

profit is exempt from the sales tax under Section 4a (c) of Act 167, P.A. 1933, supra. Your question is answered in the affirmative.

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CITIES: Home Rule – Police Department.
CIVIL SERVICE: Police Department.
ORDINANCES: Special policemen.

Where a home rule city adopts the provisions of Act 78, P.A. 1935, by incorporation by reference in its charter, the provisions of the act become a part of the charter, and the city is without authority to adopt an ordinance providing for special policemen outside of the civil service system provided for in Act 78, P.A. 1935.

An ordinance that would grant full power of arrest and authority upon special policemen employed, paid and controlled by a private employer to enforce all laws in a particular area of a home rule city is against public policy and is illegal.

No. 4008

February 19, 1963.

Hon. Raymond L. Baker
State Representative
The Capitol
Lansing, Michigan

You have requested my opinion as to the legality of Ordinance No. 104, adopted by the City of Southfield.

Section 1 of the ordinance authorizes the police chief to appoint members of any regional shopping center police or internal security department as special police officers of the City of Southfield, with full powers of arrest and authority of regular City of Southfield police officers within such regional shopping center.

Special police officers appointed by the police chief of the City of Southfield are neither required under the terms of the ordinance to take an oath of office nor give a bond.

Under Section 3 of the ordinance the authority of the special police officers is restricted to the protection and maintenance of peace and order within the regional shopping center, and such special police are required to be employed and reimbursed by such regional shopping center exclusively. Section 3 also provides expressly that the special police officers shall not be entitled to any of the rights and privileges extended to regular or other members of the City of Southfield Department.

Section 4 of the ordinance requires the regional shopping center to deliver an indemnification and hold harmless agreement under which the center agrees to defend and hold harmless the city from any and all liability claims made against the city arising out of the actions of the special police officers appointed under the ordinance.

According to information received by this office there is only one regional shopping center within the City of Southfield, consisting of 180 improved acres, space for 10,000 cars, 110 stores and services with 4,000 employees, and serving an average of 50,000 customers a day. This shopping center has been described as a separate "city" within the City of Southfield. At times the center has employed as many as 22 special policemen with their own patrol cars and all modern police equipment. We understand that, as special deputy sheriffs, they have handled every kind of case from murder and suicide to traffic violations within the shopping center.

Apparently the ordinance was promulgated after the sheriff of Oakland County required that special deputy sheriffs reside in the county of appointment, and some of the special policemen serving as special deputy sheriffs and employed by the shopping center resided in another county.

The City of Southfield is a home rule city. Its charter, which was filed with the Secretary of State on April 28, 1958, provides in pertinent part as follows:

"Section 6.5, Department of Civil Service:

"In order to guarantee to all citizens a fair and equal opportunity for public service, to establish conditions of service which will attract officers and employees of character and capacity and to increase the efficiency of the City government through improved principles of public personnel administration, there is hereby created a Department of Civil Service, which shall be under the control and management of a Commission to be known as the Civil Service Commission. Provided, however, that the provisions of this section shall not apply to the Police Department and the Fire Department in the City of Southfield but that said departments shall be covered by Act 78 of the Public Acts of 1935, as amended, or as hereafter may be amended.

"* * *"

We understand that the mayor of the City of Southfield vetoed the ordinance, listing as one of his reasons for the veto that the appointment of members of any regional shopping center police or internal security department as special police officers of the City of Southfield, contravened the provisions of Act 78, P.A. 1935, as amended, and therefore in violation of both the state law and the city charter.

Act 78, P.A. 1935, as amended, being C.L. 1948 § 38.501 et seq.; M.S.A. 1958 Rev. Vol. § 5.3351, et seq., provides for civil service for fire and/or police departments in cities, villages and municipalities having full paid members in the fire and/or police departments. Section 17a of the act requires that the act shall not take effect in any city, village or municipality until approved by the majority of the electors voting thereon at an election.

When the City of Southfield adopted the provisions of Act 78, P.A. 1935, supra, by incorporation by reference in its charter, the provisions of Act 78, P.A. 1935, became a part of the charter of the City of Southfield.

The Attorney General has ruled in O.A.G. 1957-58, Vol. II, page 22, No. 3092, that when a home rule city adopts a charter incorporating Act 78, P.A. 1935 by reference, it may not remove positions from the civil service system by ordinance.

A home rule city cannot enact ordinances that are contrary to the charter of the city. *Mayor of City of Dearborn v. Dearborn Retirement Board of Trustees*, 315 Mich. 18; *Thiesen v. Dearborn City Council*, 320 Mich. 446.

Under Section 3 of Ordinance No. 104 the special police officers appointed under the ordinance are not entitled to any of the rights and privileges extended to regular or other members of the City of Southfield Department by the City of Southfield.

The conclusion is imperative that the ordinance in question, by providing for special police outside of the civil service system, violates the provisions of Act 78, P.A. 1935, supra, and is in conflict therewith.

It is untenable to suggest that Act 78, P.A. 1935, is applicable only to those members of a city police department who are fully paid by the city. While it is true that Act 78 refers to "paid members" or "full paid members" in the title and various sections of the act, the legislature did not contemplate an evasion of the spirit of the act through the appointment of special policemen to exercise the full powers of arrest and authority of regular city policemen within certain areas of the city through the device of private employment. At best the use of the words "paid members" and "full paid members" evidences an intent to distinguish such members from volunteers who serve without any salary. *State v. Holdren* (W. Va.) 36 S.E. 2d 481.

Therefore, it is my opinion that Ordinance No. 104 violates the provisions of Act 78, P.A. 1935, and Section 6.5 of the Charter of the City of Southfield and is in conflict therewith.

There remains for consideration an even more important question of whether, irrespective of Act 78, P.A. 1935, supra, the inclusion of police officers in a city police department of persons employed and paid by a regional shopping center, as a profit corporation, constitutes an unlawful delegation of the portion of the city's police powers.

In *People v. Robinson*, 344 Mich. 353, the Michigan Supreme Court, in a divided opinion, upheld the conviction of the defendant for speeding after receiving a traffic ticket from a private police agency enforcing traffic laws within the Township of Comstock. The majority of the court refused to consider the validity of the contract between the township and the private corporation for enforcing the traffic laws within the township as an issue not properly before the court.

Justice Talbot Smith, in his dissenting opinion, held that issues pertaining to the delegation of a portion of the police powers of the township were raised for determination by the Michigan Supreme Court. Writing for reversal, he concluded at page 362:

"In short, the contract of Charles Services, Inc., with the employing municipality was against public policy, illegal and void. The actions taken under the contract and pursuant thereto were an integral part of a wholly unconstitutional scheme of law enforcement. This being the case we will not decide the isolated questions of arrest and evidence presented, since they come to us only in a context of proceedings resting upon a foundation riddled with invalidity."

Thereafter an action was brought in the Circuit Court for the County of Kalamazoo, being the case of *Lewis, et al v. Township of Comstock*,

attacking the validity of such contract between the township and Charles Services, Inc. On November 2, 1958, Judge Lucien F. Sweet, Circuit Judge, rendered an opinion appearing in Docket No. 50, page 96, Kalamazoo County Circuit Court records disposing of the legal issue. Relying upon the dissenting opinion of Mr. Justice Smith in *People v. Robinson*, supra, Judge Sweet quoted in his opinion from the opinion of Justice Smith at pages 357-358:

"The police power is an inherent attribute of sovereignty. It should require no citation of authority that it can neither be abdicated nor bargained away. It is not alienable even by express grant. The cases are collected in 2 *McQuillin, Municipal Corporations* (3d ed), § 1038 et seq. See, also, *Petz v. City of Detroit*, 95 Mich. 169, 180. Particularly is this true with respect to those inalienable rights of the citizen having to do with his personal freedom, his freedom from arbitrary stoppage, detention, or arrest, from unreasonable search and seizure. Not only are the constitutional and statutory safeguards, as interpreted by this Court, explicit as to manner of arrest, whether with or without warrant, and, if the latter, under what circumstances, but the qualifications of the arresting officer equally so. He is a responsible, upright and discreet citizen. He is elected or appointed. He takes oath. He gives bond. The basic concept is one of personal responsibility traceable directly to the authority of the people."

Circuit Judge Sweet concluded that the responsibility of the special police officers is to the private employer first, with the private employer serving as master, and the responsibility to the township being secondary.

Thus, the individuals acting as officers do not trace their authority directly to the people but rather to a private corporation for profit. The court held that the contract between a township and private corporation to be illegal and void. The decision of Judge Sweet was not appealed to the Michigan Supreme Court. While it does not represent final precedent of the state's highest court, nevertheless its reasoning and holding is persuasive.

In *Ames v. The Port Huron Log Driving & Booming Co.*, 11 Mich. 139, the Michigan Supreme Court struck down a statute as offensive to the Constitution that authorized the formation of logging companies and empowered them to control and manage the floating of logs owned by others on public waters, holding that the statute empowered private persons to exercise the police power and thus to exercise a public office without either election or appointment. Official power cannot exist in a person by his own assumption or by the employment of some other private person, such claim of power being inconsistent with any idea of government whatever.

Duties imposed upon and powers vested in officers of municipal corporations are deemed to be in the nature of public trusts and cannot, unless they are merely ministerial, be delegated or surrendered to the third persons. *Finch v. City of New York*, 205 N.Y.S. 2d 308.

The Michigan Supreme Court has held in *Blynn v. City of Pontiac*, 185 Mich. 35, that policemen are charged with the especial duty of protecting the lives of citizens within certain territorial limits, and of preserving the public peace. The preservation of the public peace being a matter of public concern, policemen are considered to be public officers.

Ordinance No. 104 does not require the special police officers to file any oath of office. Further, the ordinance imposes no requirement that they file a bond, although the private employer of such police officer is required to indemnify the city against actions for damages arising out of the acts of their employees. Thus it is clear that the special police officers are not public officers, but rather the employees of a private employer.

It is demonstrable that police officers must enforce the law without fear or favor. Persons who are accused of the commission of crimes must be apprehended if the rights and properties of others are to be safeguarded. However, accused persons also have rights that must be protected by law enforcement officers. Special policemen who are employed, paid, promoted, demoted and discharged by private employers, such as a regional shopping center, are subject to the employer as the master and not the constituted lawful authority in the City of Southfield. It is against public policy to confer full power of arrest and authority in a 180 acre portion of the City of Southfield, with full powers to investigate and enforce responsibilities under the laws of this state relating to murder, shoplifting and traffic violations with the special policemen directly responsible to a private employer.

There is no valid distinction between the facts in the *Comstock Township* case, supra, where the private corporation was entrusted with the police power in the entire municipality, and the instant case where the police power is to be exercised in a substantial portion of the City of Southfield. The police power, being an inherent attribute of the sovereignty cannot be abdicated or surrendered. Ordinance 104 provides for such abdication and surrender. It cannot stand the test of legality.

The law allows the sheriff of a county to appoint deputies by an instrument in writing to do particular acts to be known as "special deputies." Sec. 70 of Chap. 14, R.S. 1846, being C.L. 1948 § 51.70; M.S.A. 1961 Rev. Vol. § 5.863. Act 237, P.A. 1919, being C.L. 1948 § 45.406; M.S.A. 1961 Rev. Vol. § 5.916, confers authority upon a sheriff of a county to appoint deputy sheriffs to protect private interests who shall receive no compensation from the county for such services, and such deputies being required to file a detailed statement with the county clerk of all their official acts.

A special deputy sheriff who was paid by a street railway company to preserve order on property owned by the company, and who assaulted a passenger in a car in assisting the conductor to eject him for nonpayment of fare, was held to be representing his employer and not the public. *Foster v. Grand Rapids Railway Co.*, 140 Mich. 689.

An examination of Michigan statutes fails to reveal any grant of authority to a home rule city to appoint special policemen to enforce the laws of the city in a particular area thereof.

Therefore, it is my opinion that it is against public policy for the City of Southfield, by Ordinance No. 104, to grant full power of arrest and authority upon special policemen employed, paid, and controlled by a shopping center as a private employer, to enforce all laws within the area of the shopping center. Such ordinance is illegal.

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