

**OPINION NO. 70-038****Syllabus:**

1. A postal employee in the federal classified service does not hold public office within the meaning of Section 731.12, Revised Code, and is therefore not barred from serving as a village councilman, although he may be subject to applicable provisions of federal law governing political activity within the federal service.

2. A village councilman who is present at a council meeting but who abstains from voting on a resolution or ordinance is deemed to have acquiesced in the action taken

by the majority of councilmen who do vote on said resolution or ordinance.

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**To: Herman G. Cartwright, Jr., Clinton County Pros. Atty., Wilmington, Ohio**  
**By: Paul W. Brown, Attorney General, March 25, 1970**

I am in receipt of your request for my opinion concerning the following questions:

1. Can a person who is a post office employee legally serve on a village council?

2. Can a village councilman abstain from voting on a resolution or ordinance? If he can, what effect does this vote have on the resolution or ordinance?

Section 731.12, Revised Code, sets forth the qualifications of members of a village legislative authority, and provides, in pertinent part, as follows:

"\* \* \*No member of the legislative authority shall hold any other public office, be interested in any contract with the village, or hold employment with said village, \* \* \*."

Former Section 731.12, Revised Code, forbade a village councilman to hold any other public office or employment, but the prohibition against public employment was deleted in the 1965 amendment to said statute.

You do not state in your letter of request what the exact position of the individual concerned is in the post office of your locality, but you do state that he is in the federal civil service.

Initially, it is apparent that a postal employee holds a position of "public employment." The question then becomes whether an individual in the postal employ under civil service is a "public officer" within the meaning of Section 731.12, supra, i.e., whether such employment constitutes a "public office."

The cases involving what constitutes a public office and what constitutes a public employment are legion in Ohio and elsewhere, but the most usual standard applied is that found in The State, ex rel. Herbert v. Ferguson, 142 Ohio St. 496 (1944) at p. 500:

"A 'civil office' or a public office of a civil nature, as defined by the Ohio cases, is a charge or trust conferred by public authority for a public purpose, with independent and continuing duties, involving in their performance the exercise of some portion of the sovereign power."

It has usually been held that one who is subject to the direction and control of someone else or performs no duties

except such as by law are charged upon his superior holds an employment and not an office. State ex rel. Allen v. Mason, Etc., et al., 61 Ohio St. 62, 55 N.E. 167 (1899).

The federal statutes regarding government organization and civil service define one working for an executive agency of the federal government, such as the postal department, as an "employee" and most cases involving a determination as to whether or not a person employed in the civil service is an "officer" or "employee" have arrived at the conclusion that the person was an "employee". There is authority, however, for the proposition that postmasters appointed by the President are officers, at least within the meaning of a state constitution forbidding such officers from holding state office. Cf. Wimberly v. Barham, 173 La. 488, 137 So. 862 (1931).

The weight of analagous authority as well as the dictates of reason, when coupled with the tests of public office enumerated, would seem to dictate that one employed in the postal service in a given community, holding a position in such service less than postmaster, should be held to be a "public employee" and not a "public officer". Such a person does not partake of some portion of the sovereign power, but is subject to the direction and control of the postmaster, who is appointed by the President of the United States, or, in some cases, by the Postmaster-General of the United States. I therefore conclude that a person in the classified service of the postal department does not hold a "public office" within the meaning of Section 731.12, Revised Code.

Having arrived at this conclusion, however, it becomes necessary to examine Opinion No. 66-046, Opinions of the Attorney General for 1966. My predecessor in office had before him the problem of whether a person holding a position in the classified service of a state university could at the same time become a candidate for, be elected to, or hold the office of member of a village council. His conclusion was in the negative. The rationale of the holding was simply that the position of village councilman is an elective office pursuant to the provisions of Section 731.09, Revised Code, and that the political activity required of a councilman would violate the prohibition contained in Section 143.41, Revised Code, against a person in the classified service taking part in politics. A similar restriction against political activity by employees in the federal classified civil service or an employee of a federal executive agency is set forth in Title 5, U. S. C. A. Section 7324, and in Executive Order No. 10577, implementing the provisions of 80 Stat. 417, 5 U. S. C. A. Section 3301. Section 4.1 of said Executive Order provides as follows:

"Sec. 4.1. Prohibition against political activity. No person employed in the executive branch of the Federal Government of any agency or department thereof, shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No person occupying a position in the competitive service shall take any active part in political management or in political campaigns, except as may be provided by or pursuant to statute. All such persons shall re-

tain the right to vote as they may choose and to express their opinions on all political subjects and candidates."

It would appear, therefore, that although a postal employee may serve on a village council, he could conceivably be subjected to penalties by his federal employer if it was determined that he was actively engaged in political activity.

Your second question asks whether a village councilman may abstain from voting on a resolution or ordinance and, if so, what effect such abstention has on the resolution or ordinance?

This question was first considered by the Supreme Court of Ohio in the case of The State ex. rel. William M. Shinnick, Jr. v. John A. Green, 37 Ohio St. 227 (1881). The Court in the Green case, supra, was concerned with the legal effect of certain members of the Zanesville City Council abstaining from voting on the election of a city clerk. The Court stated in Syllabi 2 and 3 of its decision as follows:

"2. 'All the members being present and engaged in holding the election, members by refusing to vote when their names are called cannot defeat the election, or divest the body of the power to elect.'

"3. In such case the legal effect of refusing to vote is an acquiescence in the choice of those who do vote, and this is so, although those refusing to vote object to the mode of voting, and on the ground that no quorum voted.'"

Years later, an Ohio Court of Appeals was faced with a question concerning the effect of a village councilman's abstention from voting on a municipal ordinance. In Babyak v. Alten, 106 Ohio App. 191, 6 O.O. (2d) 450, 154 N.E. 2d 14 (1958), the Court extended the Green doctrine to village legislative matters of a permanent as well as an organizational nature and stated the rule as follows at 106 App. 196:

"That rule is that one who is present at a council meeting, but who does not register a negative vote on a matter then being voted upon shall be held to have acquiesced in the action taken by the majority of those who do vote."

The Court therefore held that the legislation enacted at the village council meeting was valid. The Court arrived at the above conclusion by construing the effect of failure to vote in light of the provisions of Section 731.17, Revised Code, which provides that the action of the legislative authority of a municipal corporation shall be by ordinance or resolution and the vote taken by yeas and nays and entered upon the journal, and that no ordinance shall be passed without the concurrence of a majority of all members elected to the legislative authority.

In conclusion, therefore, it is my opinion and you are hereby advised that:

1. A postal employee in the federal classified service does not hold public office within the meaning of Section 731.12, Revised Code, and is therefore not barred from serving as a village councilman, although he may be subject to applicable provisions of federal law governing political activity within the federal service.

2. A village councilman who is present at a council meeting but who abstains from voting on a resolution or ordinance is deemed to have acquiesced in the action taken by the majority of councilmen who do vote on said resolution or ordinance.