

Note from the Attorney General's Office:

1953 Op. Att'y Gen. No. 53-2318 was modified by 1957
Op. Att'y Gen. No. 57-1311.

2318

1. POLICE PROTECTION—MATTER OF STATE-WIDE CONCERN—POLICE DEPARTMENTS AND MEMBERS SUBJECT TO GENERAL CONTROL OF STATE—POLICEMEN DERIVE POWER OF ARREST FROM STATE—INVESTED BY LAW WITH PORTION OF SOVEREIGNTY OF STATE—OFFICERS OF STATE.
2. POLICEMEN, OFFICERS OF STATE, NOT SUCH OFFICERS “OF THE CORPORATION” WITHIN MEANING OF SECTION 4666 GC AS ARE REQUIRED TO BE ELECTORS “WITHIN THE CORPORATION”—OPINION 2357, OAG 1928, PAGE 1742, OVERRULED.
3. NO STATE STATUTE TO REQUIRE POLICEMEN TO BE RESIDENTS OF MUNICIPALITY—NONE TO SPECIFICALLY AUTHORIZE THEM TO BE NON-RESIDENTS—EACH MUNICIPALITY FREE TO DETERMINE IF POLICEMEN REQUIRED TO BE RESIDENTS OF MUNICIPALITY.

SYLLABUS:

1. Police protection, being a matter of state-wide concern, police departments and the members thereof are subject to the general control of the state. Policemen, deriving their power of arrest from the state, are invested by law with a portion of the sovereignty of the state, and are officers of the state.

2. Policemen, being officers of the state, are not such officers “of the corporation” within the meaning of Section 4666, General Code, as are required to be electors “within the corporation.” Opinion No. 2357, Opinions of the Attorney General for 1928, page 1742, overruled.

3. There being no state statute requiring policemen to be residents of the mu-

municipality or specifically authorizing them to be non-residents, each municipality is free to determine for itself whether it will require such policemen to be residents of such municipality.

Columbus, Ohio, February 20, 1953

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your request for my opinion as to certain questions propounded by the city attorney of Columbus. It appears to me that there is one fundamental question involved in this inquiry and that the answer to it will be dispositive of all other questions raised. That question is: May a municipality make its own determination as to whether to require policemen to be residents of such municipality, or are such policemen required by state law, and particularly by Section 4666, General Code, to be residents of such municipality, regardless of ordinance or charter provisions permitting them to be non-residents?

It appears that, at the present time, the City of Columbus has an ordinance requiring that, unless otherwise provided by the city council, all employes in the unclassified service and in the competitive class of the classified service shall, at all times during such employment, maintain their residence within the corporate limits of the city. I am informed that the city council is now considering the question of whether to make modifications in such ordinance, or to "otherwise provide," in order to permit, at least under certain factual situations, police officers to reside beyond the city limits. In the process of such consideration, however, the question arose as to whether such permission would be effective in view of Section 4666, General Code, and the interpretation of this Section by one of my predecessors in Opinion No. 2357, Opinions of the Attorney General for 1928, page 1742.

Before proceeding to a discussion of the legal questions here involved, it might be well to point out that the recent case of *Smith v. Municipal Civil Service Commission of Columbus*, 158 Ohio St., 401, involving an attempt by a police captain to prevent the Civil Service Commission from ordering his dismissal for alleged non-residence within the city in violation of the Columbus ordinance, throws no light on the question here under

consideration. In that case, which began as an action for declaratory judgment in the Common Pleas Court, Smith claimed that in fact he was a resident of Columbus contrary to the finding of the Commission that he was a non-resident and prayed that the court determine that in fact he was a resident and enjoin the Commission from ordering his dismissal for violation of the terms of such ordinance. The Common Pleas Court sustained a demurrer to the petition, but the Court of Appeals reversed and remanded the case to the Common Pleas Court. The Supreme Court, in turn, reversed the Court of Appeals solely on the basis that where an action in declaratory judgment depends largely upon the determination of *facts*, the trial court, in the exercise of sound discretion, may either entertain or choose not to entertain such action.

In view of the fact that your request, in effect, emanates from the City of Columbus and in large part arose out of the litigation involved in the Smith case, and in view of certain public statements attributed to some of the parties therein to the effect that my opinion will determine the question of whether Captain Smith may be compelled to reside in the City of Columbus or be discharged from the police force for violation of the ordinance, I wish to make it abundantly clear that such issue is not involved in this opinion. The issue presented here is whether the Council of the City of Columbus *may*, by appropriate legislation, permit policemen to reside beyond the city limits. Until such time as it *chooses* to grant such permission, the legal issue of whether it may grant such permission can never arise. As pointed out in the letter of the city attorney, however, other Ohio cities already have acted to permit their policemen to reside beyond the city limits. Thus, the question presented does involve a matter of general public interest throughout the state.

Reference is made in the letter of the city attorney to Article XV, Section 4 of the Ohio Constitution. This section provides that no person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector. This section does not provide that such officer shall be an elector within any specific geographical area of Ohio, and, for that reason, I conclude that it has no application to the problem presented.

I might also state that, with the possible exception of Section 4666, General Code, I know of no statute, including the civil service statutes, which could possibly be construed as specifically requiring policemen to

be residents of the municipality. My discussion, therefore, will be limited to an interpretation of Section 4666, General Code.

Section 4666, General Code, reads as follows:

“Each officer of the corporation, or of any department or board thereof, whether elected or appointed as a substitute for a regular officer, shall be an elector within the corporation, except as otherwise expressly provided, and before entering upon his official duties shall take an oath to support the constitution of the United States and the constitution of Ohio, and an oath that he will faithfully, honestly and impartially discharge the duties of the office. Such provisions as to official oaths shall extend to deputies, but they need not be electors.”

In interpreting the language of Section 4666, General Code, it would appear that four questions present themselves:

1. Whether a policeman is an *officer*;
2. Whether, if an officer, he is an officer of the *corporation*, or whether, instead, he is an officer of the *state*, appointed by the municipality merely in its capacity as an agent for the state;
3. Whether Section 4666, General Code, requires all appointed officers of the corporation to be electors therein, or whether such requirement applies only to those appointed officers of the corporation who are “appointed as a substitute for a regular officer;” and
4. Whether the language “except as otherwise expressly provided” would permit a municipality, by ordinance or charter, to so otherwise expressly provide, or whether such may be otherwise expressly provided only by state statute.

As heretofore noted, the question of whether Section 4666 has the effect of requiring a policeman to reside within the limits of a municipality was the subject of an opinion by one of my predecessors in Opinion No. 2357, Opinions of the Attorney General for 1928, page 1742. The syllabus of that opinion reads as follows:

“1. A city patrolman or policeman is an officer within the meaning of Section 4666, General Code, and as such is required to be an elector of the city in and for which he is appointed.

“2. The appointment of a person as a city policeman who is not a resident of the city for which he is appointed, is illegal and where such illegality persists by reason of the continued non-

residence of such officer he may be dismissed from the force without reference to the provisions of Section 486-17a, General Code, relating to the dismissal of persons in the classified civil service."

This opinion, in turn, relied in large part on a case decided by the Common Pleas Court of Jefferson County, namely, *De Romedis v. Village of Yorkville*, 21 N.P. (N.S.), 340, which held as disclosed by the second headnote:

"A policeman is a public officer and must therefore be an elector of the municipality from which he receives his appointment and derives his authority."

In both the *Village of Yorkville* case and the 1928 opinion, I find that the only issue considered was whether or not a policeman was an *officer*. No consideration was given to the other questions which I believe would have to be answered before concluding that Section 4666, General Code, would require policemen to live within such municipality regardless of any attempt on the part of the municipality to permit such policemen to be non-residents. Having concluded that a policeman was an officer, both the *Village of Yorkville* case and the 1928 opinion jumped to the immediate conclusion that Section 4666 would require him to reside in the municipality. For reasons set out hereafter, I believe that this was an over-simplification of the problem.

I.

Much might be said on the question of whether a policeman is an officer, as contrasted with being merely an employe. While it is well settled that a public officer, as distinguished from an employe, is one who is invested by law with a portion of sovereignty, the difficulty of application arises by virtue of a lack of satisfactory definition of "sovereignty." *State, ex rel. Milburn v. Pethtel*, 153 Ohio St., 1; *State, ex rel. Hogan, Atty. Gen. v. Hunt*, 84 Ohio St., 143.

Cases outside of Ohio are split on the question of whether a policeman is an officer, but the great weight of authority holds that he is. *McQuillin on Municipal Corporations*, Third Edition, Section 45.11; 84 A.L.R. 310. Such holdings are based on the proposition that a policeman, as a peace officer, has the duty to preserve the peace and the power to restrain the liberty of persons by making arrests. I am in accord with this

view and, therefore, must concur in the 1928 opinion to the extent that it holds that a policeman is an officer.

2.

The requirements of Section 4666, General Code, however, are applicable only to officers "of the corporation." Is a policeman an officer "of the corporation," i.e. of the municipality, or is he an officer of the State? Again, we find that the cases outside of Ohio are split on this question. The overwhelming weight of such authorities, however, holds that policemen are state and not municipal officers. McQuillin on Municipal Corporations, Third Edition, Section 45.01; 37 American Jurisprudence, 856. True, the municipality may be permitted to determine the number of policemen, fix their salaries, etc., but it has been held that in so doing they act only as agents for the state and that despite the limited control of the municipality over the policemen, they, nevertheless, are state and not municipal officers.

In Ohio, as contrasted with most other states, municipalities have home rule powers derived directly from the Constitution. Would this fact compel a different conclusion in Ohio as to the status of policemen? I believe that whatever doubt might have existed as to the effect of home rule on this subject has now been laid to rest by the decisions of the Supreme Court, beginning in 1941, holding that both police and fire protection are matters of statewide concern and under the control of state sovereignty. *State, ex rel. Strain v. Houston*, 138 Ohio St., 203; *City of Cincinnati v. Gamble*, 138 Ohio St., 220; *State, ex rel. O'Driscoll v. Cull*, 138 Ohio St., 516; *State, ex rel. Daly v. City of Toledo*, 142 Ohio St., 123; *State, ex rel. Arey v. Sherrill*, 142 Ohio St., 574.

These cases, in effect, hold that even in matters relating to organization, personnel and administration of police departments, municipalities are bound to follow the directives of the state as contained in the statutes. In reaching this conclusion, the court in the *Houston* case recognized the fact that there was "a distinct conflict of authority in the decided cases on this specific subject." It chose to align Ohio with the majority of the states which recognize the supremacy of the state in all matters of police and fire protection, including general control over police and fire departments and the members thereof. As heretofore noted, these same states hold that policemen are state and not municipal officers. It would appear

to follow, therefore, that policemen in Ohio are state and not municipal officers and, therefore, are not officers "of the corporation" within the meaning of Section 4666, General Code.

I believe that this conclusion is given further support by an examination into the question of the *source* of the power of the policeman to exercise, in his own right, a portion of sovereignty. In both the Village of Yorkville case and the 1928 opinion the conclusion was reached that a policeman was an officer on the basis that, as a peace officer, he is charged with the duty of preserving public and private property and protecting the people's interests; that he has authority to make arrests on view and the right to go beyond the municipality and make arrests throughout the state. In support of the conclusion that a policeman was an officer, the Village of Yorkville case quoted certain language from 36 L.R.A., page 881, to the effect that a policeman, because of such power of arrest, was an officer. This same quotation, however, held that he was a *state* and not a *municipal* officer. This case also quoted language from Dillon on Municipal Corporations, Section 390 to the same effect. The 1928 opinion quoted from four out-of-state cases in support of the proposition that a policeman was an officer. *Blynn v. City of Pontiac*, 185 Mich., 35; *Reising v. City of Portland*, 57 Ore., 295; *City of Chicago v. Bullis*, 138 Ill. App., 297 and *Farrell v. The City of Bridgeport*, 45 Conn., 191. It should be noted that each of such cases also held, in effect, that a policeman was a *state* officer.

It is clear that in Ohio the special power of arrest is delegated to a policeman by virtue of state statute. He is designated as a "peace officer" by Section 13432-1, General Code, and, as such peace officer, he is delegated certain powers of arrest not accorded to others. In the capacity of a peace officer, it would appear that a policeman is invested by state law with a portion of the sovereignty of the *state*. If, as would appear, he is an officer because of his right to thus exercise a portion of the sovereignty of the state, it would seem to necessarily follow that he would be a state officer.

Concluding as I do that a policeman is not an officer of the municipality and, thus, not an officer "of the corporation," I must disagree with the ultimate conclusion of the Village of Yorkville case and the 1928 Opinion that Section 4666, General Code, requires a policeman to be a resident of a municipality.

Although it would appear that a policeman is a state officer and that

no state statute requires him to be a resident of the municipality, it is equally true that no state statute specifically authorizes him to be a non-resident of a municipality. This being true, it is my opinion that a municipality may determine for itself whether or not to permit policemen to reside beyond the city limits. I believe that this is in accord with the view expressed by Bell, J. in *State, ex rel. Arey v. Sherrill*, 142 Ohio St., 574, at page 581, as follows:

“That the police department of a city is a matter of state-wide concern does not prevent the city from adopting any regulation in reference thereto so long as such regulation does not conflict with general laws.”

3.

Although my conclusion that a policeman is not an officer “of the corporation” within the meaning of Section 4666, General Code, makes it unnecessary for me to discuss the other questions involved in your letter, I believe that some brief comment should be made relative thereto.

Upon careful examination of Section 4666, it would appear somewhat doubtful as to whether this section has application to *all* appointed officers of the corporation, or whether it applies only to such officers as are “appointed as a substitute for a regular officer.”

A study of the history of this section affords some evidence that the Legislature intended to eliminate appointive officers from its operation.

In its original enactment, 66 Ohio Laws, 149, the substance of what is now Section 4666, General Code, was a part of an Act “to provide for the organization and government of municipal corporations,” passed May 7, 1869. Section 79 of that act read as follows:

“*All officers* shall be *electors* of the corporation in which they are *elected or appointed*; and before entering upon the duties of their office they shall take an oath or affirmation to support the Constitution of the United States and the State of Ohio, and also an oath or affirmation of office.” (Emphasis added.)

It is clear that in that form the law applied to all officers, whether elected or appointed. In the codification of the Revised Statutes it appeared as Section 1737. It there read in part as follows:

“Each officer of the corporation, or of any department or board thereof, whether elected or appointed, *including a person*

appointed as a substitute for a regular officer, shall be an elector within the corporation, except as herein expressly provided, * * *.”
(Emphasis added.)

The above section was last amended in 1896, 92 Ohio Laws, 68, to read, in part, as follows:

“Each officer of the corporation, or any department or board thereof, whether elected or appointed as a substitute for a regular officer, shall be an elector within the corporation, except as herein expressly provided, * * *.”

This amendment omitted the word “of,” in the first sentence, which does not appear to have made any change in the meaning. But the substantive change which was made was in cutting out the words “including a person appointed.” This omission would appear to possibly manifest an intention on the part of the Legislature to eliminate appointive municipal officers generally from the requirement of Section 4666, General Code.

It might be noted, however, that other sections do require specific appointive officers to be electors of the corporation, e.g. director of public service, Section 4323, General Code; director of public safety, Section 4367, General Code.

The effect, if any, to be given to the change in the language of the statute occasioned by the amendment of 1896 presents a closely debatable legal question which, however, is not necessary for me to decide in view of my conclusion that a policeman is not an officer “of the corporation.”

4.

If a policeman were truly a *municipal* officer, the question necessarily would arise as to the power of such municipality, under the home rule provisions of the Constitution, to exempt such policeman from the requirements of Section 4666, General Code, even in the absence of the language “except as otherwise expressly provided” which is contained in that section. Moreover, since municipalities now derive their basic powers from the Constitution and not from the statutes, as was the case at the time of the last amendment to Section 4666, it could well be argued that a municipal charter or ordinance expressly authorizing policemen to reside outside of the city would fall within the meaning of the words of the

statute. Having concluded, however, that policemen are not officers "of the corporation" within the meaning of Section 4666, General Code, it is not necessary to pursue this discussion further.

For the reasons heretofore stated, it is my opinion that :

1. Police protection, being a matter of state-wide concern, police departments and the members thereof are subject to the general control of the state. Policemen, deriving their power of arrest from the state, are invested by law with a portion of the sovereignty of the state, and are officers of the state.

2. Policemen, being officers of the state, are not such officers "of the corporations" within the meaning of Section 4666, General Code, as are required to be electors "within the corporation." Opinion No. 2357, Opinions of the Attorney General for 1928, page 1742, overruled.

3. There being no state statute requiring policemen to be residents of the municipality or specifically authorizing them to be non-residents, each municipality is free to determine for itself whether it will require such policemen to be residents of such municipality.

Respectfully,

C. WILLIAM O'NEILL
Attorney General