

5412

SALARY — WHERE COUNTY PROSECUTING ATTORNEY OR COUNTY ENGINEER ENLISTS IN MILITARY SERVICE OR IS DRAFTED INTO SERVICE, UNITED STATES GOVERNMENT, EACH WOULD CARRY RESPONSIBILITY FOR POSITION DURING ABSENCE — ENTITLED TO RECEIVE SALARY.

SYLLABUS:

Where a county prosecuting attorney or a county engineer enlists in some branch of the military service or is drafted into the service of the United States Government during the present war, each would carry the responsibility for his position during his absence in such service and would be entitled to receive the salary pertaining thereto.

Columbus, Ohio, August 28, 1942

Honorable Ray Bradford, Prosecuting Attorney,
Batavia, Ohio.

Dear Sir:

I have your communication reading as follows:

“I would be pleased to receive your opinion on the following:

A. If a county prosecutor enlists in some branch of the service or is drafted into the service of the United States Government during this present war, could he receive his salary and does he carry the responsibility for his position during his absence until the time for his re-election?

B. Could the county engineer appoint his successor during the war under the circumstances as stated in A, and could he receive his salary?”

The basic question of the effect of entering the military service by either of the officers named in your letter is discussed in my opinion rendered November 2, 1940 (Opinions Attorney General, 1940, p. 982), the syllabus of which reads as follows:

“The office of county auditor does not become vacant by reason of the temporary absence of the incumbent while on active duty as an officer in the reserve corps of the United States Army.”

It is unnecessary to review at length the authorities discussed in

that opinion. So far as the law is concerned, the same principles would apply to the case of the county prosecutor or the county engineer who might enlist in some branch of the service or be drafted into the service of the United States Government during the present war.

Quoting the general rule as found in 32 O.J. p. 1044:

“An office is vacant in contemplation of law when there is no present incumbent provided by law; or, as is sometimes said, in contemplation of law there can be no vacancy in an office so long as there is a person in possession of the office who is legally qualified to perform the duty.”

State ex rel. vs. McCracken, 51 O.S. 123; Moliter vs. The State, 10 O. Dec. Rep. 324; 22 R. G. L. 437.

Nor would the temporary absence of an officer create a vacancy. In 22 R. C. L. p. 560, under the title “Abandonment of Office”, I find the following:

“In order to constitute an abandonment of office, it must be total, and under such circumstances as clearly to indicate an absolute relinquishment, * * * Temporary absence is not sufficient where no statute fixes the period beyond which the absence must not continue.”

Since the issuance of my opinion above noted, the 94th General Assembly passed an act which became effective July 21, 1941, and which was codified as Sections 2397-1 and 2397-2, General Code, which sections read as follows:

Section 2397-1:

“Whenever any county officer shall be absent from the county for ninety consecutive days, except in case of sickness or injury as hereinafter provided, his office shall be deemed vacant and the county commissioners shall declare a vacancy to exist in such office.

Such vacancy shall be filled in the manner provided by law.”

Section 2397-2:

“Whenever any county officer is absent from the county because of sickness or injury, he shall cause to be filed

with the county commissioners a physician's certificate of his sickness or injury; and if such certificate is not filed with the commissioners within ten days after the expiration of the ninety consecutive days of absence from the county, his office shall be deemed vacant and the county commissioners shall declare a vacancy to exist in such office.

Nothing contained in this act shall apply to a county officer while in the active military service of the United States."

It will be noted that the Legislature has expressly provided that nothing in this act should apply to a county officer while in the active military service of the United States.

Except for the sections last above quoted, there are no statutes in Ohio which would cause the absence of a county officer from his office to result in a vacancy in the office. On the other hand, those sections should not be construed as creating immunity from proceedings for his removal.

Section 10-1, General Code, provides for the removal by judicial proceedings of any public officer, for causes therein named. Special process for the removal of the prosecutor is found in Section 2913, General Code, which reads as follows:

"On complaint, in writing, signed by one or more taxpayers, filed in the court of common pleas, containing distinct charges and specifications of wanton and wilful neglect of duty or gross misconduct in office by the prosecuting attorney, the court shall assign the complaint for hearing and cause reasonable notice thereof to be given to the prosecuting attorney and of the time fixed by the court for the hearing. * * * If it appears that the prosecuting attorney has wilfully and wantonly neglected to perform his duties or has been guilty of gross misconduct in office, the court shall remove him from office and declare the office vacant, but otherwise the complaint shall be dismissed, and the court shall render judgment against the losing party for costs."

Section 2912, General Code, provides that if a vacancy occurs in the office of the prosecuting attorney, the court of common pleas shall appoint a prosecuting attorney.

The county engineer may also be removed by the special proceeding found in Section 2790, General Code, which reads:

“Any person may bring a civil action in the court of common pleas against the county surveyor, alleging his incapacity, misconduct in office or neglect of duty. A copy of the petition with the summons shall be served on such surveyor. Such cause shall have precedence over other business, and, if upon trial thereof, the court finds a surveyor guilty of any of the charges, by the judgment of the court he shall be removed from office.”

Under the provisions of Section 2785, General Code, a vacancy in the office of county surveyor, because of death, resignation or otherwise, is to be filled by appointment by the county commissioners.

As to the right of each of these officers to receive his salary or other compensation even though absent from his office, the general rule is as stated in 22 R.C.L. p. 529, where it is said:

“The right of an officer to his fees, emoluments, or salary is not impaired by his occasional or protracted absence from his post.”

The same principle is stated in 46 C.J. 1014:

“The person holding an office is entitled to the compensation attached thereto; this right does not rest upon contract, and the principles of law governing contractual relations and obligations in ordinary cases are not applicable. The right to the compensation attached to a public office is an incident to the title to the office and not to the exercise of the functions of the office; hence, the fact that officers have not performed the duties of the office does not deprive them of the right to compensation, provided their conduct does not amount to an abandonment of the office.”

The principles above stated, both as to tenure of office and as to the right to receive the salary provided by law, were set forth in an opinion by one of my predecessors (Opinions Attorney General, 1918, p. 970), the syllabus of which reads:

“1. The mere fact that a county surveyor enlists in the army and leaves the county to take training at Ft. Benjamin Harrison, does not ipso facto vacate the office.

2. Under the provisions of section 2785 G.C. the county commissioners have authority to fill a vacancy when a vacancy occurs; but they have no authority to declare and create a vacancy in the office of county surveyor.

3. County commissioners have no authority to attempt to fill a vacancy in the office of county surveyor unless a vacancy actually occurs either through the death or voluntary resignation of the county surveyor, or unless he is removed under the provisions of section 2790 G.C.

4. A county surveyor is entitled to the salary provided by law until he resigns or the office otherwise becomes vacant."

Section 2782-1, General Code, changes the title of "county surveyor" to "county engineer". Referring to your question as to the right of the county engineer to "appoint his successor during the war", I am unable to determine with certainty what you mean by "appoint his successor". Assuming that you have in mind the question of his turning over his duties to his deputy, I think it worth while to examine the statutes relative to the qualifications of the county engineer and of his deputies.

Section 2783, General Code, provides as follows:

"No person holding the office of clerk of court, sheriff county treasurer or county recorder, shall be eligible to the office of county engineer. In all counties no person shall be eligible as a candidate for the office of county engineer or be elected or appointed thereto, except a registered professional engineer and registered surveyor licensed to practice in the state of Ohio, or a person who shall have previously served as county engineer immediately prior to his election."

There is nothing in the statutes particularly referring to the county engineer, or county surveyor as he was formerly designated, which authorizes him to appoint deputies, but there are several references in those statutes to his deputies. However, general authority is found in Section 2981, General Code, relating to all county officers, a portion of which section reads:

"Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation, and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid semi-monthly from the county treasury, upon the warrant of the county auditor. * * * ."

It will be noted that no special qualifications are prescribed for the deputies to be appointed pursuant to the last above quoted sec-

tion, and that the only limitation on the amount which the several officers may spend in the employment of such deputies and other assistants is that such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners. The county engineer, having the professional qualifications above noted, and continuing in office notwithstanding his temporary absence in the military service of the United States, retains along with the salary thereof, full responsibility for such office notwithstanding the fact that he may for the time being delegate a large part of his duties to his deputy, who may or may not possess such technical qualifications.

In the event that the county commissioners have not provided the county engineer with a sufficient allowance to employ the necessary deputies or assistants during his absence in the service, there would seem to be no reason why he should not compensate them out of his own income or other resources.

Attention should be given to that portion of Section 7181, General Code, which reads as follows:

“The county surveyor shall give his entire time and attention to the duties of his office and shall receive an annual salary to be computed as follows: * * * ”

That statute was discussed at length in the opinion above referred to, found in Opinions Attorney General, 1918, p. 970, and it was there shown that the legislative intention in enacting that provision was to give the surveyor a fair salary for the duties performed by him, and at the same time compel him to devote his professional time and attention to the duties of his office and not to the acceptance of employment for which he received fees in addition to his regular salary.

In a subsequent opinion (Opinions Attorney General, 1922, p. 477), the then Attorney General reviewed the 1918 opinion with approval and held:

“1. A county surveyor is a public officer whose salary is fixed by statute (Sec. 7181 G.C.). Therefore, the salary is to be treated as an incident to the office itself, and not to the performance of the duties of the office (Opinion Vol. 1, p. 970, Opinions of Attorney General, 1918, adhered to).

2. Where a county surveyor in the year 1918, filed application with the board of county commissioners for leave of absence without pay while in the military service of the United States, and the county commissioners passed a resolution purporting to grant such leave, and the county surveyor entered such military service and remained therein for the last six months of 1918 following his application for leave of absence, such county surveyor is not now barred from asserting a claim to payment of such salary. Accordingly, the salary for said period of six months constitutes a claim against the county, of which the surveyor is entitled to payment without reference to allowance or disallowance by the board of county commissioners."

Specifically answering your inquiries, it is my opinion that where the county prosecuting attorney or the county engineer enlists in some branch of the military service or is drafted into the service of the United States Government during the present war, each would carry the responsibility for his position during his absence in such service and would be entitled to receive the salary pertaining thereto.

Respectfully,

THOMAS J. HERBERT
Attorney General.