

1949.

PUBLIC OFFICER—GENERAL ASSEMBLY PROHIBITED IN APPOINTING—DEFINITION OF PUBLIC OFFICER—STATUS OF NOMINATING COMMITTEE FOR SELECTION OF PROPOSED LIQUOR COMMISSION DISCUSSED.

SYLLABUS:

1. *The prohibition upon the making of appointments by the General Assembly as contained in Section 27 of Article II of the Constitution of Ohio is limited to the appointment of public officers and does not extend to appointments to positions which are not public offices.*
2. *Members of a committee or commission whose functions are temporary, not durable, permanent, and continuous, are not regarded as public officers within the meaning of the Constitution. Gleason et al. vs. Cleveland, 49 O. S., 431.*
3. *Where the duties of a public servant fixed by law are not merely transient, occasional and incidental, but durable, permanent and continuous, he is a public officer, and his appointment may not lawfully be made by the General Assembly, unless specific authority is granted therefor by the Constitution of Ohio. State ex rel. Attorney General vs. Kenyon, et al., 7 O. S. 547.*

COLUMBUS, OHIO, December 2, 1933.

HON. GEORGE WHITE, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR WHITE:—I am in receipt of your recent communication, which reads as follows:

“May I request from you formal opinion with respect to certain provisions of the report of the Governor’s Advisory Committee for Liquor Control?

The committee recommends:

‘We suggest a nominating committee of seven members to be appointed by him, consisting of the President of the Ohio Bar Association, the President of the Ohio Medical Association, the President of the Ohio Manufacturers’ Association, the President of the Ohio Federation of Labor, a representative of the two major farm organizations of the state, the President of the Federation of Women’s Clubs, and the President of the Ohio Welfare Conference.

This committee will select by majority vote, nine highly qualified citizens, from which the Governor will select three to be appointed by him with the approval of the Senate.

In the event any one of the above mentioned organizations should for any reason not be available, the others shall select, by majority vote, the President of another organization.’

It has been suggested to me informally that such a plan of choosing the commission would offend the provisions of the Ohio Constitution in so far as Article II, Section 27 forbids the assumption of any appointing power by the General Assembly.

May I have your formal opinion at your earliest opportunity?”

Section 27 of Article II of the Constitution of Ohio referred to by you, is as follows:

"The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by law; but no appointing power shall be exercised by the general assembly, except as prescribed in this Constitution, and in the election of United States senators; and in these cases the vote shall be taken 'viva voce.'"

While I do not have before me the report of your "Advisory Committee for Liquor Control", I understand the recommendation of the Committee to be that in the enactment of laws for the control of the manufacture and distribution of alcoholic liquors, provision be made for a liquor control commission to be appointed by the Governor, the said commission to consist of three members. It is proposed that the Governor be limited in his appointment of the members of the liquor control commission, to the appointment of three from a list of nine "highly qualified citizens," which list is to be made up of persons nominated thereto by a nominating committee consisting of seven members to be appointed by the Governor. The seven members to be so appointed to this nominating committee shall be those persons who at the time are the Presidents of the Ohio Bar Association, the Ohio Medical Association, the Ohio Manufacturers' Association, the Ohio Federation of Labor, the Ohio Federation of Women's Clubs and the Ohio Welfare Conference, together with a representative of each of the two major farm organizations of the state. In the event any of the above mentioned persons should for any reason not be available, the others shall select, by a majority vote, the president of some other organization.

In view of the constitutional provision quoted above, it is clear that if a liquor control commission is created in such a manner as to constitute the members of the commission public officers, which no doubt would be the case, the law may direct the manner of their election or appointment inasmuch as no provision is made by the Constitution of Ohio or the Constitution of the United States for the election or appointment of such officers.

It is equally clear that the legislature does not have the power of appointment of such officers. This, however, is not contemplated by the recommendation of the advisory committee, as you state. The appointment of the members of the commission is to be left to the Governor, but he is to be limited in making such appointments, to appointing such persons only as possess the qualifications fixed by the legislature.

If the advisory committee's recommendation is followed and its proposal, as stated by you in your recommendation is enacted into law, it will not constitute an appointment of the liquor control commission of three members by the legislature but will amount to an appointment by the legislature of the nominating committee which will be authorized and directed to select the nine highly qualified citizens from the list of whom the Governor may select the persons to compose the liquor control commission.

So far as the personnel of a proposed liquor control commission to be appointed as suggested, is concerned, it simply amounts to a fixing on the part of the legislature, of the qualifications of the members of the commission and not an appointment of those members. The recommendation of the advisory committee goes no farther than to suggest that the Governor in appointing a liquor control commission be limited to appointing thereto those persons who possess the qualifications of being "highly qualified citizens" who have been so adjudged by a committee of seven selected by the legislature. The power of the legisla-

ture to so limit an appointing authority can not be denied. This principle is stated in *Corpus Juris*, Vol. 12, page 837, as follows:

“The legislature has general authority to prescribe the qualifications of officers where they are not prescribed by the Constitution, and in this way it may limit the executive choice, even though it is without power to make the appointment or to designate the officer by whom it shall be made.”

In *Gleason et al. vs. Cleveland*, 49 O. S. 431, it was held that the constitutional inhibition contained in Section 27 of Article II, of the Constitution of Ohio was against the appointment of officers by the general assembly and did not apply to the appointment of members of a committee or commission created for the accomplishment of a particular purpose and whose function ends with the accomplishment of that purpose; and that persons clothed with such temporary functions are not regarded as officers within the meaning of the constitution. In that case there were under consideration the provisions of an act of the General Assembly authorizing the appointment by the Governor of a board of commissioners for the erection of a monument on the public square in Cleveland, Ohio (85 O. L. 564). This law provided for the appointment of a state commission by the Governor. His power of appointment was limited, however, to the appointment of persons who were members of the monumental committee of the Cuyahoga County Soldiers' and Sailors' Union. It was contended that the persons so to be appointed were virtually appointed by the legislature and that the act, therefore, was unconstitutional. It was held that the members of this commission were not officers, and therefore, their appointment was not within the constitutional inhibition of Section 27 of Article II of the Constitution of Ohio, and that even if they were to be regarded as officers, the manner of their appointment was such that it did not constitute an appointment by the legislature. In the course of the court's opinion, it was said:

“If they are officers, within the meaning of the constitution, the direction for their appointment by the Governor from ‘the present Monumental Committee of the Cuyahoga County Soldiers' and Sailors' Union,’ is impersonal, and does not require the appointment of specific persons; whoever at the time the appointment is made, compose that committee, may be appointed by the Governor, whether they were such members at the passage of the act or not.

But it also seems clear from the previous decisions of this court, that the members composing this commission, are not officers within the meaning of sec. 27, art. 2, of the constitution, denying to the legislature the power of appointment to office. *Walker vs. Cincinnati*, 21 Ohio St. 14, 50.

They are created for the accomplishment of a particular purpose—the erection of a monument, and their functions end with the accomplishment of that purpose. It was held in the case just cited, that persons clothed with such temporary functions are not regarded as officers within the meaning of the constitution.”

Inasmuch as the inhibition upon the legislature's powers of appointment contained in Section 27 of Article II, of the Constitution of Ohio, applies only to the appointment of public officers, and does not prohibit the legislature from

making appointments to positions which do not measure up to the dignity of public offices, it is necessary to determine whether or not members of the nominating committee referred to, would be public officers, if the recommendation of your advisory committee is enacted into law.

As the proposal of your advisory committee has not yet been incorporated in a proposed law, or at least no draft of such a proposed law has been submitted for my consideration, I am unable to state just what powers and duties this proposed committee is to be endowed with. If the committee's duties end with the selection of nine highly qualified citizens from whom the original appointment of a liquor control commission is to be made, it is my view that they would not be public officers and their selection by the legislature in the manner suggested would not be the exercise of an appointment by the legislature which is prohibited by the constitution. On the other hand, if this nominating committee is to have continued existence and is to be vested with the power of the selection of a list of highly qualified citizens from which vacancies in the liquor control commission which may exist from time to time shall be filled, or from which lists successors to the original appointees upon the expiration of their terms which will no doubt be fixed by the legislature, it is my opinion that membership on the nominating committee would be a public office, and an appointment by the legislature, to that position would be in contravention of the provisions of Section 27 of Article II of the Constitution of Ohio.

In the case of *State ex rel. Attorney General vs. Kennon et al.*, 7 O. S. 547, the court was called upon to consider the provisions of two acts of the legislature, and to determine whether or not those acts contravened the provisions of Section 27 of Article II of the Constitution of Ohio, in that by their terms, the legislature had exercised the power of appointment to public offices. The first of these acts was "An Act to provide for the more expeditious completion of the new state house, prescribing the order in which it shall be done" (55 O. L., 122), and the other "An Act providing for the appointment and more thorough system of accountability of officers of the Ohio Penitentiary, fixing their compensation, prescribing their duties, and determining the manner of working convicts." (55 O. L., 136).

The first of these acts directed that a board consisting of three persons, and denominated "the commissioners of the state house", should be appointed by William Kennon, Asahel Medbery and William B. Caldwell. This commission was empowered to further prosecute the work in the completion of the new state house in the city of Columbus and was to hold office for a term of two years, and until its successors should be duly appointed and qualified. It was further provided that in case any vacancy should occur in said board it should be filled by the said William Kennon, Asahel Medbery and William B. Caldwell.

The other of the acts referred to above, created a board of three members to be known as the Directors of the Ohio Penitentiary. This board was to be appointed by William Kennon, Asahel Medbery and William B. Caldwell. The said Kennon, Medbery and Caldwell, or a majority of them were empowered to fill vacancies which might occur in said board of directors by death, resignation, or otherwise, and to remove members of said board for cause.

The court held that the appointment of the said Kennon, Medbery and Caldwell, by the legislature, was the exercise of a power which was prohibited to the legislature for the reason that these men, empowered as they were by the legislature, were public officers. Stress was laid by the court on the fact that the power conferred upon the position for which these men had been selected

was a continuing power and not a transient, occasional or incidental power. Reference was made to the definition of a public office as made by Judge Platt in a case in 20 Johns, 492, in which the term "public office" was defined as "an employment on behalf of the government in any station or public trust, not merely transient, occasional or incidental." Reference was also made to the definition of the term "office" as given by Webster, where the word is said to signify "a particular duty, charge, or trust conferred by public authority and for a public purpose." After referring to this definition the court said:

"If we accept either or both of these definitions as substantially correct, it is clear to our minds, that if these statutes are held valid, these defendants are officers. Theirs is a public duty, charge, and trust, conferred by public authority, for public purposes of a very weighty and important character. Their duties, their charge and trust, are not transient, occasional, or incidental, but durable, permanent, and continuous."

In this connection it may be well to note the seventh branch of the syllabus of the above case, which reads as follows:

"The statutes under consideration which provide for the creation of a board, authorizing it to appoint commissioners of the state-house and the directors of the penitentiary of the state, and fill all vacancies which might occur in the offices of directors or state-house commissioners, and authorizing such board, or a majority, to remove any director of the penitentiary for causes specified, or which might by the board be deemed sufficient, created offices; and conceding that the general assembly could provide for the creation of such board and offices, yet the general assembly could not exercise the power of appointing the officers of such board, without exercising 'appointing power,' which is forbidden by the constitution."

Courts have frequently been called upon to determine whether or not a particular position was a public office and many attempts have been made to define a public office. In the case of *State vs. Hunt*, 84 O. S. 143, at page 149, it is said by Judge Spear that the definitions of a public office are multitudinous, not to say multifarious and so varied that the ingenious barrister may find support for almost any proposition relating to the general subject which the necessities of his case may seem to demand. I have found no case, however, in this state where a committee or a person selected for the performance of a mere temporary function, and whose functions upon the accomplishment of that purpose are at an end, has been regarded as a public officer. I feel that the case of *Gleason vs. Cleveland*, 49 O. S. 431, cited above, is ample authority for holding that if a law should be enacted authorizing a committee consisting of the President of the Ohio Bar Association, Ohio Medical Association, Ohio Manufacturers' Association, the Ohio Federation of Labor, the Ohio Federation of Women's Clubs and the Ohio Welfare Conference and two representatives of major farm organizations to select nine highly qualified citizens from which list the Governor should be authorized and directed to appoint three members of a liquor control commission, and that by its provisions the life of the committee ended upon the selection of the list of nine highly qualified citizens, it would not be held to

be violative of the provisions of Section 27 of Article II of the Constitution of Ohio forbidding the General Assembly to exercise the power of appointment of public officers.

On the other hand, if the committee in question is empowered not only to select a list of citizens from whom the Governor should select three members for appointment to membership on a liquor control commission, but as well, to select citizens from whom successors to original appointments on this commission are to be made and from which list appointments are to be made to fill vacancies it is my opinion that the members of the nominating committee are thereby constituted public officers and therefore their selection by the legislature as proposed would be violative of the constitutional provision prohibiting the legislature from making appointments of public officers.

Respectfully,

JOHN W. BRICKER,
Attorney General.

1950.

EMPLOYMENT—NATIONAL RE-EMPLOYMENT SERVICE OPERATING UNDER PROVISIONS OF NATIONAL INDUSTRIAL RECOVERY ACT—COUNTY FUNDS MAY NOT BE PAID EMPLOYEES ENGAGED SOLELY TO FEDERAL AGENCIES—STATE-CITY GOVERNMENT SERVICE DISTINGUISHED.

SYLLABUS:

1. *The National Reemployment Service may be regarded as operating under the provisions of the National Industrial Recovery Act (H. R. 5755) enacted by the 73rd Congress.*

2. *A board of county commissioners has no authority to employ assistant county clerks for the sole purpose of assisting Federal agencies, such as the National Reemployment Service, and pay for such services out of county funds. However, under House Bill 705, the governor or any commission to which the governor may delegate any of his functions and powers under this Act may call upon any county employees for aid in carrying out his or its functions under this Act.*

3. *Opinion No. 862, dated May 28, 1933 is still applicable in its reasoning even though there are no county relief boards existing in the State.*

4. *The National Industrial Recovery Act, (H. R. 5755) and the Ohio Statute (H. B. 705) apply to the National Reemployment Service established in this state, as distinguished from the State-City Employment Service functioning under the State Law, (S. B. 402) and the Federal Act, (S. R. 510).*

COLUMBUS, OHIO, December 4, 1933.

State Relief Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication which reads as follows:

“For the guidance of the State Relief Commission in its relations with the National Reemployment Service, established in Ohio by the U. S. Department of Labor, an opinion is requested upon the following questions: