

749

1. SOLDIERS' RELIEF COMMISSION—SECTION 2930 G. C., AS AMENDED, PROVIDES FOR APPOINTMENT OF FIVE MEMBERS UPON TAKING EFFECT OF AMENDMENT, OCTOBER 16, 1945.
2. PROVISIONS NOT MANDATORY, BUT DIRECTORY AS TO TIME OF SUCH APPOINTMENT.
3. WHERE NO APPOINTMENTS MADE, MEMBERS HOLDING OFFICE PRIOR TO OCTOBER 16, 1945, ENTITLED TO HOLD OVER UNTIL SUCCESSORS DULY APPOINTED AND QUALIFIED—SECTION 8 G. C.
4. COMMISSIONERS ENTITLED TO COMPENSATION WHILE HOLDING OVER—SECTION 2932 G. C.
5. COMMISSIONERS WHILE SO HOLDING OVER HAVE AUTHORITY UNDER SECTIONS 2933-1 AND 2933-3 G. C. TO EMPLOY SUCH CLERKS AND OTHER ASSISTANTS NECESSARY FOR PERFORMANCE OF DUTIES COMMITTED TO THEM—COMPENSATION PAID OUT OF FUNDS PROVIDED BY COUNTY COMMISSIONERS UNDER SECTION 2936 G. C.
6. SOLDIERS' RELIEF COMMISSION APPOINTED UNDER SECTION 2930 G. C.—NO AUTHORITY TO CHANGE INVESTIGATOR PROVIDED FOR BY SECTION 2933-1 G. C. TO SERVICE OFFICER PROVIDED FOR BY SECTION 2933-3 G. C.

SYLLABUS:

1. Section 2930 General Code, as amended, provides for the appointment of five members of the soldiers' relief commission upon the taking effect of said amendment, to wit, October 16, 1945.
2. The provisions of Section 2930 General Code, are not mandatory but are directory as to the time of such appointment.
3. In case no appointments have been made under Section 2930 General Code as amended, the members of said commission who are holding office under appointment made pursuant to said Section 2930 as in effect prior to October 16, 1945, are entitled under the provisions of Section 8 General Code, to hold over until their successors are duly appointed and qualified.

4. Such commissioners while so holding over, are entitled to compensation as provided by Section 2932 General Code.

5. Such commissioners while so holding over, have authority under Sections 2933-1 and 2933-3 General Code, to employ such clerks and other assistants as they deem necessary for the performance of the duties committed to them, and the compensation of such employes is to be paid out of funds provided by the county commissioners under the provisions of Section 2936 General Code.

6. The soldiers' relief commission appointed under Section 2930 General Code has no authority to change the investigator provided for by Section 2933-1 General Code, to the service officer provided for by Section 2933-3 General Code.

Columbus, Ohio, February 15, 1946

Hon. Albert T. Stroup, Prosecuting Attorney
Van Wert, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

"As to General Code of Ohio, Section 2930, I respectfully request your opinion as follows:

1. When is the Soldiers' Relief Commission supposed to be appointed?

2. Is it mandatory or directory that they be appointed at that time?

3. In case no appointments have been made up to the present time, does the old Soldiers' Relief Commission which was holding office under the statute effective August 18, 1941, hold over their appointment until a new Commission is appointed and qualified if so

(a) Do the County Commissioners have power to pay their salaries?

(b) Does the old Commission have the authority to change the Investigator under the old statute to a Service Officer under the new one?

(c) Does the old Commission have power to employ extra help, and if so how is such help to be paid?"

The soldiers' relief commission established by Section 2930 et seq. General Code, has been in existence for a considerable number of years. Prior to 1941, Section 2930 provided that there should be such a commission in each county, composed of three persons, residents of the

county, each of whom should serve for three years. One of these commissioners was to be appointed by a judge of the court of common pleas on or before the first Monday in April of each year. It was further provided that "wherever possible, one member of said commission shall be a wife or widow or son or daughter of an honorably discharged soldier, sailor or marine of the civil war or of the Spanish-American war or of the world war". It further provided that one of the other members, wherever possible, should be a member of the United Spanish War Veterans and the other a member of the American Legion.

Effective August 18, 1941 (119 v 303), said Section 2930 was amended to read as follows:

"There shall be a commission known and designated as 'the soldiers' relief commission' in each county, composed of three persons, residents of the county, each of whom shall serve for three years, and wherever possible one member of said commission shall be a member of the United Spanish War Veterans; one a member of the American Legion; and one a member of the Veterans of Foreign Wars or of the Disabled American Veterans of the World War. On or before the first Monday in April of each year, a judge of the court of common pleas in such county shall appoint one commissioner for such term."

In connection with that amendment there was added Section 2930-1 General Code, reading as follows:

"Nothing in this act shall serve to effect the termination of the term of office of any member of such commission as now exists until the expiration of their term of office. As the existing terms expire one member shall be appointed each year under the provisions of this act."

The subsequent sections up to and including Section 2941 General Code, outline the powers and duties of the commission which were directed entirely toward the distribution of relief to needy soldiers and certain of their dependents, who were named, the funds to be furnished by an appropriation by the county commissioners. None of the powers or duties of said commission in this respect has been changed or modified by any amendments of the statutes as they existed in 1941 but, as will hereafter be pointed out, some entirely new duties have been added by the act of

the last General Assembly, which duties do not pertain to the distribution of relief.

The 96th General Assembly amended said Section 2930 to read as follows:

“There shall be a commission known and designated as ‘the soldiers’ relief commission,’ in each county, composed of five persons, residents of the county, appointed by a judge of the common pleas court, each of whom shall serve for five years, and wherever possible one member of said commission shall be a member of the United Spanish War Veterans; one a member of the American Legion; one a member of the Veterans of Foreign Wars; one a member of the Disabled American Veterans and an honorably discharged veteran of World War II. Upon taking effect of this act one member shall be appointed for a term of one year; one member shall be appointed for a term of two years; one member shall be appointed for a term of three years; one member shall be appointed for a term of four years and one member shall be appointed for a term of five years. Thereafter, as their respective terms expire, one member shall be appointed each year for a term of five years.”

At the same time they added supplementary section 2933-3 General Code, which reads in part as follows:

“The soldiers relief commission is hereby empowered to employ a ‘county veterans’ service officer’ who must be an honorably discharged veteran of the United States armed forces. The duties of such officer shall be to advise and assist persons in the armed forces of the United States, veterans of the United States armed forces of any war, and the wives, widows, children, parents, and dependents of any such, in presenting claims or obtaining rights or benefits under any law of the United States or of this state.”

Said Section 2933-3 further authorized the commission to employ such clerks, stenographers and other personnel to assist the service officer and to fix their compensation, and authorized the county commissioners to provide for the expenses of the office of such service officer and the compensation of said employes out of the funds appropriated to the soldiers’ relief commission.

It will be observed that instead of a commission of three members there is now a commission of five; instead of terms of three years they are to be appointed for terms of five years; the qualifications for member-

ship are somewhat changed, and the appointments of all five members are to be made "upon taking effect of this act". There is nothing in this new legislation whereby the members of the old commission are to be held in office for any purpose or to serve until the new commission is appointed. It seems clear that the old commission was entirely done away with and the terms of those who had yet some time to serve, were terminated. The question arises whether or not their positions were so completely abolished that they ceased at the moment the act took effect, to have any authority whatever either to hold over awaiting the appointment of the new commission or to carry on the duties committed to the soldiers' relief commission both by the old and the new act so as to prevent a suspension of the operation of the system. Your question suggests that for some reason the judge of the court of common pleas whose duty it is to appoint the members of the new commission, immediately upon taking effect of the act, has either failed or declined to make those appointments.

If we must hold that the three-man commission formerly in office was completely abolished and the tenure of the commissioners abruptly terminated, then it might happen that the operation of the entire system would be suspended for a considerable time, merely because the authority charged with the duty of appointing new officers to carry on the system failed to act.

It is stated in 42 Am. Juris. page 905 :

"The power to abolish an office may be exercised at any time and even while the office is occupied by a duly elected or appointed incumbent, for there is no obligation on the legislature or the people to continue a useless office for the sake of the person who may be in possession thereof. By abolishing the office, the legislature does not deprive the incumbent of any constitutional rights, for he has no contractual right or property interest in the office. He accepts it with the understanding that it may be abolished at any time, and the tenure of the office is not protected by constitutional provisions which prohibit impairment of the obligation of contract."

It is said by the same authority at page 907 :

"Where an office is duly abolished by the legislature or the people, it ceases to exist and the incumbent is no longer entitled to exercise the functions thereof, or to claim compensation for so doing, unless he is under contract with the state so as to come

within the protection of the constitutional inhibition against impairment of the obligation of contract. Since a de jure office is generally essential to the existence of a de facto officer, persons cannot act as de facto officers of an office which has been abolished."

In the case of *Elyria v. Vandemark*, 100 O. S. 365, it was held :

"When a public office is abolished by duly constituted authority, the incumbent thereof ceases to be an officer, for he cannot be a de facto officer of an office no longer in existence."

In that case the court had before it Section 4250 of the General Code, which provided in part :

"In cities having a population of less than twenty thousand, the council may by a majority vote merge the office of director of public safety with that of public service, one director to be appointed for the merged department."

The council of Elyria passed an ordinance providing for such merger but no one was appointed to fill such merged position. The director of public safety having subsequently brought suit to compel the payment of his salary one of the questions before the court was whether his position had been abolished by the ordinance aforesaid. The court said at page 369 of the opinion :

"The authority to create an office and the power to abolish the same are coexistent, and hence the tribunal authorized to create an office may abolish such office at any time it chooses, either during or at the end of the term of any incumbent of such office. The incumbent would not be entitled to compensation thereafter, for he could not be a de facto officer of an office which was no longer in existence. It is well settled in this state that when an office is abolished by duly constituted authority the incumbents thereof cease to be officers, for there can be no incumbent without an office."

If, therefore, the office of the former members of the soldiers' relief commission was abolished by the recent amendment of Section 2930 in which an entirely new commission was substituted for the old, then it would seem to follow that the old commissioners would not have any authority to act even as de facto officers. It does not, however, appear to me that the effect of this legislation was to abolish the *office*. All that was done was to change the size and personnel of the commission, and

incidentally terminate the *terms* of the commissioners then in office, who would give way to new members appointed for a longer term and for terms beginning at a different time from the old, to wit, on the effective date of the new act. There certainly was no intention on the part of the legislature to do away with the plan of soldiers' relief or the existence of a body authorized to administer it. There is a distinct difference between abolishing an office and putting an end to the tenure of an officer.

If our Supreme Court is right in its statement hereinabove quoted, that "the tribunal authorized to create an office may abolish such office at any time it chooses", then it would certainly have the power to *reduce* the office by shortening the term of the incumbents. This is asserted as a general principle in 43 Am. Juris. p. 11, where it is said:

"There is no doubt of the power of the legislature which creates an office to abolish it or to change it, and the legislature may shorten or lengthen the term of the office itself, in the absence of constitutional inhibition."

I find no provision in the Ohio Constitution that would impose such restriction. It may be well to examine Section 20 of Article II of that instrument. It provides:

"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."

It should be noted that there is no provision against reducing the term, and no provision against making a change which would affect the term. It is the salary which cannot be affected. And while an officer is entitled to his compensation without interference by change of law, his right is conditioned on his remaining in service and performing the prescribed duties. Furthermore, the commissioners of soldiers' relief have no stated compensation fixed by law by way either of salary or fees. Section 2932 simply provides:

*"On the presentation of an itemized statement thereof, the county commissioners shall allow the persons composing the soldiers' relief commission, their actual expenses incurred in the performance of their duties, and a fair compensation for their services. * * *"*
(Emphasis added.)

They may present no such statement, and if presented the county commissioners may and may not allow it. Hence, it could hardly be claimed that a shortening of their term would affect their salary.

The law recognizes that an office may sometimes be occupied by a person who has no legal right thereto and that his actions may be binding upon the public and upon private persons with whom he deals. Such an officer is known as a de facto officer.

It is said in 43 Am. Jur. page 235 :

“The rule has been generally stated that where an officer under color of right or title continues in the exercise of the functions and duties of the office without legal authority after his term of office has expired, or after his authority to act has ceased, he is an officer de facto. But where the defects in the officer’s title are notorious and such as to make those relying on his acts chargeable with such knowledge, application of the rule has been denied. *Care is required to distinguish between one who holds over without any legal right to do so, thereby becoming a de facto officer, and one who has the legal right, after the expiration of his term to continue in office until his successor has qualified. In such case, the officer holding over is one de jure and not de facto.*” (Emphasis added.)

If the commissioners who were appointed under the old law, are still performing the duties with which they were originally charged, notwithstanding their legal tenure may have terminated because of the failure of the appointing authority to appoint new commissioners, I should hesitate to characterize them as mere de facto officers. That term ordinarily implies the existence of an adverse claimant to the office and an attempt on the part of the incumbent to hold on to an office to which he has no title or a doubtful title against the right of the lawful or de jure officer. And it is on this principle that the de facto officer is generally denied the right to claim and enforce his claim for compensation for his services. The commissioners in question are quite probably actuated not by a desire to hold on to the office merely for their own benefit, but rather by a sense of duty to the system and those who are entitled to its benefits. The situation seems to me to fall within the letter and spirit of Section 8 of the General Code, which provides :

“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.”

This section may possibly be considered as converting a de facto officer, recognized as such under common law principles, into a de jure officer. Plainly, one who holds pursuant to this statute cannot be considered as a de facto officer. Until his successor is duly appointed and qualified he is holding the office with absolute right and pursuant to the law; not only the law under which he was appointed, but the law which seeks to prevent a lapse or vacancy in office. I can not resist the conclusion that it was the intention of the General Assembly to have the system of soldiers' relief go on continuously and without interruption, regardless of the fact that it saw fit to change the composition of the commission and to substitute a new personnel for the old membership. It would follow that in case of delay on the part of the appointing authority to appoint the members of the new commission the members formerly appointed would have the right to continue in the performance of their duties.

The principle which I am asserting, that the office of the soldiers' relief commission was not interrupted or changed by the change in the composition of the board is, I believe, recognized in the case of *Kirker v. Cincinnati*, 48 O. S. 507, where the court had under consideration a statute which had undertaken to do away with a "board of public improvements" for Cincinnati and to substitute a "board of city affairs", the appointing power being lodged in a different officer. The new act having been declared unconstitutional the court was called upon to determine the legality of the acts of the board members appointed thereto. It was said by the court:

"The act did not in a legal sense create a new office. The board of city affairs was clothed with the same functions as the board of public improvements. If then, as can hardly be questioned, the identity of an office is to be determined by the functions that belong to it, the board of city affairs is, in law, the same as the board of public improvements: For there is nothing in a name by which the essence of things can be changed. The designation, board of city affairs, is only another appellation for the administrative functions with which it was clothed, as is, also, the designation, board of public improvements. So that the act of October 24, 1890, held unconstitutional, simply provided a mode for the removal of the then members of this administrative board, and the appointment of new ones."

It is the settled policy of the state to avoid if practicable, a vacancy in a public office. Section 8 supra, was enacted for the purpose of continuing the term of an officer until such time as his successor can be elected or appointed and qualified in order to prevent a vacancy. See 32 O. Jur. pages 1041, 1047; State, ex rel. v. McCracken, 51, O. S. 123; State, ex rel. v. Metcalf, 80 O. S. 244. In 32 O. Jur. page 1048 it is said:

“Where an officer, appointed by the governor, by and with the advice and consent of the senate, is authorized by law to hold his office for a term of three years and until his successor is appointed and qualified, and no appointment of a successor is made by the regular appointing power at the expiration of his term of three years, the *office does not become vacant, but the incumbent holds over as a de jure officer until his successor is duly appointed and qualified.*” (Emphasis added.)

It is my opinion that the members of the five-man commission to be appointed under Section 2930 General Code, will when appointed, be the successors of the three-man commission appointed pursuant to the same section prior to its amendment, and the present commissioners are de jure officers and entitled to hold their offices until their successors are appointed and qualified.

Your question as to the right of the members of the old commission to receive their salaries, and the power of the county commissioners to pay the same needs but little discussion. If we are right in our conclusion as to their right to serve as de jure officers, they would of course be entitled to the compensation provided by law. Section 2932, which was untouched by the amendments hereinabove mentioned, provides that the county commissioners shall allow the persons composing the soldiers' relief commission “a fair compensation for their services.”

You inquire whether the hold-over commissioners have the authority to change the investigator under the old law to a service officer under the new law. I fail to find in the law any authority to change the investigator provided for in Section 2933-1 General Code into the service officer provided for in Section 2933-3 which I have already quoted. The latter section is a new provision created by the last session of the general assembly, having nothing to do with relief, but designed by its express terms to give assistance to veterans and their dependents in “presenting

claims or obtaining rights or benefits under any law of the United States or of this state", and for that purpose, providing for a service officer and a corps of assistants. On the other hand the "investigator" referred to had, under the former law, and still has the duty of assisting in carrying on relief work. Investigators and their clerks are to be veterans or wives, widows, sons or daughters of veterans, and are specifically exempted from civil service examination. The "service officer" must be a veteran and there is no provision exempting him or any of his assistants from the requirements of civil service examinations. Accordingly, it is my opinion that these two positions are unrelated, and that it is not within the power of the commissioners to change the investigator under the old statute into the service officer provided for under the new law.

As to the employment of extra help, it is sufficient to say that the old commission, so long as it serves has all the powers conferred by the law on the commission in regard to employment of clerks and other assistants. That would include the employment under Section 2933-1 General Code, of "such investigators and clerks as may be necessary to carry on relief work when the necessity arises," and under Section 2933-3 supra to employ a service officer and "such clerks, stenographers, and other personnel to assist the service officer in the performance of his duties, as may be necessary." The number of all such employes that may be required from time to time is left to the discretion of the commissioners.

As to payment of compensation of employes of the commission, it is provided by Section 2933-1 that compensation of persons employed thereunder "shall be paid from the county allotment of soldiers' relief funds." This would plainly refer to the provisions of Section 2936 General Code, which requires the county commissioners to make an annual levy in such amount as the relief commission finds necessary, not to exceed five-tenths of a mill per dollar of assessed value of the property in the county. The compensation of persons employed under Section 2933-3 supra, is by its express terms to be paid from funds provided for in said Section 2936, General Code.

As to the time when the soldiers' relief commission is to be appointed, I call your attention to the express terms of Section 2930, already quoted, to wit:

*“Upon taking effect of this act one member shall be appointed for a term of one year; * * *”* (Emphasis added.)

The amendatory act took effect on the 16th day of October, 1945.

You inquire whether it is “mandatory or directory that the commissioners be appointed at that time.” The language of the statute is plainly mandatory as to the duty to appoint. However, the Supreme Court, in the case of *State, ex rel. v. Fanning*, 134 O. S. 383, had under consideration the provision of Section 2930 as then in force, requiring the appointment of commissioners to be made on or before the first Monday in April. It appeared that the appointment was not made until the 21st day of April. The court, in a per curiam held:

“We are of opinion that the provisions of Section 2930, General Code, are not mandatory but are directory as to the time of appointment, and therefore the appointment of Fanning was valid although made after the first Monday in April.

Under Section 8, General Code, O’Neill was entitled to continue in office until his successor was appointed, but his incumbency terminated when Fanning was appointed by the Common Pleas Court.”

In specific answer to your several questions it is my opinion:

1. Section 2930 General Code, as amended, provides for the appointment of five members of the soldiers’ relief commission upon the taking effect of said amendment, to wit, October 16, 1945.
2. The provisions of Section 2930 General Code, are not mandatory but are directory as to the time of such appointment.
3. In case no appointments have been made under Section 2930 General Code as amended, the members of said commission who are holding office under appointment made pursuant to said Section 2930 as in effect prior to October 16, 1945, are entitled under the provisions of Section 8 General Code, to hold over until their successors are duly appointed and qualified.
4. Such commissioners while so holding over, are entitled to compensation as provided by Section 2932 General Code.

5. Such commissioners while so holding over, have authority under Sections 2933-1 and 2933-3 General Code, to employ such clerks and other assistants as they deem necessary for the performance of the duties committed to them, and the compensation of such employes is to be paid out of funds provided by the county commissioners under the provisions of Section 2936 General Code.

6. The soldiers' relief commission appointed under Section 2930 General Code has no authority to change the investigator provided for by Section 2933-1 General Code, to the service officer provided for by Section 2933-3 General Code.

Respectfully,

HUGH S. JENKINS,
Attorney General.