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MUNICIPAL CORPORATIONS - HOME RULE AMENDMENTS - CONFLICT BETWEEN LOCAL AND STATE LAW

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MUNICIPAL CORPORATIONS — HOME RULE AMENDMENTS — CONFLICT BETWEEN LOCAL AND STATE LAW — The petitioner, on behalf of the city of Akron, applied for a writ of mandamus to compel the board of health of the city to apply the municipal civil service regulations to the employees of the board. In 1912, Ohio had adopted a so-called "home rule amendment" to its constitution,[1] under authority of which the city had formulated its charter. By statute, each city in Ohio constitutes a city health district,[2] and the officers thereof are appointed by the mayor of the city with the consent of the city council.[3] The state statutes make no express reference to civil service regulations. *Held*, writ denied. The board of health is a distinct agency of the state. Consequently, municipal civil service rules are inapplicable to the employees of the board. *State ex rel. Mowrer v. Underwood*, 61 Ohio App. 103, 22 N. E. (2d) 424 (1939).

The right of municipal home rule, or of local self-government, generally refers to the right of a municipality to govern itself with respect to matters of local significance, unrestrained by legislative coercion.[4] In some jurisdictions, even in the absence of constitutional authority, it has been asserted that each municipality exists in a dual capacity.[5] In local affairs, these authorities attribute to the municipality an inherent right of self-government. However, this approach is based upon historical considerations, and the weight of authority is apparently to the contrary. The majority of courts seem to hold that, in the absence of constitutional provision, a municipal corporation is the creature of the legislature and exists subject to the legislative will.[6] But, in view of the abuses of the legislative prerogative, assurance of municipal supremacy in local

[1] "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." Ohio Const. (1851), art. 18, § 3.

[2] 1 Ohio Gen. Code (Page, 1937), § 1261-16.

[3] 3 Ohio Gen. Code (Page, 1938), § 4404.

[4] 1 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., 263 (1928). The author says: "Municipal home rule in its broadest sense means the power of local self-government. Any power of local self-government, therefore, in whatever manner arising, whether inherent as sometimes claimed, or conferred or recognized by constitutional or statutory grant, or powers emanating from the people of the local community themselves and set forth in a charter authorized by state organic law, would be included."

[5] People ex rel. Le Roy v. Hurlbut, 24 Mich. 44 (1871); State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274 (1888); City of Lexington v. Thompson, 113 Ky. 540, 68 S. W. 477 (1902); State ex rel. White v. Barker, 116 Iowa 96, 89 N. W. 204 (1902).

[6] 1 DILLON, MUNICIPAL CORPORATIONS, 5th ed., 154 (1911), where it is stated: "It must now be conceded that the great weight of authority denies *in toto* the existence, in the absence of special constitutional provisions, of *any inherent right of local self-government which is beyond legislative control.*" People ex rel. Wood v. Draper, 15 N. Y. 532 (1857); Brown v. City of Galveston, 97 Tex. 1, 75 S. W. 488 (1903); Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124 (1903); State ex rel. Clausen v. Burr, 65 Wash. 524, 118 P. 639 (1911); Coyle v. Gray, 7 Houst. (12 Del.) 44, 30 A. 728 (1884); McBain, "The Doctrine of an Inherent Right of Local Self-Government," 16 COL. L. REV. 190, 299 (1916).

affairs has been conferred in many states by constitutional amendment.[7] These are the so-called "home rule amendments," and the power of the municipality to manage its local affairs is, under such amendments, derived from constitutional authority.[8] Notwithstanding such constitutional grant, state regulation will supersede that of the municipality when the matter regulated is one of state-wide or general concern.[9] Accordingly, a difficulty of primary importance encountered under the home rule amendments lies in distinguishing between local and state affairs. It has been suggested that there is no precise line of division between the two classifications.[10] Conceding the cogency of this contention, still a line must be drawn in many situations. The regulation of the height of municipal buildings has been held to be a local matter.[11] The regulation of education [12] and the public health [13] is generally considered to be a matter of state concern. Consequently, it would seem that state regulation of matters of public health would supersede municipal regulations in conflict therewith. Granting this, it still may be questioned, in the instant case, whether there is any conflict between the state statutes and the local civil service regulations. The power of a municipality, under the Ohio constitution, to regulate matters of public health is not negatived but is only made subservient to state regulation.[14] Since the statutes are silent with regard to civil service regulations, it might well be inferred that the state legislature has only prescribed a minimum, and that the municipality may impose additional regulations. This argument has

[7] For an analysis of the various home rule amendments, see McBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE (1916), and McGOLDRICK, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE, 1916-1930 (1933).

[8] St. Louis v. Western Union Tel. Co., 149 U. S. 465, 13 S. Ct. 990 (1893); Froelich v. City of Cleveland, 99 Ohio St. 376, 124 N. E. 212 (1919).

[9] State v. Jaastad, 43 Ariz. 458, 32 P. (2d) 799 (1934); Peterson v. Chicago & Alton Ry., 265 Mo. 462, 178 S. W. 182 (1915); Keefe v. People, 37 Colo. 317, 87 P. 791 (1906); 43 C. J. 179 (1927).

[10] 1 McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., 527 (1928). The author says: "The consequence is there are no well established rules or principles by which to determine what are municipal and what are state affairs."

[11] State ex rel. Ekern v. City of Milwaukee, 190 Wis. 633, 209 N. W. 860 (1926). For additional examples of matters considered to be municipal or local affairs, see 22 MICH. L. REV. 276 (1924); 35 MICH. L. REV. 841 (1937), and 12 WIS. L. REV. 254 (1937).

[12] State ex rel. Harbach v. City of Milwaukee, 189 Wis. 84, 206 N. W. 210 (1926); Los Angeles City School District v. Longden, 148 Cal. 380, 83 P. 246 (1905); State ex rel. Smith v. City of St. Paul, 128 Minn. 82, 150 N. W. 389 (1914); 46 A. L. R. 695 (1927).

[13] Davock v. Moore, 105 Mich. 120, 63 N. W. 424 (1895); Board of Health v. Susslin, 132 La. 569, 61 So. 661 (1913); City of Bucyrus v. State Department of Health, 120 Ohio St. 426, 166 N. E. 370 (1929); 46 A. L. R. 693 (1927), stating "The matter of the public health is of state-wide concern, and not merely of local interest, and it has been quite uniformly held that matters relating to the public health are not corporate purposes, and that the legislature, therefore, has plenary power in respect thereof. . . ."

[14] Ohio Const. (1851), art. 18, § 3: "and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

prevailed in a somewhat analogous case involving the salaries of firemen.[15] Although the court in the instant case finds support for its conclusion in an earlier Ohio decision,[16] it does not follow, of necessity, that because an employee exercises a state function, he thereby becomes immune from municipal regulation and control. A municipality has been allowed to regulate the salaries of officers exercising a state function, when such regulation does not conflict with state legislation.[17] Since the scope of the authority of the health officer is limited to the municipality, he might be regarded as being within a realm where joint control should prevail.[18] This is particularly true in Ohio where the power to appoint the health officers is expressly delegated to the municipality by the legislature. In addition, the petitioner sought here to apply the regulations only to the employees of the board, and not to the officers themselves.

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[15] Markley v. City of St. Paul, 142 Minn. 356 at 358, 172 N. W. 215 (1919). In this case, a state workmen's compensation act included city firemen. The city charter also provided for disability benefits. The court said: "But such provision [statute] will not prevent a city operating under a home rule charter from providing additional compensation to a fireman injured in the course of his employment." See also Van Gilder v. City of Madison, 222 Wis. 58, 268 N. W. 108 (1936). However, this latter case may be distinguished on the ground that it involved an actual conflict between the state and municipal regulations. The municipality there attempted to reduce the salaries of policemen and firemen without complying with the express statutory requisites.

[16] Board of Health of Canton v. State ex rel. O'Wesney, 40 Ohio App. 77, 178 N. E. 215 (1931).

[17] Burton v. City of Detroit, 190 Mich. 195, 156 N. W. 453 (1916). Here the municipality, by charter amendment, was allowed to fix salaries of officials serving state functions.

[18] MCGOLDRICK, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE, 1916-1930, pp. 330-331 (1933).