Text as published on gao.gov, https://www.gao.gov/products/b-129013, archived 2026-07-17. GAO published no original file for this decision. Rendered by Comptroller Desk.

B-129013, Sep. 20, 1956

Number: B-129013

Date: 1956-09-20

B-129013, SEP. 20, 1956

TO HONORABLE H. V. HIGLEY, ADMINISTRATOR, VETERANS ADMINISTRATION:

REFERENCE IS MADE TO LETTER DATED AUGUST 16, 1956, FROM THE DEPUTY ADMINISTRATOR OF YOUR ADMINISTRATION PRESENTING FOR DECISION THE QUESTION AS TO WHETHER THE VETERANS ADMINISTRATION HOSPITAL AT FORT THOMAS, KENTUCKY, MAY LEGALLY ENTER INTO A CONTRACT WITH THE CITY OF FORT THOMAS FOR THE FURNISHING OF FIRE PROTECTION SERVICES TO THE HOSPITAL AT A COST OF $4,800 PER ANNUM, IN VIEW OF OUR DECISIONS 25 COMP. GEN. 599 AND 35 ID. 311 HOLDING THAT SUCH SERVICES ARE REQUIRED TO BE FURNISHED WITHOUT CHARGE.

IT APPEARS FROM THE DEPUTY ADMINISTRATOR'S LETTER, AS SUPPLEMENTED BY LETTER DATED SEPTEMBER 5, 1956, FROM YOUR DEPUTY GENERAL COUNSEL, THAT THE VETERANS ADMINISTRATION HOSPITAL OCCUPIES AN AREA OF APPROXIMATELY 116 ACRES LOCATED WHOLLY WITHIN THE LIMITS OF THE CITY OF FORT THOMAS. ALSO APPEARS THAT EXCLUSIVE JURISDICTION OVER THIS AREA WAS CEDED TO THE UNITED STATES, WITH CERTAIN RESERVATIONS NOT MATERIAL HERE, BY A SPECIAL ACT OF CESSION APPROVED FEBRUARY 29, 1888 (KENTUCKY ACTS, 1887, CHAPTER 325, P. 26), WHICH PROVIDES, IN PERTINENT PART, THAT THE "SAID TRACT OF LAND, AND THE IMPROVEMENTS WHICH MAY BE ERECTED THEREON, SHALL BE EXEMPT FROM STATE, COUNTY, AND MUNICIPAL TAXES SO LONG AS IT SHALL REMAIN THE PROPERTY OF THE UNITED STATES.' IT FURTHER APPEARS THAT THE HOSPITAL HAS REQUESTED THE CITY OF FORT THOMAS TO PROVIDE FIRE PROTECTION SERVICES IN ORDER THAT THE FIRE DEPARTMENT NOW OPERATED BY THE HOSPITAL CAN BE ELIMINATED. THE CITY CONTENDS, HOWEVER, THAT SINCE IT IS CLASSIFIED AS A FOURTH CLASS CITY UNDER SECTION 86.160, KENTUCKY REVISED STATUTES, IT IS NOT REQUIRED TO FURNISH SUCH FIRE PROTECTION SERVICES WITHOUT REIMBURSEMENT, AND THE CITY HAS SUBMITTED A PROPOSAL TO PROVIDE THE NECESSARY SERVICES AT AN ANNUAL RATE OF $4,800, PAYABLE MONTHLY.

AS INDICATED IN THE DECISIONS CITED BY THE DEPUTY ADMINISTRATOR, CONTRACTS ENTERED INTO WITH MUNICIPALITIES FOR FURNISHING FIRE PROTECTION TO FACILITIES OF THE FEDERAL GOVERNMENT LOCATED WITHIN THEIR BOUNDARIES DO NOT GIVE RISE TO VALID ENFORCEABLE OBLIGATIONS. THIS IS IN ACCORDANCE WITH THE PRINCIPLE, RECOGNIZED BY THE OVERWHELMING WEIGHT OF AUTHORITY, THAT THE FURNISHING OF FIRE PROTECTION IS A GOVERNMENTAL FUNCTION. IT IS ALSO WELL ESTABLISHED THAT, IN THE ABSENCE OF A STATUTE PROVIDING THEREFOR, NEITHER THE GOVERNMENTAL BODY NOR ITS OFFICERS ARE LIABLE IN DAMAGES FOR ACTS OF OMISSION OR COMMISSION, MISFEASANCE OR NONFEASANCE, WITH REFERENCE TO THE PERFORMANCE OF THIS GOVERNMENTAL FUNCTION, AND THAT SUCH LIABILITY MAY NOT BE CREATED BY CONTRACT. SEE UNITED STATES V. CITY OF SAULTE STE. MARIE, DECIDED MARCH 23, 1905, BY THE UNITED STATES DISTRICT COURT FOR THE W. D. OF MICHIGAN, 137 F. 258. SEE, ALSO, DAVIS V. CITY OF LEBANON, DECIDED BY THE COURT OF APPEALS OF KENTUCKY JUNE 12, 1900, 57 S.W. 471;

PERKINS V. CITY OF LAWRENCE (KAN. 1955), 281 P.2D 1077; SHEA V. CITY OF PORTSMOUTH (N.H. 1953), 94 A.2D 902; COLUMBUS V. MCILWAIN (MISS. 1949), 28 S.2D 921; HUGHES V. STATE (N.Y. 1937), 299 N.Y.S. 387; RICHARDSON V. HANNIBAL (MC. 1932), 50 S.W. 2D 648, 84 A.L.R. 508, AND ANNOTATION AT 514.

IT DOES NOT APPEAR THAT ANY PROVISION HAS BEEN MADE UNDER THE KENTUCKY REVISED STATUTES AUTHORIZING CITIES TO FURNISH FIRE PROTECTION BY CONTRACT. SECTION 86.160, CHAPTER 86 KRS, RELATING TO THE ORGANIZATION AND GOVERNMENT OF CITIES OF THE FOURTH CLASS, REFERRED TO BY THE CITY OF FORT THOMAS, PROVIDES THAT THE CITY COUNCIL MAY, WITHIN THE CITY, PROVIDE FOR THE PREVENTION AND EXTINGUISHMENT OF FIRES, AND ESTABLISH AND REGULATE FIRE COMPANIES.

UNDER CHAPTER 92, KRS, FINANCE AND REVENUE OF CITIES OTHER THAN THE FIRST CLASS, SECTION 92.280 PROVIDES THAT THE "LEGISLATIVE BODY OF EACH CITY OF THE SECOND TO THE SIXTH CLASS SHALL PROVIDE EACH YEAR, BY ORDINANCE, FOR THE ASSESSMENT OF ALL REAL AND PERSONAL PROPERTY WITHIN THE CORPORATE LIMITS THAT IS SUBJECT TO TAXATION FOR CITY PURPOSES" AND CITIES OF ALL CLASSES ARE AUTHORIZED UNDER SECTION 92.281 "TO USE THE REVENUES THEREFROM FOR SUCH PURPOSES AS MAY BE PROVIDED BY THE LEGISLATIVE BODY OF THE CITY.' IN THIS CONNECTION, THE CONSTITUTION OF THE COMMONWEALTH OF KENTUCKY EXPRESSLY PROVIDES UNDER SECTIONS 3 AND 170 THAT "PUBLIC PROPERTY USED FOR PUBLIC PURPOSES" IS EXEMPT FROM ALL TAXATION INCLUDING INSTITUTIONS NOT OPERATED FOR PROFIT, SUCH AS INFIRMARIES AND HOSPITALS. SEE MASON COUNTY V. HAYSWOOD HOSPITAL OF MAYSVILLE (CT. OF APPEALS OF KENTUCKY NOV. 23, 1915), 179 S.W. 1050.

AND, CHAPTER 95, KRS, RELATIVE TO CITY POLICE AND FIRE DEPARTMENTS, EXPRESSLY PROVIDES UNDER SECTION 95.380 FOR THE USE OF FIRE APPARATUS OUTSIDE CITY LIMITS "IN THE EXERCISE OF A GOVERNMENTAL FUNCTION" IN PERTINENT PART, AS FOLLOWS:

"95.380 (2741U-3) USE OF FIRE APPARATUS OUTSIDE CITY LIMITS, CITIES OF ALL CLASSES.

"/1) ANY CITY IN THE STATE OWNING OR CONTROLLING FIRE APPARATUS MAY TAKE IT TO EXTINGUISH FIRES TO ANY POINT IN THE COUNTY IN WHICH THAT CITY IS LOCATED, INTO A SMALLER TERRITORY IN THAT COUNTY, OR INTO AREAS OF ANOTHER COUNTY OR STATE, AS DETERMINED BY THE CITY LEGISLATIVE BODY. THE APPARATUS SHALL BE SO USED ONLY IN CONFORMITY WITH REASONABLE TERMS AND REGULATIONS WHICH THE CITY LEGISLATIVE BODY MAY PRESCRIBE.

"/2) NEITHER THE CITY NOR ITS OFFICERS OR EMPLOYEES SHALL BE LIABLE IN ANY MANNER ON ACCOUNT OF THE USE OF THE APPARATUS AT ANY POINT OUTSIDE OF THE CORPORATE LIMITS OF THE CITY. THE APPARATUS SHALL BE DEEMED TO BE EMPLOYED IN THE EXERCISE OF A GOVERNMENTAL FUNCTION OF CITY.

"/3) ALL CITY OR FIRE PROTECTION DISTRICT FIREMEN, FULL PAID OR VOLUNTEER, SERVING AT A FIRE OR DOING FIRE PREVENTION WORK OUTSIDE THE CORPORATE LIMITS OF A CITY OR A FIRE PROTECTION DISTRICT SHALL BE CONSIDERED AS SERVING IN THEIR REGULAR LINE OF DUTY, AS THOUGH THEY WERE SERVING WITHIN THE CORPORATE LIMITS. * * *"

THUS, IT IS SEEN THAT UNDER THE LAW OF KENTUCKY FOURTH CLASS CITIES, SUCH AS THE CITY OF FORT THOMAS, ARE AUTHORIZED TO OBTAIN REVENUES FOR DEFRAYING THE COST OF FURNISHING FIRE PROTECTION BY LEVYING TAXES ON PROPERTY LOCATED WITHIN THEIR CORPORATE LIMITS. IT IS SEEN, ALSO, THAT THE PROPERTY OF THE UNITED STATES, HERE IN QUESTION, IS EXEMPT FROM ALL STATE AND LOCAL TAXES NOT ONLY BY VIRTUE OF THE

FACT THAT THE FACILITY IS OWNED BY THE UNITED STATES, BUT BECAUSE IT IS A HOSPITAL OWNED AND OPERATED FOR PUBLIC PURPOSES. CONSEQUENTLY, IT APPEARS THAT THE PROPOSAL OF THE CITY OF FORT THOMAS TO CHARGE THE FEDERAL GOVERNMENT FOR SUCH FIRE PROTECTION AS IS AVAILABLE UNDER THE STATE LAW IS AN UNJUSTIFIABLE ATTEMPT TO DISCRIMINATE AGAINST THE HOSPITAL PROPERTY WHICH WOULD, IF ACCEPTED, HAVE THE EFFECT OF NULLIFYING THE TAX EXEMPT STATUS OF THAT PROPERTY.

MOREOVER, UNDER THE LAW OF THE COMMONWEALTH OF KENTUCKY ALL CITIES FROM THE FIRST TO THE SIXTH CLASS AND, THEREFORE, INCLUDING THE FOURTH CLASS CITY OF FORT THOMAS, ARE ACTING IN A GOVERNMENTAL CAPACITY WHEN FURNISHING FIRE PROTECTION SERVICE, AND THIS IS SO WHETHER SUCH SERVICES ARE PERFORMED WITHIN OR WITHOUT THE CITY CORPORATE LIMITS. CF. 34 COMP. GEN. 195, AND B-123294, MAY 2, 1955. THUS, ALTHOUGH THE HOSPITAL IS LOCATED IN A FEDERAL ENCLAVE AND THEREFORE IS OUTSIDE THE JURISDICTIONAL LIMITS OF THE CITY, WITH THE EXCEPTION OF THE RESERVATIONS CONTAINED IN THE SPECIAL ACT OF CESSION, NEVERTHELESS, THE STATE LAW EXPRESSLY PROVIDES THAT ALL FIRE PROTECTION SHALL BE DEEMED TO BE "IN THE EXERCISE OF A GOVERNMENTAL FUNCTION" OF THE CITY. THE EXERCISE OF THIS AUTHORIZED GOVERNMENTAL FUNCTION MANIFESTLY CARRIES WITH IT NO POWER TO INTERPOSE CONDITIONS NOT PROVIDED BY LAW. HENCE, THE PROPOSED CONTRACT "TO FURNISH TO THE GOVERNMENT FIRE PROTECTION SERVICE FOR THE VETERANS ADMINISTRATION HOSPITAL AT FORT THOMAS, KENTUCKY, AS MAY BE REQUIRED" IN CONSIDERATION OF MONTHLY PAYMENTS TO THE CITY "AT THE RATE OF $4,800 PER YEAR" IS ULTRA VIRES AND COULD, THEREFORE, HAVE NO BINDING FORCE ON THE CITY. FURTHERMORE, THE GOVERNMENT WOULD BE ENTITLED TO NO GREATER FIRE PROTECTION SERVICES UNDER SUCH AN ARRANGEMENT THAN IF THE CONTRACT HAD NOT BEEN WRITTEN. CF. UNITED STATES V. CITY OF SAULTE STE. MARIE, SUPRA; ALSO, B-126228, JANUARY 6, 1956, AND B-125617, APRIL 11, 1956.

ACCORDINGLY, IN ANSWER TO THE QUESTION PRESENTED, IT REASONABLY FOLLOWS THAT THE VETERANS ADMINISTRATION MAY NOT LEGALLY ENTER INTO THE PROPOSED CONTRACT.