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RESIDENCE REQUIREMENTS, FIREMEN—TOWNSHIP, MUNICIPALITY—NO SUCH REQUIREMENT FOR TOWNSHIP FIREMEN—FIREMEN ARE NOT "OFFICERS" OF VILLAGE, §733.68 RC, NOT REQUIRED TO BE ELECTORS OF MUNICIPAL CORPORATION—VILLAGE FIRE CHIEF IS OFFICER OF MUNICIPALITY, §733.68, RC; MUST BE AN ELECTOR UNLESS OTHERWISE PROVIDED IN CHARTER—2318 OAG 1953, p. 39, MODIFIED; AUTHORITY OF *LYNCH v. CLEVELAND,* 164 O. S. 437.

SYLLABUS:

1. There being no statute requiring firemen and the fire chief to be residents of the township in which they serve, it is manifest that no such requirement exists.

2. Village firemen, not being "officers" within the meaning of Section 733.68, Revised Code, are not required to be electors of the municipal corporation which they serve.

3. A village fire chief is an officer of a municipality within the meaning of Section 733.68, Revised Code, and as such must be an elector of the said municipality, unless otherwise provided in the charter, Opinion No. 2318, Opinions of the Attorney General for 1953, page 39, modified on the authority of Lynch v. Cleveland, 164 Ohio St., 437.

Columbus, Ohio, November 19, 1957

Hon. James H. DeWeese, Prosecuting Attorney,
Miami County, Troy, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"1. Is there any residence qualification for the fire chief and the firemen appointed by a Board of Township Trustees?

2. Is there any residence qualification for the fire chief and firemen appointed by village officials?"

It may be well to point out immediately that Section 4, Article XV, Ohio Constitution, has no application to the questions raised in your request. 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. See Opinion No. 2318, Opinions of the Attorney General for 1953, page 41.

I turn now to your first question pertaining to residence qualifications of the fire chief and firemen appointed by a board of township trustees. I know of no statute which could be construed as specifically requiring firemen and a fire chief to be residents of the township, and since the constitution requires no such residency, I must conclude that no such requirement exists.

The answer to your second question is not so simple. Again, I find no statute specifically requiring firemen and a fire chief to be residents of the village in which they are employed. However, since a village is a municipal corporation, Section 733.68, Revised Code, must be considered. This section provides:

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

In interpreting the language of Section 733.68, *supra,* it would appear that two questions are presented:

1. Is a fireman or a fire chief an officer?

2. If he is an officer, is he an officer of the *corporation,* or is he instead an officer of the *state,* appointed by the village merely in its capacity as an agent for the state?

I shall consider first the above two questions as they apply to a fireman.

Much has been written in an effort to distinguish between an officer and a mere employee. It is perhaps well settled that a public officer, as distinguished from an employee, is one invested by law with some portion of the sovereign functions of government. State, *ex rel* Myers v. Coon, 4

O.C.C. (N.S.), 560; 26 O.C.C., 241. It is stated in 42 American Jurisprudence, page 880, that:

> "* * * Ordinarily and generally, a public office is defined to be the right, authority, and duty created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public. * * *."

On page 881 of the same volume:

> "* * * It (a public office) must have some permanency and continuity and possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public. The powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority; and the duties must be performed independently and without control of a superior officer, other than the law, unless they are those of an inferior or subordinate officer, created or authorized by the legislature and by it placed under the general control of a superior officer or body. * * *"
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> (Parenthesis added.)

This same proposition is restated in the case of State, *ex rel,* Newman, State Librarian v. Skinner, 128 Ohio St., 325, as follows:

> "A public officer, as distinguished from an employee, must be invested by law with a portion of the sovereignty of the state and authorized to exercise functions either of an executive, legislative, or judicial character."

In Opinion No. 2318, Opinions of the Attorney General for 1953, page 43, my predecessor held that a policeman is an officer. That opinion stated:

> "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. * * *"

The Supreme Court of the State of Ohio does not place firemen and policemen in the same category, for while policemen have been considered public officers, firemen, other than the chief, have not been so considered.

In the notable case of State, *ex rel.* Attorney General v. Jennings, 57 Ohio St., 415, the Court said this at page 426:

> "* * * Applying what has been said to the case before us, and it clearly appears, as we think, that the fireman, *other than the chief,* employed by the council under the ordinance of June 23, 1897, are not public officers. They have no control of the fire department, nor of any of its property for any purpose, other than to use it in the extinguishment of fires whenever the occasion requires. They are subject on all occasions and in whatever they do in the course of their employment, to the direction and control of the chief of the department. They receive for their services $50.00 per month, and may be discharged at any time by the council. Hence they are simply persons in the employment of the fire department, and are not public officers of any kind. * * *"
> (Emphasis added.)

See also 32 Ohio Jurisprudence, 895, Section 33, and cases cited therein.

Since it has been determined that a fireman is not an officer, it is unnecessary to consider further the second specific question I have suggested above. This being true, I am of the opinion that Section 733.68, Revised Code, has no application to firemen, and since no other statute requires a fireman to be a resident of the village which employs him, I find that such residence is not necessary.

The questions set out above, as they relate to the fire chief, present a more complex problem. I think it is apparent that a fire chief, as he carries out his duties, is exercising a part of the sovereign function of the state in protecting lives and property from the dangers of fire. In carrying out these functions he does so not as an employee or subordinate, but as the primary official responsible for the protection of the public from the dangers of fire.

Reviewing again the case of State, *ex rel.* Attorney General v. Jennings, 57 Ohio St., 415, I quote this pertinent part from page 426:

> "* * * it clearly appears, as we think, that a fireman, *other than the chief,* are not public officers. They have no control of the fire department, nor of any of its property for any purpose, other than to use it in the extinguishment of fires, whenever the occasion requires." (Emphasis added.)

Conversely as to the chief of the department, the conclusion seems

inescapable that, by reason of the control and the power vested in the fire chief, he is a public officer.

Having determined that the fire chief is an "officer", it becomes necessary to answer the second question, to-wit: whether the fire chief is an officer of the *corporation* as contemplated in Section 733.68, Revised Code. In other words, is he an officer "of the corporation", *i.e.* of the municipality, or is he an officer of the state? My predecessor in office took the position that police fire protection are state matters, clearly setting forth his reasons in Opinion No. 2318, Opinions of the Attorney General for 1953, page 44, which reads in pertinent part:

> "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."

The case cited in the above opinion, in effect, hold that both fire and police matters are subject to state control even as to charter cities whose powers of local self-government are derived from constitutional provisions. The Houston case recognized the supremacy of the state in all matters of police and fire protection, including general control over police and fire departments and members thereof. The overwhelming weight of authority hold that fire department personnel are primarily the concern of the state. McQuillin on Municipal Corporations, Third Edition, Section 45.01. The case of Cincinnati v. Gamble, 138 Ohio St., 228, stated the Ohio position in this way:

> "* * * There is, however, no necessity to look to decisions in other states for the question is no longer an open one in Ohio. In the case of City of Wooster v. Arbenz, 116 Ohio St., 281, at 284, 156 N.E., 210, 52 A.L.R. 518, this language was used: 'In performing those duties which are imposed upon the state as obligations of sovereignty, such as protection from crime, or fires, or contagion, or preserving the peace and health of citizens and pro-

tecting their property, it is settled that the function is governmental, and if the municipality undertakes the performance of those functions, whether voluntarily or by legislative imposition, the municipality becomes an arm of sovereignty and a governmental agency and is entitled to that immunity from liability which is enjoyed by the state itself.' "

The recent case of State, *ex rel.* Lynch v. City of Cleveland, 164 Ohio St., 437, has, however, thrown considerable doubt on the rule stated in the opinion mentioned above. In that case the question involved was whether a city could appoint a police chief without conforming to the provisions of Section 143.34, Revised Code, which dictated that the vacancy must be filled from a civil service eligibility list. The city had amended its charter to provide that the appointment need not be made from such list. In arriving at the conclusion that the city could do this, the court, quoting from Harsney v. Allen, 160 Ohio St., 36, said:

" 'In the case of Lapolla v. Davis, 55 Ohio Law Abs., 490, it was held that the provision in the Youngstown charter placing the position of police chief in the unclassified service is paramount to Section 486-8, General Code, which places that position in the classified service subject to competitive examination. A motion to certify the record in that case was overruled by this court and an appeal as of right dismissed (151 Ohio St., 550, 86 N.E. (2d), 615).' "

And the opinion continues:

"Is the method of selecting a chief of police a matter of local self-government within the meaning of the first part of section 3 providing that 'municipalities shall have authority to exercise all powers of local self-government?' It would seem that if a municipality is to possess such powers, one of them should be the authority to determine the method of selection that probably would be most effective and desirable in meeting the needs of that particular community.

Hence, this court is of the opinion that the people of Cleveland did possess the political power to amend their charter and choose their own method for selecting their own chief of police other than from a civil service elibility list."

It seems clear that the Supreme Court has undergone a change of view as to the status of police, and I assume fire, protection. The Court now seems willing to allow the people of Cleveland "to choose *their own* method of selecting *their own* chief of police". Although the majority in the Lynch

case does not overrule the earlier decisions which held police and fire protection to be strictly a state concern, there is no escape from the fact that serious doubt now exists as to the validity of such decisions. Judge Taft, in a concurring opinion strongly urged that the Supreme Court had changed its position and that municipalities did in fact have primary control over police protection. In urging that the Houston case, as well as others, be specifically overruled, Taft, J. said at page 441:

> "I could not and did not concur in the judgment dismissing the appeal in the Lapolla case 'for the reason that no debatable constitutional question is involved', because that decision was clearly irreconcilable with the previous decision in State, ex rel. Arey v. Sherrill, City Mgr., 142 Ohio St., 574, 53 N.E. (2d), 501, and also because I had very great difficulty in finding any reasonable ground of reconciling the decision in the Lapolla case with the decisions and pronouncements of law made in State ex rel. Strain, Dir. v. Houston, Chief of Fire Dept., 138 Ohio St., 203, 34 N.E. (2d), 219; City of Cincinnati v. Gamble, et al., Bd. of Trustees, 138 Ohio St., 220, 34 N.E. (2d), 226; In re Fortune, 138 Ohio St., 385, 35 N.E. (2d) 442; State ex rel. O'Driscoll, a Taxpayer, v. Cull et al., Civil Service Comm., 138 Ohio St., 516, 37 N.E. (2d) 49; and State, ex rel. Daly v. City of Toledo, 142 Ohio St., 123, 50 N. E. (2d) 338. Each of these six decisions was rendered only 12 to 15 years ago and five of them were concurred in by three of the present members of this court and the sixth (State ex rel. Daly v. City of Toledo) was concurred in by two of those judges.
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> It is regrettable that this court should neglect either to overrule, distinguish or even to notice its previous decisions and pronouncements of law made so recently and which are so difficult to reconcile with the decisions rendered in the Lapolla case and in this case."

Since the Lynch case recognizes the supremacy of the municipal government over that of the state in the field of police, and by implication fire, protection, I feel compelled to hold that a fire chief is an officer of the municipality. Necessarily, Opinion No. 2318, Opinions of the Attorney General for 1953, which relied upon the Houston case and others as authority, no longer is declarative of the existing law.

Having determined that a fire chief is a municipal officer, it follows that he must comply with the provisions of Section 733.68, Revised Code, which requires him to be an elector of said corporation. This, of course, means that the fire chief must be a resident of the municipality which he serves unless such municipality chooses to provide otherwise in its charter.

For the reason herein stated, it is my opinion and you are advised that:

1. There being no statute requiring firemen and the fire chief to be residents of the township in which they serve, it is manifest that no such requirement exists.

2. Village firemen, not being "officers" within the meaning of Section 733.68, Revised Code, are not required to be electors of the municipal corporation which they serve.

3. A village fire chief is an officer of a municipality within the meaning of Section 733.68, Revised Code, and as such must be an elector of the said municipality, unless otherwise provided in the charter, Opinion No. 2318, Opinions of the Attorney General for 1953, page 39, modified on the authority of Lynch v. Cleveland, 164 Ohio St., 437.

Respectfully,
WILLIAM SAXBE
Attorney General