

4058

1. UNITED STATES, ARMED FORCES — ENLISTMENT OR CONSCRIPTION — PERSON ABSENT VACATES POSITION IN CLEVELAND CITY COUNCIL BY SPECIFIC TERMS OF CHARTER.
2. SUCH PERSON MAY BE CANDIDATE FOR OFFICE, MEMBER CLEVELAND CITY COUNCIL — MAY NOT QUALIFY FOR THAT OFFICE, IF ELECTED.

SYLLABUS:

1. *A person absent with the armed forces of the United States either by reason of enlistment or conscription by virtue of the specific terms of the charter of the City of Cleveland, Ohio, vacates his position in the city council.*

2. *A person absent with the armed forces of the United States may be a candidate for the office of member of city council of the City of Cleveland, Ohio, but because of his status in the armed forces may not qualify for that office if elected.*

Columbus, Ohio, August 11, 1941.

Bureau of Inspection and Supervision of Public Offices, State House Annex,
Columbus, Ohio.

Gentlemen:

I have your recent letter which presents for answer the following three questions regarding the council of the City of Cleveland, Ohio:

“(1) Does a member of a City Council, who is drafted **into the United States Army** under the Selective Service Act and executive orders issued in connection therewith, vacate his office upon being inducted into the United States Army?

(2) Does a member of a City Council, upon voluntary enlistment in the military or naval forces of the United States, vacate his office as Councilman upon being accepted and assigned to duty in the armed forces of the United States?

- (3) Is a member of the armed forces of the United States, on active duty as such, eligible for election to the office of member of Council of a municipality?"

In an opinion dated November 2, 1940 and found in Opinions of the Attorney General for the year 1940, Vol. II, page 962, I came to the conclusion that the office of county auditor does not become vacant by reason of the absence of the incumbent while on active duty as an officer of the reserve corps of the United States Army. I see no need to repeat the reasoning and the discussion of that opinion which lead to the conclusion adopted therein. That opinion, which I consider to be the general rule applying in the case of an officer absent temporarily with the armed forces of the United States, was based upon general principles of law applying to the vacation or abandonment of office in the absence of specific statutory provisions which would, of course, control. That rule was legislatively stated by the present General Assembly when it enacted legislation, the effect of which is to cause a vacation of any county office after a ninety day absence of the incumbent. See Sections 2397-1 and 2397-2, General Code. The act of the Legislature, however, makes this exception:

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

It is my view then that the rule of the above opinion would apply in the situation you present unless some specific provisions of the charter of the City of Cleveland dictate an opposite result. Proceeding to examine the pertinent sections of the charter of the City of Cleveland, I find that Section 24 provides for the council of that city and is as follows:

"The legislative powers of the city, except as reserved to the people by this charter, shall be vested in a council, each member of which shall be elected from a separate ward. Members of council shall be elected for a term of two years and shall serve until their successors are chosen and have qualified. If at any time, the office of a member of council is vacant by reason of non-election, death, resignation, removal of residence from the ward represented or from any other cause whatsoever, except when the vacancy is caused by a recall election, such vacancy shall be filled by the council for the unexpired term."

The qualifications requisite for members of the council are stated in Section 26, which follows:

“Members of the council shall be residents of the city and have the qualifications of electors therein. A member of the council, who at the time of his election, was a resident of the ward which he represents shall forfeit his office if he removes therefrom. Members of council shall not hold any other public office or employment, except that of notary public or member of the state militia, and shall not be interested in the profits or emoluments of any contract, job, work or service of the municipality. Any member who shall cease to possess any of the qualifications herein required shall forthwith forfeit his office, and any such contract in which any member is or may become interested may be declared void by the council. No member of the council shall, except in so far as is necessary in the performance of the duties of his office, directly or indirectly interfere in the conduct of the administrative department, or directly or indirectly take any part in the appointment, promotion or dismissal of any officer, or employee in the service of the city other than the officers or employees of the council.”

Section 27 in part touches on the question of vacancies by the following language:

“ * * * For each absence of a member from regular meetings of the council, unless authorized by a two-thirds vote of all members thereof, there shall be deducted a sum equal to two per cent (2%) of the annual salary of each member. Absence from ten (10) consecutive regular meetings shall operate to vacate the seat of a member unless such absence be authorized by the council.”

Without repeating the specific words of those sections it can be seen from them that vacancies in council arise by death, non-election, resignation, removal of residence from the ward represented, the holding of any other public office or employment and ten unexcused consecutive absences from the meetings of council. Of the above reasons for the existence of a vacancy the one stating “shall not hold any other public office or employment except that of notary public or member of the state militia” by its nature demands first consideration.

The same words are found in Section 4207, General Code, which states the qualifications for members of council of a city not operating under charter and various courts in passing upon those words have indicated that they are broad in scope and not limited. For example, see State, ex rel. Shank v. Gard, 8 O.C.C. (N.S.) 599, wherein it was said:

“The inhibition against the holding of other public office or employment * * * relating to the qualifications of councilmen, is not limited to other office or employment by the municipality, but extends to all public office and employment.”

In the case of *State, ex rel. Baden vs. Gibbons*, 40 O.L.R. 285, the same words were under consideration and the same result was stated by the court. Since it is necessary to construe the words "other public office or employment" as meaning any public office or employment, it becomes necessary to determine if absence with the armed forces, either voluntary or by conscription, amounts to the "holding of other public office or employment."

I feel that it may be said without long discussion that the holding of a commission as an officer in the armed forces of the United States constitutes the holding of public office under the authority of the United States and that, consequently, a commissioned officer in the armed forces is a public officer of the United States. See *Opinions of the Attorney General for the year 1940, Vol. II, page 982*. So it may be said that if either of the persons about whom you inquire are to be absent as a commissioned officer he holds other public office and, consequently, vacates his position in council. I feel likewise that it may be said that a person in the armed forces of the United States who is not a commissioned officer holds other public employment.

In 18 R.C.L., at page 1045, it is said that one who enlists in the armed forces enters into a contractual relationship. If the relationship is contractual and for his services the person concerned receives compensation, as do all members of the armed forces, it may be safely said that his status in the armed forces is one of public employment. Also in *Andrews v. The State*, 90 Pac. (2nd) 995 (Ariz.), it is said in the first headnote:

"The act of enlisting in the national guard is of a contractual nature resulting in employment of the enlisted men by the State."

And at page 996:

"Under the contract the state has employed the enlisted men."

From the above statements it would follow that one who enlists in the army of the United States likewise enters into the employ of the United States and holds other public employment and a person conscripted or drafted into the army, in my opinion, would also be in the employ of the United States since he likewise receives compensation from

the United States in return for his services to the federal government. It is necessary, therefore, to come to the conclusion that the words of Section 26 of the city charter of Cleveland, "members of council shall not hold any other public office or employment * * * , " prohibit a member of city council from holding his position in council and also being a member in the armed forces of the United States as a commissioned officer or otherwise, and that the effect of enlistment or conscription into the army would create a vacation of the position in council. See *State, ex rel. Baden v. Gibbons*, supra, wherein at page 291 it is said:

"Where, however, it is the holding of two offices at the same time which is forbidden by the constitution or the statutes, a statutory incompatibility is created, similar in its effect to that of the common law, and, as in the case of the latter, it is well settled that the acceptance of a second office of the kind prohibited, operates *ipso facto* to absolutely vacate the first."

Your third question is whether or not a person, absent with the armed forces of the United States, may become a candidate for election to the position of a member of city council of Cleveland, Ohio.

The charter of the city requires two qualifications only for candidates to member of the city council. They are that members of the council shall be residents of this city and have the qualifications of electors therein. It is obvious that the persons about whom you inquire are electors and residents of the city else they could not have been originally elected to the office they now hold and that there is nothing in the charter to prevent their standing for re-election. However, such action would be an empty gesture for if elected while absent with the armed forces, they would be "holding other public office or employment" and if they qualify after election, by reason of their holding other public office or employment there would be an instantaneous forfeiture of their office in council. Therefore, for a practical answer to your third question it may be said that a person absent with the armed forces of the United States may be a candidate for city council of the City of Cleveland, Ohio, but that such person can not qualify for the office after elected by reason of his membership in the armed forces.

I am fully aware that the conclusion reached herein will no doubt work a hardship in some instances. It may seem unjust to hold that a young man who has spent years and made many sacrifices to qualify himself to serve the public should lose, after having attained his goal and realized his ambitions, his seat in council and be deprived of the emolu-

ments thereof, because he chose to serve his country in time of need or was involuntarily inducted into the military service. With regard thereto, however, it must be borne in mind that the consideration of hardship may never prevail against the positive provisions of law. The people of Cleveland when they fixed the qualifications of councilmen in the charter of that city did so in clear and unmistakable language. Therefore, the Attorney General may not take into consideration the hardship, inequality or unfairness which may be caused thereby. It is his duty to interpret the law as he finds it without reference to whether the provisions thereof are wise or unwise, fair or unfair. It would, therefore, be a wholly unwarranted exercise of power for me, in the instant case, where the charter provisions under consideration are clear and unambiguous and not susceptible to dual construction, to take into consideration the expediency thereof. If the provisions of the Cleveland charter with respect to qualifications of councilmen seem harsh or unjust, the remedy is not in the hands of the Attorney General but lies in an amendment to said charter.

In connection herewith, I might also point out that a liberal construction in favor of the public should always be accorded a statute, as the Legislature is presumed to have enacted laws for the public good. Courts have repeatedly declared that where a reasonable interpretation can be given to a statute which will make it operate for the welfare of the public as distinguished from the welfare of certain individuals, such interpretation should be adopted.

Specifically stating the conclusions reached herein, I am of the opinion that:

1. A person absent with the armed forces of the United States either by reason of enlistment or conscription by virtue of the specific terms of the charter of the City of Cleveland, Ohio, vacates his position in the city council.

2. A person absent with the armed forces of the United States may be a candidate for the office of member of city council of the City of Cleveland, Ohio, but because of his status in the armed forces may not qualify for that office if elected.

Respectfully,

THOMAS J. HERBERT,
Attorney General.