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1. VILLAGE MARSHAL — VACANCY IN OFFICE — SEPTEMBER 5 - DECEMBER 31, 1941 — FILLED UNDER PROVISIONS SECTION 4252 NOT AS PRESCRIBED IN SECTION 4384-2 GENERAL CODE.
2. VILLAGE MARSHAL, EXISTENT CHIEF OF POLICE, APPOINTED PURSUANT TO SECTION 4384 GENERAL CODE, IS "OFFICIAL" — NOT ENTITLED TO PARTICIPATE IN STATE INSURANCE FUND AS VILLAGE EMPLOYE — SECTION 1465-61, PARAGRAPH 1, GENERAL CODE.

SYLLABUS:

1. *Vacancies in the office of village marshal occurring between September 5, 1941 and December 31, 1941 shall be filled in the manner provided in Section 4252, General Code, and not as prescribed in Section 4384-2, General Code.*

2. *A village marshal, now designated chief of police, appointed pursuant to Section 4384, General Code (119 v. S. 3), is an "official" within*

the purview of paragraph 1 of Section 1465-61, General Code, and is not, therefore, entitled to participate in the state insurance fund as an employe of the village.

Columbus, Ohio, November 26, 1941.

Hon. Carl W. Rich, Prosecuting Attorney,
Cincinnati, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion wherein you propound the following questions:

“1. If a marshal, who was duly elected in 1939, resigns his office at this time, can he be immediately appointed at the same salary under the new law, or would such appointment act merely as an appointment for the unexpired term?”

2. Will chiefs of police appointed under the new law be entitled to the benefits of the Industrial Commission Act?”

The Ninety-Fourth General Assembly, in Amended Senate Bill No. 3, amended Section 4384, General Code, whereby the office of village marshal was changed from an elective to an appointive one. Although this section became effective September 5, 1941, it did not affect the tenure of office of village marshals who were regularly elected, pursuant to former Section 4384, General Code, in November, 1939. See Opinion No. 4049, Opinions of the Attorney General for the year 1941. In other words, marshals elected in November, 1939, remain in office for the two year term ending December 31, 1941.

Such being the case, we come to your first question which is concerned with the tenure of office of one appointed to fill a vacancy in the office of village marshal which arose subsequent to September 5, 1941. More specifically you inquire whether such appointee serves only for his predecessor's unexpired term or enjoys the indefinite tenure, subject to removal for cause, provided in Section 4384, General Code (119 v. S. 3).

Article XVII, Section 2 of the Constitution of Ohio provides:

“ * * * the term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four (4) years as may be so prescribed (by the General Assembly). * * *

Any vacancy which may occur in any elective state office other than that of a member of the General Assembly or of Governor, shall be filled by appointment by the Governor until the disability is removed, or a successor elected and qualified. Every such vacancy shall be filled by election at the first general election for the office which is vacant, that occurs more than thirty (30) days after the vacancy shall have occurred. The person elected shall fill the office for the unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by law." (Parenthetical matter mine.)

The latter provision with respect to vacancies in "other elective offices" is applicable to municipal officers. *Jones vs. Cleveland*, 124 O.S. 544, 548. Pursuant to this constitutional mandate, the Legislature enacted Section 4252, General Code, which reads as follows:

"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."

It being not "otherwise provided by law" it appears that at least prior to September 5, 1941, a vacancy in the elective office of village marshal was filled by the mayor for the unexpired term.

With the above in mind, we turn now to Section 4384-2, General Code, which was enacted by the present General Assembly as part of the same act in which Section 4384, General Code, was amended (Amended Senate Bill No. 3, 94th General Assembly.) Said section provides in part as follows:

"All appointments made after the effective date of this act, except those officers holding office on the effective date thereof, shall be for a probationary period of six months continuous service, and no appointments shall be deemed finally made until the appointee has satisfactorily served his probationary period.
* * * "

The question now arises whether this section or Section 4252, supra, applies when filling a vacancy in the office of village marshal between September 5, 1941 and December 31, 1941. To pose the question another way, we are called upon to determine whether at the present time the office of village marshal is an elective or appointive one. If we conclude

the office is elective it appears Section 4252, supra, would apply; otherwise Section 4384-2 would govern.

In Opinion No. 4049, Opinions of the Attorney General for 1941, it was held that the term of a village marshal elected November, 1939 was not affected by Amended Senate Bill No. 3, supra. It would necessarily follow that said office remains an elective one until the expiration of such marshal's term on December 31, 1941, and, therefore, Section 4252, supra, would apply. Moreover, to hold otherwise would be contrary to the limitations relative to the filling of vacancies contained in Article XVII, Section 2, supra.

I am, therefore, of the view that the earliest time possible at which an appointment pursuant to Section 4384-2, supra, may be made is January 1, 1942, and further, that the present mayor and council are without authority to make any such appointment to become effective January 1, 1942, at which time the terms of such mayor and council will have expired. As stated by the Supreme Court in the case of *State, ex rel. Morris v. Sullivan*, 81 O.S. 79:

"1. The well settled rule of the common law forbids that an officer clothed with power of appointment to a public office, shall forestall the rights and prerogative of his successor, by making a prospective appointment to fill an anticipated vacancy in an office the term of which cannot begin until after his own term and power to appoint have expired."

See also *State, ex rel. Moulton v. Myers*, 99 O.S. 26 and 32 O. Jur. 922.

In answer to your first question I am, therefore, of the opinion that vacancies in the office of village marshal occurring between September 5, 1941 and December 31, 1941 shall be filled in the manner provided in Section 4252, supra, and not as prescribed in Section 4384-2, supra.

Your second question as to whether or not the village marshal now designated chief of police is entitled to participate in the state insurance fund, requires a consideration of Section 1465-61, General Code, which provides in part as follows:

"The term 'employee,' 'workman' and 'operative' as used in this act, shall be construed to mean:

1. Every person in the service of the state, or of any county, city, township, incorporated village or school district therein, including regular members of lawfully constituted police

and fire departments of cities and villages, under any appointment or contract of hire, express or implied, oral or written, except any official of the state or of any county, city, township, incorporated village or school district therein."

Immediately the question arises: Is the chief of police an "employee" or an "official" of the village? If the former, he may participate in the state insurance fund; otherwise not.

On a number of occasions our Supreme Court has been called upon to consider the distinction between an "employee" and an "officer," and further, to define the attributes of an office. An examination of these cases leads to the conclusion that the question of whether or not a particular position constitutes an "office" depends upon delegation thereto of a portion of the sovereign power. This view is supported by reference to the following authorities:

State, ex rel. Attorney General v. Jennings, et al., 57 O.S. 415:

"2. To constitute a public office, against the incumbent of which *quo warranto* will lie, it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else."

Industrial Commission of Ohio v. Rogers, 122 O.S., 134, 136:

"There are many definitions of an 'officer,' none of which is sufficient to determine the status of every agency through which the state acts; but the outstanding characteristic common to all definitions of an officer is the possession by him of some sovereign power."

State, ex rel. Newman v. Skinner, 128 O.S. 325:

"1. 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."

See also *State, ex rel. Landis v. Board of Commissioners*, 95 O.S. 157; *State, ex rel. Alcorn v. Beeman*, 34 O.App. 382; Annotation, 93 A.L.R. 333, 334; 22 R.C.L. 374; Opinion No. 3217, Opinions of the Attorney General for 1940, Vol. II, page 1190.

Having in mind the above expressions of the Supreme Court, let us inquire as to the powers and duties of the village marshal or chief of police. Of importance is Section 4385, General Code, which provides as follows:

“The marshal shall be the peace officer of the village and the executive head under the mayor of the police force. The marshal, the deputy marshals, policemen or nightwatchmen under him shall have the powers conferred by law upon police officers in all villages of the state, and such other powers not inconsistent with the nature of their offices as are conferred by ordinance.”

Additional powers and duties of the marshal are set forth in Sections 4386 and 4387, General Code.

An examination of the sections above referred to leads to the conclusion that as executive head of the village police force the chief has been invested with a portion of the sovereign power of the state and as such is an “official” within the purview of Section 1465-61, *supra*.

In the case of *Davis v. Industrial Commission*, 54 O.App. 453, the Court of Appeals of Wood County was called upon to determine in what capacity the deceased was acting at the time of his death. At page 455 of the Opinion it was said:

“ * * * If he was attempting to make the arrest in the capacity of deputy sheriff of Wood County, then his widow might be entitled to compensation from the Industrial Commission of Ohio out of the Workmen’s Compensation Fund. *But if he was acting and engaged in the performance of his duties as marshal of the village of North Baltimore at that time, then no right of compensation exists.*” (Emphasis mine.)

The court did not state specifically its reasons for the view expressed by the language above emphasized, but undoubtedly it was based upon the fact the court considered the village marshal an “official” within the meaning of Section 1465-61, *supra*.

Since the *Davis* decision the Legislature, as explained above, has changed the office of village marshal from an elective to an appointive one. This change, however, was not accompanied by a change in the powers and duties of said office. Those powers and duties attached to the office remain the same; Sections 4385, 4386 and 4387, *supra*, were not altered or amended. As pointed out above, those sections invest the

marshal with a portion of the sovereign power of the state and authorize him to exercise the executive functions therein prescribed. In the Davis case, *supra*, it appears the court based its conclusions on the nature of the duties of the village marshal. No change having been made in those duties, we feel the expression of the court in that case remains applicable irrespective of the fact the tenure of office was changed.

Answering your second question, it is my opinion that a village marshal, now designated chief of police, appointed pursuant to Section 4384, General Code (119 v. S. 3), is an "official" within the purview of paragraph 1 of Section 1465-61, *supra*, and is not, therefore, entitled to participate in the state insurance fund as an employe of the village.

Respectfully,

THOMAS J. HERBERT,

Attorney General.