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VILLAGE MARSHAL — TENURE OF OFFICE — AMENDED SENATE BILL 3, 94 GENERAL ASSEMBLY — WHERE TERM EXPIRES DECEMBER 31, 1941 — INCUMBENT REMAINS UNTIL SUCCESSOR APPOINTED — SECTION 4384 G.C. — WHEN MAYOR MAY APPOINT VILLAGE MARSHAL WHO SHALL BE DESIGNATED CHIEF OF POLICE — PROBATIONARY PERIOD — THOSE PERMANENTLY APPOINTED ON AND AFTER SEPTEMBER 5, 1941 — REMOVAL FROM OFFICE — SECTIONS 4263 TO 4267 G.C.

SYLLABUS:

1. *The tenure of office of a village marshal who was elected for a two year term ending December 31, 1941, is not affected by the enactment of Amended Senate Bill No. 3, Ninety-Fourth General Assembly.*

2. *One whose elected term as village marshal expires December 31, 1941, remains in such office until such time as his successor is appointed, in the manner prescribed by Section 4384 (119 v. S. 3), and qualifies therefor.*

3. *At the end of an elected village marshal's term (December 31, 1941), the village mayor, with the advice and consent of the village council, may appoint a marshal who shall be designated chief of police. If such appointee is the marshal who is holding office on September 5, 1941, the appointment is complete at the outset. Should the appointee be some other person his appointment may not be deemed finally made until he has successfully concluded a probationary period of six months continuous service.*

4. *Those village marshals permanently appointed on or after September 5, 1941, may be removed from office only as prescribed in Sections 4263 to 4267, inclusive, General Code.*

Columbus, Ohio, August 8, 1941.

Hon. Lester W. Donaldson, Prosecuting Attorney,
Painesville, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion on the following:

"I would appreciate an interpretation from your office of Amended Senate Bill No. 3, which was passed by the last session of the General Assembly. It amends Section 4384, 4384-1 and 4384-2 of the General Code.

Referring particularly to Revised Section 4384-2, which reads in part as follows:

'All appointments made after the effective date of this Act except those officers holding office on the effective date hereof shall be for a probationary period of six months continuous service, * * * .'

The questions upon which we would like to have your opinion are as follows:

(1) Does the present marshal, whose term expires December 31, 1941, and who does not resign as marshal, hold office until the end of his elected term, or is it possible to replace him by appointing a marshal by act of the Mayor and with confirmation of Council before his term expires?

(2) Assuming that the present marshal's term expires on December 31, 1941, does he hold over after this date and is he considered as 'an officer holding office on the effective date hereof' or on January 1, 1942 will it be possible for Council and the Mayor to appoint a new marshal?

(3) Does the Act in question give a present marshal the right to continue in office beyond his elected term of office without reappointment or until removed as provided for in the Act?"

Amended Senate Bill No. 3, Ninety-Fourth General Assembly, to which you refer, will become effective September 5, 1941. By this act, the General Assembly amended Section 4384, General Code, and enacted supplemental Sections 4384-1 and 4384-2, General Code, relative to the appointment and removal of marshals and other village police officers. Said act changed the office of village marshal from an elective to an appointive one. This is evidenced by a comparison of existing Section 4384 with said section as amended, as follows:

Section 4384, General Code:

"The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. When provided for by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special policemen, and may remove them for cause, which shall be stated in writing to council."

Section 4384, General Code, as amended, (119 v. S. 3)

"In each village there shall be a marshal, who shall be designated chief of police, who shall be an elector thereof, appointed by the mayor with the advice and consent of council, and 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. Provided, however, that in the case of the removal of a marshal or chief of police of a village, an appeal may be had from the decision of the village council to the court of common pleas of the county in which such village is situated,

to determine the sufficiency of the cause of removal. Such appeal shall be taken within ten days from the finding of the village council."

Your inquiry is concerned with a village marshal who was elected, under the provisions of existing Section 4384, supra, for a two year term ending December 31, 1941. The question arises what effect, if any, Amended Senate Bill No. 3, supra, has on his tenure of office. Controlling in this respect is Article II, Section 20 of the Constitution of Ohio, which provides as follows:

"The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Clearly, the office of village marshal has not been abolished. This being true, a marshal who was elected in 1939 for a two year term retains that office until the expiration thereof, i.e., December 31, 1941. To hold that said marshal's term expires on the effective date of Section 4384, as amended, would violate the inhibition of Article II, Section 20, supra. Such an interpretation would affect the salary of such officer during his existing term by depriving him thereof for the period beginning September 5, 1941 and ending December 31, 1941. Accordingly, in specific answer to your first question, it is my opinion that the tenure of office of a village marshal who was elected for a two year term ending December 31, 1941, is not affected by the enactment of Amended Senate Bill No. 3.

Your second and third questions are related and will be discussed together. Section 4384-2, General Code, quoted in part in your letter, provides as follows:

"All appointments made after the effective date of this act, except those officers holding office on the effective date hereof, 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. At the end of the probationary period the mayor shall transmit to the council a record of such employee's service with his recommendations thereon; and with the concurrence of the council the mayor may remove or finally appoint the employee, as the case may be."

Herein provision is made for a probationary period which must be served by all marshals who are appointed after September 5, 1941. The section, however, contains an exception to the effect that those officers

holding office on September 5, 1941, who are later appointed to the same office in the manner prescribed by Section 4384, as amended, need not serve such probationary period. Having already occupied the office in question, such persons may be finally appointed at the outset. All other appointees, i.e., those not holding office on September 5, 1941, must first serve a probationary period of six months continuous service before their "appointments shall be deemed finally made."

Let us now consider the right of an elected marshal to hold over after the expiration of his term on December 31, 1941. Under the provisions of existing Section 4384, *supra*, such marshal "shall serve until his successor is elected and qualified." As of September 5, 1941, this section, of course, is of no force and effect; it will be superseded by Section 4384, as amended. This being the situation, your attention is invited to Section 8, General Code, which provides as follows:

"A person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

There being no other provision in the laws or constitution with respect to the right of a village marshal to hold over after the expiration of his term, it would appear that this section is controlling in that regard. Consequently, it is my opinion that one whose elected term as village marshal expires December 31, 1941, remains in such office until such time as his successor is appointed, in the manner prescribed by Section 4384, (119 v. S. 3), and qualifies therefor. At the end of an elected village marshal's term, however, it is within the discretion of the village mayor to appoint, with the advice and consent of the village council, a marshal who shall be designated chief of police. The mayor and council may, of course, choose to name the marshal whose elected term has just expired. As explained above, in such case the appointment would become final immediately. However, should the appointee designated be some other person, his appointment may not be deemed finally made until the successful conclusion of six months continuous service. In either case, once the final appointment has been made, removal may be effected only as prescribed by Sections 4263 to 4267, inclusive, General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.