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NATURAL RESOURCES, DEPARTMENT OF—MEMBER OF LEGISLATURE WHICH CREATED OFFICES, CHIEF OF DIVISION OF WATER, GEOLOGICAL SURVEY, FORESTRY OR WILDLIFE—CAN NOT BE APPOINTED TO SUCH OFFICE—ARTICLE II, SECTION 19, OHIO CONSTITUTION.

SYLLABUS:

A member of the legislature which created the offices of Chief of Divisions of Water, Geological Survey, Forestry or Wildlife cannot be appointed to such office by reason of Article II, Section 19 of the Ohio Constitution.

Columbus, Ohio, May 24, 1950

Hon. A. W. Marion, Director, Department of Natural Resources
Columbus, Ohio

Dear Sir :

Your request for my opinion reads as follows :

“I would appreciate very much receiving your formal opinion as to the legality of appointing a member of the present legislature to the position of Chief in one of the Department’s Divisions of the Department of Natural Resources.

“For example, were the Chiefs of one of the Divisions, such as Water, Geological Survey, Forestry and Wildlife, which were in existence prior to the establishment of the enactment of Senate Bill 13 establishing a new Department of Natural Resources, to resign, could a member of this present legislature legally be appointed as Chief of one of those Divisions or would it be necessary to wait twelve months after the Bill became effective, as would be the case in the appointment of the Chief in one of the newly created Divisions.

“I will appreciate very much receiving your formal opinion on this matter at the earliest possible date.”

From your request it is evident that you believe the newly created Divisions of Water, Geological Survey, Forestry and Wildlife are not new creations but mere extensions of the old “divisions.” For example, your request assumes that the office of Chief of Division of Forestry was in existence prior to the enactment by the 98th General Assembly of Senate Bill No. 13. It should be pointed out that these Divisions are as much new Divisions of the Department of Natural Resources as the Division of Parks. For example, before the enactment of Senate Bill No. 13 by the 98th General Assembly, the state agricultural experiment station was in charge of the supervision of forestry in Ohio. There was no legally created *Division* which could be considered as a counterpart of the new Division of Forestry. To substantiate this view, Section 154-6, General Code, should be examined. It reads in part as follows :

“Offices are created within the several departments as follows :

“* * * In the department of natural resources :

Chiefs of divisions as follows:

Lands and soil.
 Water.
 Forestry.
 Wild life.
 Geological survey.
 Parks.
 Beach erosion. * * *"

This section *creates* the new offices of chiefs of the various divisions under the Department of Natural Resources. This section became effective August 11, 1949. There was no such office as Chief of the Division of Forestry before the effective date of this act.

Further examination of Senate Bill No. 13 reveals that the older sections of the Ohio Code which gave powers similar to those now had by the new Divisions to various offices of the state were expressly repealed by this Senate Bill No. 13 and are no longer in existence.

Article II, Section 19 of the Ohio Constitution provides as follows:

"No senator or representative shall, during the term for which he shall have been elected, or for one year thereafter, be appointed to any civil office under this state, which shall be created or the emoluments of which shall have been increased, during the term for which he shall have been elected."

In 32 O. Jur. 855, it states as follows:

"Generally, according to legal definition, an office is an employment on behalf of the government, in any station or public trust, not merely transient, occasional, or incidental. As a general rule, the term 'office' embraces the ideas of tenure, duration, emolument, and duties. In accordance therewith, it is said that a public office is the right, authority, and duty created and conferred by law by which, for a given period—either fixed by law or enduring at the pleasure of the creating power—an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

In the case of *The State, ex rel. Herbert v. Ferguson, Auditor*, 142 O. S. 496 at page 501, the court defines a "civil office" as follows:

"A 'civil office' or a public office of a civil nature, as defined by the Ohio cases, is a charge or trust conferred by public authority for a public purpose, with independent and continuing

duties, involving in their performance the exercise of some portion of the sovereign power. * * *

Sovereign powers is defined in 32 O. Jur. 862, as follows :

“* * * Sovereignty, in its broadest aspects, means supreme power ; and if a man is placed in a position which is continuous and permanent, and has certain powers which, under the law, nobody can exercise but him—which nobody can control but him then he has some of the sovereign power delegated to him ; and as long as he continues, or the law which provides for the office or place continues, he has that portion of the sovereign power existing in him. Manifestly, however, each case should be decided on its peculiar facts, and this involves necessarily a consideration of the legislative intent in framing the particular statute by which the position, whatever it may be, is created. It has been decided that if specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state. Therefore, an appointee whose duties though specifically fixed by law, do not require the exercise of political or governmental functions as a part of the sovereignty of the state but simply involve the exercise of clerical acts in recording the transactions of officers who are invested with such functions, is not such a public officer as contemplated by the Ohio Constitution. But an individual upon whom is devolved the performance of independent statutory duties which, to a certain extent, involve the exercise of part of the sovereignty of the state, although subject to the direction and control of a statutory board, is generally considered a public officer.”

Examination of the powers and duties of the various Chiefs of Divisions under the Department of Natural Resources reveals that they do exercise such sovereign powers as selling or leasing impounded waters, issuing permits for fish propagation, and “acting in those multitudinous cases involving business or political dealings between individuals and the public wherein the latter must necessarily act through an official agency.” Thus, I believe that the offices of Chiefs of the Divisions of Water, Geological Survey, Forestry and Wildlife are “civil offices” within the purview of Article II, Section 19 of the Ohio Constitution.

In conclusion, therefore, it is my opinion that a member of the legislature which created the offices of Chiefs of Divisions of Water, Geological Survey, Forestry or Wildlife cannot be appointed to such office by reason of Article II, Section 19 of the Ohio Constitution.

Respectfully,

HERBERT S. DUFFY,
Attorney General.