisting or supporting esp. by interaction * * *"

As I pointed out earlier herein, in answering the questions of the auditor of state in Opinion No. 3071, both he in his request and I in my opinion were speaking in relation to police department functions. I believe this to be perfectly clear from a reading of said opinion. Said opinion turns

upon the home rule power of municipalities and the methods followed and duties of the so-called auxiliary policemen as were set forth in the request. I know of no reason why the civil defense unit could not refer to itself as auxiliary police service; however, such reference would not change its position in the eyes of the law and may be confusing to some.

In specific answer to your inquiry, please be advised that Opinion No. 3071, Opinions of the Attorney General for 1962, issued June 15, 1962, dealt with the operation of a police force by an Ohio city and in no way was intended to affect the operation of local civil defense units organized and operating under Chapter 5915., Revised Code.

Respectfully,
MARK MCELROY
Attorney General