

Director of the Department of Public Works, certain premises for the use of the Ohio Unemployment Compensation Commission.

By this lease, which is for the term of two years and seventeen days, commencing on the 15th day of December, 1938, and ending on the 31st day of December, 1940, and which provides for an annual rental of \$3,900.00, payable in quarterly installments of \$975.00 each, there is leased and demised to the State for the use of the Ohio Unemployment Compensation Commission, a remodelled, two-story building located at 237-238 Boardman Street in Youngstown, Ohio, containing approximately a total of 8000 square feet of floor space.

This lease has been properly executed by the Massachusetts Mutual Life Insurance Company, the lessor, by the hand of its Vice President, duly authorized in the premises. I likewise find that this lease and the provisions thereof are in proper form.

The lease is accompanied by contract encumbrance record No. 74, which has been executed in proper form and which shows that there are unencumbered balances in the rotary appropriation account sufficient in amount to pay the rental under this lease from December 15, 1938, to December 31, 1938. This is a sufficient compliance with the provisions of Section 2288-2, General Code. This lease is accordingly approved by me and the same is herewith returned to you.

Respectfully,

HERBERT S. DUFFY

Attorney General.

3171.

UNEMPLOYMENT RELIEF STUDY COMMISSION—MEMBERSHIP AN OFFICE—PURVIEW, CONSTITUTION, ARTICLE IV, SECTION 14—MAY NOT BE HELD BY JUDGE, COMMON PLEAS COURT—SEE AMENDED SENATE BILL 478.

SYLLABUS:

Membership on the Unemployment Relief Study Commission created by Amended Senate Bill 478 of the 92nd General Assembly in special session is an office within the meaning of the term as used in Article IV, Section 14 of the Constitution, and may not be held by a judge of the common pleas court.

COLUMBUS, OHIO, November 1, 1938.

HON. WILLIAM M. BOYD, Chairman, Unemployment Relief Study Commission, 14907 Sylvia Avenue, Cleveland, Ohio.

DEAR SIR: Your letter of recent date is as follows:

"Judge W. J. Jones of McArthur, Ohio, has been appointed by the Governor to serve on the Unemployment Relief Study Commission, the purpose of which is to study and investigate the problem of relief and report back its recommendations to the 93rd General Assembly.

The question has been raised as to whether or not a judge of the common pleas bench can serve on any such commission. As you undoubtedly know, there is no compensation connected with this appointment except reimbursement for traveling and other expenses incurred in connection with the duties of this commission.

The members of the commission would like to have your opinion on this matter."

Amended Senate Bill No. 478, passed July 1, 1938, approved July 11 and filed in the office of the Secretary of State July 11, 1938, creates your commission and provides its powers and authority in the following language:

"SECTION 1. That an unemployment relief study commission be, and is hereby created, consisting of nine members, as follows: Three members of the Senate appointed by the presiding officer thereof; three members of the House of Representatives appointed by the Speaker; and three citizens of Ohio who are public officials of local government to be appointed by the governor. The members of the commission shall serve without pay, but shall be reimbursed for their actual traveling and other expenses incurred in connection with the duties of the commission.

SECTION 2. That within ten days after the date of adjournment or recess of the present session, the governor shall call a meeting of the members of the commission, and at such meeting the commission shall organize, select a chairman, a vice-chairman, employ a secretary, and adopt rules of procedure. The commission shall proceed with all dispatch in the study of all laws and acts concerning unemployment relief, poor relief, work relief, statutory relief, relation of public assistance and unemployment, cooperation between local subdivisions, the state and federal agencies, and all factors concerning and affecting the social problem of unemployment relief.

SECTION 3. Said commission is hereby given full power and authority to summon and examine witnesses, compel the production of records, books, documents, files and data of all public and private agencies and organizations; all of which powers and functions and duties to be effective at any and all hearings, which the commission is hereby authorized to conduct at any place or places in the state of Ohio as in its discretion it may deem necessary, and to do all things necessary and reasonable for the purpose of this Act.

The commission may, if it deems it advisable, visit such other states as are known to have perfected the financing and the administration of relief, for the purpose of securing additional data.

SECTION 4. Recognizing the permanent character of unemployment and the need of a permanent division within the department of welfare, the commission shall make a study of and recommend legislation for revenue purposes based on taxation according to the ability to pay and make a study of and recommend such revision of laws and/or new legislation for reorganization of the department of welfare as may be most beneficial and proper for the purposes set forth herein.

SECTION 5. The commission shall recognize that the welfare of the people of Ohio is a first consideration of government, and that the people of Ohio must have the opportunity to live as a free and happy people with adequate food, clothing, shelter, personal, and family necessities so as to preserve the health of its people, their homes and family life and to uphold the sacred institutions of this generation.

SECTION 6. The commission herein created shall make a full report of its findings and recommendations to the governor on or before December 31, 1938.

SECTION 7. There is hereby appropriated out of any moneys in the state treasury to the credit of the general revenue fund and not otherwise appropriated the sum of ten thousand dollars for the purpose of paying the expense of this commission."

Article IV, Section 14 of the Constitution provides, among other things, that judges of the common pleas courts shall not "hold any other office of profit or trust, under authority of this state, or the United States." Your inquiry accordingly resolves itself into a

determination of whether or not membership on your commission constitutes an office of trust within the meaning of the term as used in this constitutional limitation. It is clearly not an office of profit in view of the fact that it carries no compensation other than expenses.

There is no hard, fast rule by which it may be determined whether or not a given public employment may be a public office. The meaning of the term "office" as used in the Constitution has been considered by the Supreme Court on numerous occasions. One of the clearest statements of what constitutes a public office is contained in the opinion of such court in the case of *State, ex rel. vs. Commissioners*, 95 O. S. 157, wherein the court said at pages 159 and 160:

"The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him. But it has been held by this court that while an oath, bond and compensation are usually elements in determining whether a position is a public office they are not always necessary. * * * The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment. * * * It is no longer an open question in this state that to constitute a public office, * * * it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law."

A similar test for determining what constitutes a public office is set forth in 46 C. J. 929, as follows:

"An important characteristic which ordinarily distinguishes an office from an employment or contract lies in the fact that the creation of an office involves a delegation to the person filling the office of some part of the sovereign power or function of government to be exercised by him for the benefit of the public. But a public officer is none the less a public officer because his authority is confined to narrow limits since it is the duty, and the nature of that duty, which

makes him a public officer, and not the extent of his authority.”

The most recent authority in Ohio upon the question here under consideration is the case of *State, ex rel. vs. Gessner*, 129 O. S. 290, the second branch of the syllabus reading as follows:

“A judge of the Court of Common Pleas is precluded from becoming a member of a county charter commission by Section 14, Article IV of the Constitution of Ohio, providing that no such judge shall hold any other office of profit or trust under the authority of the state of Ohio or the United States.”

In the opinion of the court at pages 293 and 294, the following is said upon this subject:

“Definitions of public office, and as to who are public officers, as enunciated by the courts and text-writers, are numerous, 23 American and English Encyclopaedia of Law (2d Ed.), 322, gives the following definitions: ‘In the most general and comprehensive sense, a public office is an agency of the state, and a person whose duty it is to perform this agency is a public officer. Stated more definitely, a public office is a charge or trust conferred by public authority for a public purpose, the duties of which involve in their performance the exercise of some portion of the sovereign power, whether great or small. A public officer is an individual who has been appointed or elected in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law.’

Similarly, Mechem on Public Offices and Officers, Section 1, page 1, has this to say: ‘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.’”

While in the instant case, unlike the member of a county charter commission considered in the Gessner case, supra, the mem-

bers of your commission are appointed rather than elected, it is nevertheless observed that the members of your commission exercise entirely independent functions and prerogatives and in the formulation of their report and recommendations of appropriate legislation, members of your commission are not amenable to superior authority. Their tenure is reasonably definite in that their duties must be accomplished "on or before December 31, 1938." The nature of their work is clearly legislative, and in the public service. In my judgment, the work of your commission unquestionably constitutes the performance of sovereign functions. The language of the court in the Gessner case, *supra*, at page 295, is therefore particularly pertinent:

"He exercises independent prerogatives and is not amenable to superior authority. His tenure is reasonably definite in that his duties must be fully accomplished within ten months after election. His participation in framing or amending a charter is in the performance of sovereign powers. The nature of his work possesses legislative qualities. His acts are in the public service. While he is not required to take an oath of office, gives no bond, and receives no compensation, these are lesser indicia of public office and lose significance when compared with the other more important criteria which have been noted."

In view of the foregoing, I am constrained to the view and it is accordingly my opinion that membership on the Unemployment Relief Study Commission created by Amended Senate Bill 478 of the 92nd General Assembly in special session is an office within the meaning of the term as used in Article IV, Section 14 of the Constitution, and may not be held by a judge of the common pleas court:

Respectfully,

HERBERT S. DUFFY

Attorney General.