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1. FIRE CHIEF—MUNICIPAL CORPORATION—APPOINTED UNDER SECTION 4389 G.C.—SALES—INTEREST IN EXPENDITURE OF MONEY—SECTIONS 3808, 12910, 12911, 12912 G. C.
2. REGULAR FIREMAN—MUNICIPAL CORPORATION—APPOINTED UNDER SECTION 4389 G. C. WITHIN PROVISIONS OF SECTIONS 12910, 12911 G. C.—NOT WITHIN PROVISIONS OF SECTIONS 3808, 12912 G. C.
3. VOLUNTEER FIREMAN OF MUNICIPALITY—NOT AMENABLE TO SECTIONS 3808, 12910, 12911, 12912 G. C.

SYLLABUS:

1. The fire chief of a municipal corporation appointed pursuant to the provisions of Section 4389, General Code, comes within the provisions of Sections 3808, 12910, 12911 and 12912 of the General Code.
2. A regular fireman in a municipal corporation appointed pursuant to the provisions of Section 4389, General Code, comes within the provisions of Sections 12910 and 12911 of the General Code, but not within the provisions of Sections 3808 or 12912, General Code.
3. A volunteer fireman of a municipality is not amenable to the provisions of Sections 3808, 12910, 12911 or 12912 of the General Code.

Columbus, Ohio, April 1, 1948

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

“Reports received from our State Examiners assigned to and working in municipal corporations cite numerous cases in which the Fire Chief and Firemen (including members of volunteer fire departments) are selling gasoline, supplies, merchandise, and performing other services including the rental of equipment, to the municipal corporation with which they are connected as such fire chief or volunteer firemen.

In view of the provisions of Section 4389, General Code, as amended by House Bill No. 110, passed by the 92nd General Assembly, under date of March 3, 1937, the persons appointed thereunder to the positions of Fire Chief and Firemen (including volunteer firemen) respectively, appear to be officers of the village, having a more or less permanent tenure of office.

We are unable to find an Opinion or Court Decision of recent date which is applicable to this question. Section 4389, General Code, having been amended subsequent to the date of any reference on file in this Bureau pertaining to said subject. Since the questions involved are of state wide interest, we respectfully request that you give us your Opinion and answer to the following questions:

QUESTION: Does the Fire Chief in a municipal corporation, appointed pursuant to the provisions of Section 4389, General Code, come within the provisions of Sections 3808, 12910, 12911 and 12912, of the General Code?

QUESTION: Does a fireman, or volunteer fireman, in a municipal corporation, appointed pursuant to the provisions of Section 4389, General Code, come within the provisions of Sections 3808, 12910, 12911, and 12912 of the General Code?"

Section 3808, General Code, to which you refer, reads as follows:

"No member of the council or of any board and no officer or commissioner of the municipal corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this section shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive, contrary to the provisions of this section, and if in office he shall be dismissed therefrom.

The provisions of this section shall not apply where a member of the council or of a board or an officer or commissioner of the municipal corporation, being a shareholder of a private corporation but not being an officer or director thereof, owns not in excess of five per centum of the stock of such private corporation and the value of the stock so owned does not exceed five hundred dollars. If a stockholder desires to avail himself of the exception provided in this section, before entering upon such contract such person shall first file with the clerk of the municipal corporation an affidavit stating his exact status and connection with said corporation."

Section 12910, General Code, reads as follows:

"Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Section 12911, General Code, follows closely the wording of Section 12910, except that it relates to a contract with a public body with which the officer or employe is not connected when the contract involves more than \$50.00 and is not let on bids.

Section 12912, General Code, provides as follows:

"Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect,

superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work, or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

The first of the above mentioned statutes has no criminal liability attached to it, whereas violation of Section 12910 or Section 12911 constitutes a felony, and a violation of Section 12912 constitutes a misdemeanor.

Section 4389, General Code, which relates to the organization of a fire department in a village, reads as follows:

"In each village having or hereafter establishing a fire department, the head thereof shall be a fire chief, appointed by the mayor with the advice and consent of the council, who shall continue in office until removed therefrom for the causes and under the powers and procedure provided for the removal of officers by sections 4263 to 4267, inclusive, of the General Code. Council may provide *for the employment* of such firemen as it deems best and fix their compensation, *or for the services* of volunteer firemen and such firemen shall be appointed by the mayor with the advice and consent of the council, and shall continue in office until removed therefrom for the causes and under the powers and procedure provided for the removal of officers by sections 4263 to 4267, inclusive, of the General Code."

(Emphasis added.)

From the provision of the above section, there can be no doubt but that the chief of a fire department is an officer appointed with a degree of formality by the mayor with the advice and consent of the council, having definite powers conferred by law, and having a tenure for life unless removed by the formal proceedings for the removal of other officers of cities and villages as set forth in Sections 4263 to 4267, General Code. This procedure for removal authorizes the mayor to prefer charges on certain grounds therein named. A hearing in the nature of a trial is had before the council which is authorized to issue subpoenas for witnesses and papers, to administer oaths and to enter a final judgment of removal.

The provisions of the above statutes forbidding officers and employes to be interested in any contract for the purchase of property, supplies or fire insurance either with the subdivision with which he is connected or

with one with which he is not connected, have frequently been applied and enforced, and it has been held that it is not necessary for such officer or employe to have an actual profit in such contract. *Doll v. State*, 45 O. S., 445. Section 12912, however, requires that he be interested in the "profits of a contract, job, work or services." The theory upon which such contracts are forbidden appears to be that the possession of an office or position with a public body opens the way for fraud or favoritism or gives such officer or employe an unfair opportunity to secure such contract.

Having in mind that the chief of a fire department is an officer of importance having control of a certain branch of municipal government and having under him the direction of a corps of firemen, I have no hesitancy in concluding that he is such an officer as is referred to in the several statutes above quoted and that he does come within the provisions of Sections 3808, 12910, 12911 and 12912 of the General Code, and for participation in any sale contemplated by those sections or in any job or work forbidden by them, he is liable to the penalties and punishments therein described.

Coming to the question relating to firemen or volunteer firemen in a village, the answer is not quite so clear, particularly as relates to volunteer firemen. However, a reading of Section 4389, General Code, leaves one with the conviction that the General Assembly, by the language used, has put regular members of the fire department and also volunteer firemen in the same class as the chief both as to their appointment, their tenure, and the formalities by which they may be removed.

In an opinion rendered some years ago by one of my predecessors, found in 1914 Opinions of the Attorney General, page 458, it was held:

"A volunteer fireman is not within the provision of section 12910 and section 12911, General Code, prohibiting firemen from being interested in contracts on the ground that said statutes do not contemplate such a casual employment."

That opinion was based on the argument that a volunteer fireman is only a casual employe and is not such an "agent, servant or employe" as was contemplated by the language of the statute. It was said in the course of the opinion:

"The statute is manifestly aimed at such individuals connected with city government as have a definite and substantial

identification with an officer holding a position of trust or profit, or of a board of officers in like capacity. * * * Indeed, the term servant, as it is most frequently comprehended, implies permanency, continuity of service and a more or less continual subjection to the will of the superior."

I am loath to hold that a volunteer fireman who usually receives only a nominal pay and in some cases no pay, for a very useful service, was intended by the General Assembly to be included within the terms of these penal statutes, the violation of which, as I have already noted, may result in a term in the penitentiary. Looking at the history of Section 4389, I note that it was inherited from the Revised Statutes, and was embodied in the new municipal code enacted in 1902, being codified as Section 1536-868 of the Revised Statutes. As there enacted, it read as follows:

"In any village which now maintains, or may hereafter establish, a fire department, the head of said department shall be a fire chief, an elector of the corporation, who shall be appointed by the mayor, for a term of two years. Council may provide for the employment of such firemen as it may deem best, and fix their compensation, or for the services of volunteer firemen. All firemen, other than volunteers, shall be appointed by the mayor for terms of one year, by and with the advice and consent of council. In the management of the fire department and the prevention of fires, council shall have all the powers conferred by general law in sections 2470, 2471, 2472 and 2473, of the Revised Statutes of Ohio, and the fire chief shall have all the powers conferred upon a fire engineer in sections 2474 and 2475, of the Revised Statutes of Ohio."

There, it will be noted, it was made quite clear that there should be a chief appointed by the mayor, for a term of two years. It was further provided that council may provide for the *employment* of such *firemen* as it may deem best, *or* for the services of *volunteer firemen*. It is then provided that all firemen other than volunteer firemen, shall be appointed by the mayor for terms of one year by and with the consent of council. In Section 4389 supra, quite similar words are used, as the general assembly has referred to the "*employment* of such *firemen* as it may deem best * * * *or* for the *services* of *volunteer firemen*." Here it seems to me is a clear indication that the legislature recognized regular firemen as "employees," and volunteers as something other than employees. There is no express provision that these volunteers shall be "employed." The

provisions of the statute that such "firemen," including volunteers, shall be appointed by the mayor, with the advice and consent of council, and shall continue in office until removed by formal proceedings, does not change their character. I see nothing in the statutory changes that have been made since the opinion of my predecessor above referred to was rendered, which calls for any modification of that opinion.

There is no question but that regular firemen are employes of the municipalities by whom they are appointed, and are amenable to the laws in question prohibiting employes generally, from having an interest in certain contracts. It is however, wholly inconsistent with the idea of a "volunteer" in public service of the kind in question that he should be included within the operation of such statutes, and I find myself unable to give the law so harsh a construction.

It will be noted that Sections 3808 and 12912, *supra*, are limited in their application, by their terms, to *officers*. Notwithstanding the provisions of Section 4389 *supra*, relative to the appointment and removal of firemen and volunteer firemen, and in spite of the language there used whereby it is stated that "they shall continue in office until removed", I do not feel justified in holding that even regular firemen are officers. In the case of *State ex rel. Attorney General v. Jennings*, 57 O. S., 415, it was held:

"Where, in pursuance of an ordinance, a fireman is employed by the council to perform the usual duties of a fireman; who has no control of the fire department; or its property other than in the use of it; performs his duties subject to the chief of the department and the city council; and is paid by the month for his services, he is not a public officer; and cannot be ousted from his employment by a proceeding in *quo warranto*, on the ground that he should have been appointed by the mayor with the advice and consent of the council."

Judge Minshall in the course of his opinion points out the features which characterize an office as distinguished from an employment, and says:

"But the character of an office cannot be attached to a position by a name merely. Whether it be an office or not, will depend upon the nature and character of the duties attached to it by law."

Accordingly, a regular fireman and a volunteer fireman are not in my opinion subject to the provisions of Sections 3808 and 12912 of the General Code.

In applying the sections above referred to, we should keep in mind Section 12912-1, General Code, which relieves from responsibility under said penal section a person whose only interest in such contract is as a stockholder with not more than five per cent and not exceeding \$500 in value of the stock of a corporation with which the contract is made.

Accordingly and in specific answer to your questions, it is my opinion :

1. The fire chief of a municipal corporation appointed pursuant to the provisions of Section 4389, General Code, comes within the provisions of Sections 3808, 12910, 12911 and 12912 of the General Code.

2. A regular fireman in a municipal corporation appointed pursuant to the provisions of Section 4389, General Code, comes within the provisions of Sections 12910 and 12911 of the General Code, but not within the provisions of Sections 3808 or 12912, General Code.

3. A volunteer fireman of a municipality is not amenable to the provisions of Sections 3808, 12910, 12911 or 12912 of the General Code.

Respectfully,

HUGH S. JENKINS,
Attorney General.