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REMOVAL FROM OFFICE — DIRECTOR, PUBLIC SERVICE AND SAFETY — CONSTITUTES REMOVAL FOR CURRENT TERM — OFFICER MAY NOT THEREAFTER BE REAPPOINTED FOR THAT TERM — SECTIONS 4670 TO 4675 G.C. — DE FACTO OFFICER — HOW VOUCHER CLAIMS APPROVED — ACTION FOR RECOVERY OF SALARY — CANNOT BE MAINTAINED BY DE FACTO OFFICER HOLDING OFFICE — IF SALARY PAID FOR ACTUAL SERVICES, IT MAY NOT BE RECOVERED BACK BY POLITICAL SUBDIVISION.

SYLLABUS:

1. *The removal of the director of public safety and service from office pursuant to Sections 4670 to 4675, General Code, both inclusive, constitutes a removal for the current term and the officer may not thereafter be reappointed to that term.*

2. *The reappointment of an officer for the current term and his possession of the office after his removal has been ordered constitutes the officer a de facto officer.*

3. *Voucher claims of de facto officers involving the interests of third persons may be approved providing there is compliance with the applicable law relating thereto.*

4. *An action for the recovery of salary annexed to an office cannot be maintained by a de facto officer holding such office. If, however, a salary has been paid to such de facto officer for services actually rendered, said salary may not be recovered back by the political subdivision.*

Columbus, Ohio, June 13, 1941.

Bureau of Inspection and Supervision of Public Offices,
Columbus, Ohio.

Gentlemen:

This will acknowledge receipt of your request for my opinion, which reads as follows:

"We are submitting herewith a letter from the City Solicitor of Wapakoneta, which contains a question that may be of general interest and application throughout the State of Ohio.

Accordingly, may we request that you give this matter consideration and favor us with your opinion in answer to the following questions.

Question 1. If the incumbent of the office of Director of Public Safety and Service in a city is removed from office by the Probate Court in accordance with the provisions of sections 4670 — 4675 of the General Code, and after said removal order is effective the mayor of said city immediately reappoints the same person to said office of Director of Public Safety and Service of said city, is said reappointment legal?

Question 2. If the answer to the first question is in the negative, is the fiscal officer of the city authorized to acknowledge the acts of said incumbent in the approval of voucher claims, etc., and to pay the salary claimed by such incumbent under the reappointment to office as a de facto officer or otherwise?"

Section 4674, General Code, with respect to the removal of officers of municipal corporations for misconduct therein, provides as follows:

"If, on the trial, the charges in the complaint are sustained by the verdict of the jury, or by the decision of the probate judge, when there is no jury, such judge shall enter the charges and findings thereon upon the record of the court, make an order removing such officer from office, and forthwith transmit a certified copy thereof to the presiding officer of the council, whereupon the vacancy shall be filled as provided by law."

The method provided by law for the filling of vacancies caused by removal or otherwise, is set forth in Section 4252, General Code, which provides that:

"In case of death, resignation, removal or disability of any officer or director in any department of any municipal corporation, unless otherwise provided by law, the mayor thereof shall fill the vacancy by appointment, and such appointment shall continue for the unexpired term and until a successor is duly appointed, or duly elected and qualified, or until such disability is removed."

This power of appointment reposing in the mayor, when exercised in filling vacancies in the office of Director of Public Safety, or in the office of Director of Public Service, or in case of one director for both

departments when merged, pursuant to Section 4250, General Code, is qualified only to the extent that the prospective appointee shall be an elector of the city. Sections 4323 and 4367, General Code.

In this regard it is to be noted that Section 4674, *supra*, relating to ouster proceedings contains no provision whatever, imposing any disqualification on the part of the ousted official to hold any other office or to hold the same office thereafter. Hence the officer removed is in no manner tainted by the proceedings so as to affect his status as an elector.

Since the status of an elector is still retained and since this is the only eligibility requirement, it would seem that the power of appointment resting in the mayor if exercised in favor of a previously removed official would have the effect of nullifying the ouster proceedings.

While this may be true as to succeeding or future terms, the courts have generally held that the order of removal may not be rendered ineffective by reappointment during the current term.

This conclusion appears to rest primarily on the ground that the term is a part of the office. In the case of *State ex rel Thompson, Attorney General v. Crump, et al.*, 134 Tenn. 121, it was held that when one is removed from office, he is removed for the current term, and he cannot thereafter be reelected to that term.

And, in the case of *People v. Ahern* (1909) 196 N.Y. 221, 229, the following observation was made by the court:

“It is of course plain that the legislature intended that the proceeding should be a serious one and an effective method of getting rid of unfit public officials. It is equally clear and will doubtless be so conceded in anything which may be said or written on the other side of this question, that this purpose will be frustrated and the administration of the law turned into a farce if under it an official may be immediately reappointed and a removal turned into a mere temporary suspension. In order to avoid such a result and keeping in mind the purpose of the statute we are justified, in my judgment, in construing the removal for which it provides as meaning a permanent and lasting ouster for the entire remaining term of the incumbent from the office which he has been filling and whose obligations he has been found unable or unwilling to discharge. * * *”

To the same effect are numerous other decisions cited in L.R.A. 1916 D. In Vol. 32 O. Jur., Section 44, page 904, the above stated principle is recognized by the following language:

“In most jurisdictions, in the case of an elective officer, the voters cannot, in a special election, restore to office one who has just been removed therefrom or limit the effect or the enforcement of the judgment of ouster by electing the unfaithful officer for the remainder of the forfeited term. Nor can restoration be effected by a board in which is vested the power to fill the vacancy caused by the removal. * * * ”

The difficulty under the facts set forth in your inquiry and the attached brief does not rest in the recognition of the above rule, but in the application of the rule to the office of director of public safety and service.

Manifestly, if there is no term in connection with the office of director of public safety and service, in view of the foregoing, immediate reappointment of the ousted official would in legal contemplation be proper.

Section 4251, General Code, however, provides that:

“The director of public service, director of public safety, directors of the university, street commissioner, or any board or officer whose appointment is required herein shall be appointed not earlier than the second Monday in January and not later than the first Monday in February, and shall hold their respective offices until their successors are appointed as herein required.”

Since the language of the section just quoted does not expressly set forth a term of office for the officer in question, it becomes necessary to construe the section for the purpose of determining whether the duration of the office is fixed and definite.

The expression “term of office” is generally defined as designating a fixed and definite period of time and refers to the tenure or duration of the office, and not to the incumbent. *State v. Rogers*, 93 Mont. 355. *Barrett v. Duff*, 114 Kan. 220.

Section 4251, *supra*, clearly implies that the office of the director of public safety and service has a definite time for commencement, namely, between the second Monday in January and the first Monday in

February. A definite commencement in itself implies a definite termination, but it is not necessary to rely on a mere implication, for the section in question provides that the successors shall be appointed between the first Monday in January and the second Monday in February. It follows that if the successor in office must be appointed at a fixed time, the predecessor's office must terminate at a fixed time.

An examination of Section 4252, *supra*, discloses that appointments made to fill vacancies under the authority thereof, shall continue for the *unexpired term* and until a successor is duly appointed. Clearly if the appointment made is to continue for an unexpired term, there must have been a term in the first instance, that is, the officer originally appointed must have been appointed for a term of definite duration. To take a position, therefore, that the office in question has not a term, would be to render ineffective and inapplicable the provisions of Section 4252, *supra*. This, of course, would do violence to the most fundamental rules of statutory construction, to-wit, that the provisions in all statutes in *pari materia* must be considered in arriving at the intention of the legislature. A harmonious construction of the sections under consideration rendering each fully effective calls for an interpretation ascribing a term in connection with the office of the director of public safety and service in order that the legislative plan for filling vacancies may be operative.

The fact that the incumbent may be removed by the mayor summarily under Section 4250, General Code, and for cause under Sections 4670 to 4675, General Code, has no effect on the term of office as such. There is a difference between "right of incumbency" and "term of office." Inability because of removal while affecting the former does not operate by rendering indefinite the latter. *Barret v. Duff*, 114 Kan. 220; *Palmer v. Commonwealth*, 122 Ky. 693.

In concluding that there is tenure or a fixed term incident to the office of director of public safety and service, the rule prohibiting re-appointment during the term in which the removal took place is therefore applicable.

Under the circumstances, however, the assumption of the office and recognition by the appointing power together with the commission of appointment, although invalid, is sufficient to constitute a colorable right

to the office and to create an officer de facto. 32 O. Jur. 1086. 22 R.C.L. 593.

Officers de facto, as a general rule, have been denied the right to recover the salary annexed to the office in which they have a colorable right. In an action for salary the title to office is in issue and must be established, although there be no other claimant and regardless of the fact that the duties of the office have been performed by the de facto officer. This rule is founded on the principle that compensation is an incident of the office and that one cannot sue to recover that which does not belong to him. *Romero v. United States*, 24 Ct. Cl. 331; *Matthews v. Copiah County*, 53 Miss. 715; *Eubank v. Montgomery County*, 127 Ky. 261; *Tanner v. Edwards*, 31 Utah, 80.

This general rule has been followed in Ohio in the case of *Ermston v. Cincinnati*, 7 O.N.P. 635, and in *State ex rel. Henry v. Newark*, 6 O.N.P. 523. The case of *Brown v. Milford*, 8 O.N.P. 317, while holding contra, can be distinguished on the facts since it involved a failure to give bond which does not ipso facto work a forfeiture of the office.

Since the weight of authority favors the principle that the right to compensation follows the true title, I have no hesitancy under the present facts in declaring that to be the rule to be followed by fiscal officers in Ohio. If, however, a salary has been paid to a de facto officer and services have actually been rendered, the government may not recover back the salary. 32 L.R.A. (N.S.) 951.

Voucher claims involving the interests of third persons, however, may be upheld as valid. In the case of *State ex rel. Westcott v. Ring*, 126 O.S. 203, 208, it is said:

“The general rule is that acts of a *de facto* officer are to be upheld as valid, so far as they involve the interests of the public and of third persons, until his title to the office is adjudged insufficient.

* * * The acts of a *de facto* officer must comply with the requirements of applicable law, to the same extent and in the same manner as valid acts of *de jure* officers.”

In specific answer to your inquiry, therefore, it is my opinion that:

1. The removal of the director of public safety and service from office pursuant to Sections 4670 to 4675, General Code, both inclusive, constitutes a removal for the current term and the officer may not thereafter be reappointed to that term.

2. The reappointment of an officer for the current term and his possession of the office after his removal has been ordered constitutes the officer a de facto officer.

3. Voucher claims of de facto officers involving the interests of third persons may be approved providing there is compliance with the applicable law relating thereto.

4. An action for the recovery of salary annexed to an office cannot be maintained by a de facto officer holding such office. If, however, a salary has been paid to such de facto officer for services actually rendered, said salary may not be recovered back by the political subdivision.

Respectfully,

THOMAS J. HERBERT,
Attorney General.