

1012.

OHIO MILK MARKETING COMMISSION—MEMBER OF 90TH GENERAL ASSEMBLY CANNOT LAWFULLY BE APPOINTED EXECUTIVE SECRETARY THEREOF—POSITION IS CIVIL OFFICE WITHIN MEANING OF SECTION 19, ARTICLE II OF OHIO CONSTITUTION—OFFICE AND EMPLOYMENT DEFINED AND DISTINGUISHED.

*SYLLABUS:*

*A person who is a member of the 90th General Assembly cannot lawfully be appointed to the position of executive secretary of the Ohio Milk Marketing Commission, because the position is a civil office within the meaning of that phrase as used in section 19 of article II of the Constitution of the State of Ohio.*

COLUMBUS, OHIO, July 1, 1933.

HON. GEORGE WHITE, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

“Section 4 of the above entitled Act provides that the Commission ‘shall have power to employ an executive secretary’. The duties and responsibility devolving upon such executive secretary are referred to in other sections of the Act.

The question arises whether or not the position of executive secretary constitutes a ‘civil office’ as defined in Section 19, Article 2 of the Constitution of Ohio.

It is understood that if a member of the Ninetieth General Assembly is chosen for this position, he will first resign as a member of the Legislature in accordance with the provisions of Section 15 of the General Code of Ohio.

I will appreciate having your opinion on this subject at your early convenience.”

The act in question (Amended Substitute House Bill No. 671 of the 90th General Assembly) was passed as an emergency measure on the 8th day of June, 1933, and became effective upon your approval on the 22nd day of June, 1933. It is an act entitled “A bill to regulate the distribution of fluid milk or cream and for this purpose to create the Ohio milk marketing commission and to define its powers and duties, and to declare an emergency.” It provides for the appointment by the Governor of a “commission” of four members for the purpose of administering the act. Section 4 of this act provides in part:

“The commission shall select one of its members as chairman and shall have power to employ an executive secretary, and other clerical or office assistants and not to exceed ten examiners, and to fix their compensation which in the case of the secretary shall not exceed four thousand and four hundred dollars per annum, \* \*. Each member of the commission and its executive secretary shall give bond to the state of Ohio conditioned for the faithful performance of his duties and for the safe-keeping and lawful application of moneys coming to the commission

in such amount as shall be prescribed by the director of agriculture, and with surety to the satisfaction of such director."

Section 5 of the act provides in part:

"The commission shall have power:

\* \* \* \* \*

(b) To investigate as the emergency permits all matters pertaining to the production, storage, distribution and sale of milk in this state. For the purpose of such investigation or any hearing which the board is authorized or required to conduct, the commission or any member thereof, and its executive secretary shall have power to administer oaths, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony. In case of disobedience of any person to comply with the order of the commission or a subpoena issued by the commission, or any of its members, or its executive secretary, or on the refusal of a witness to testify to any matter regarding which he may be lawfully interrogated, the common pleas judge of the county in which the person resides, on application of any member of the commission, or its executive secretary, shall compel obedience by attachment proceedings as for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein."

The question presented is whether or not a person who was a member of the 90th General Assembly may lawfully be appointed to the position of executive secretary of the commission, in view of the fact that the position was created during the term for which such member was elected.

It is provided by Section 19, Article II of the Constitution of Ohio, 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."

Section 15 of the General Code of Ohio provides in part as follows:

"No member of either house of the general assembly except in compliance with the provisions of this act shall:

\* \* \* \* \*

Accept any appointment, employment or office from any committee or commission authorized or created by the general assembly, or from any executive, or administrative branch or department of the state, which provides other compensation than actual and necessary expenses.

Any such appointee, officer or employee who accepts a certificate of election to either house shall forthwith resign as such appointee, officer or employee and in case he fails or refuses to do so, his seat in the general assembly shall be deemed vacant. Any member of the general assembly who accepts any such appointment, office or employment,

shall forthwith resign from the general assembly and in case he fails or refuses to do so, his seat in the general assembly shall be deemed vacant."

It has been held by a former Attorney General that the term "civil office", as used in Section 19 of Article II of the Constitution of Ohio, is meant to be used in contradistinction to a military office and includes all public offices, at least those that are filled by appointment. See Opinions of the Attorney General for 1931, p. 1032.

Considerable difficulty is experienced in many cases in determining definitely whether or not a particular public position measures up to the characteristics and standards fixed for a public office, or whether it is a mere public employment. The courts have not always been consistent in fixing the characteristics and standards for a public office. As stated by Chief Justice Marshall in *State, ex rel. vs. Callow*, 110 O. S. 367, it is "difficult to fully harmonize" the numerous cases in which our courts have attempted to apply the test of a public office. In an earlier case, however, *State, ex rel. Landis vs. Board of Commissioners of Butler County, et al.*, 95 O. S. 157, Judge Jones remarked that "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."

In a still later case, *State, ex rel. vs. Conley*, 124 O. S. 265, Judge Kinkade, in commenting on the question of what constitutes a public office, said on p. 266:

"The question is not free from doubt. The decisions are not in harmony."

As pointed out by Judge Jones in the Butler County case, supra:

"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."

A similar test for determining whether a position is a public office or employment is stated in 46 C. J. 929:

"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."

Spear, Judge, in the case of *State, ex rel. vs. Brennan*, 49 O. S. 33, at page 38, laid down the following test:

"It is not important to define with exactness all the characteristics of a public office, but it is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, *or with public functions to be exercised in the supposed interest of the people*, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office."

(Italics the writer's.)

In the case of *State of Missouri, by Wingate, vs. Valle*, 41 Mo. 29, at page 31, it was held that:

"A civil office is a grant and possession of the sovereign power, and the exercise of such power within the limits prescribed by the law which creates the office constitutes the discharge of the duties of the office; and it is distinguished in this respect from a mere employment as a contractor or agent under some public office."

The most satisfactory test, as I gather from a review of the many cases involving this question, and the one most often applied by this office in previous opinions, is whether or not an incumbent of a position is vested by law with the performance of continuous, independent duties, a part of the sovereignty of the state, and especially if this be coupled with durability of tenure, oath, bond and emoluments. Any one, two, three or all of the criteria, oath, bond, emoluments and durability of tenure, do not in and of themselves constitute a public position a public office, unless the position carries with it the performance of some independent public duties fixed by law, so far as the decisions of the courts of this state disclose.

Upon examination of Substitute House Bill No. 671, I find that the executive secretary of the milk commission occupies a position in the administration of government which involves the exercise of an independent public function or a portion of the power of the sovereignty. The act attaches to the position of executive secretary at least one attribute of sovereignty which is sufficient to include the position within the prohibition contained in section 19 of article II of the Constitution of Ohio and that is the power to administer oaths, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony. In the discharge of those duties and powers, the executive secretary of the milk commission exercises public functions which are in the interest of the people of the state. It has also been held by many courts that the power and right to administer oaths, to take depositions, subpoena witnesses and compel their attendance, constitutes the person so empowered a public officer and the office which he holds a public office. Thus, it was held in the case of *State of Nevada, ex rel. Summerfield, vs. Clark*, 21 Nev. 333, that the office of notary public was a civil office within the meaning of that term as used in a constitutional provision of that state which provided that:

"No person holding any lucrative office under the government of the United States or any other power, shall be eligible to any *civil office* of profit under this state." (Italics the writer's.)

The court at page 336 said that a notary public "is charged with duties to the public at large that constitutes him a public or state officer". It was likewise held in the following cases that a notary is a public officer: *Governor vs. Gordon*, 15 Ala. 72; *Smith vs. Meador*, 74 Ga. 416; *Keeney vs. Leas, et al.*, 14 Ia. 464; *State, ex rel. Robinson, vs. McKinley*, 57 O. S. 627; and *State, ex rel. Attorney General, vs. Adams*, 58 O. S. 612.

Judge Stephenson, in the case of *Ex parte Bevan*, 126 O. S. 126, at page 135, said that:

"A notary public is a ministerial officer, as that term has been understood so long that 'the memory of man runneth not to the contrary.' Some worth-while authorities insist that the word 'ministerial' means nothing, as applied to an officer—that our officers are legislative, executive and judicial. Under this strict nomenclature we must hold that a notary public is an executive officer, clothed with such power as the Legislature, within its constitutional limitations, saw fit to delegate to him."

The executive secretary of the milk commission, by virtue of the provisions of section 5 of the aforesaid act, has been invested by the legislature with functions and powers which are identical in scope and effect as those conferred upon a notary public (sections 126, 11512 and 11529), except that a notary public may commit without the intervention of any court a person who fails or refuses to testify or who fails to appear in obedience to a subpoena, whereas, the executive secretary of the milk commission must make application to a court of common pleas in order to secure compliance with a subpoena issued by him or to compel a witness to testify. The difference in the method of compelling the attendance of witnesses and of punishing those who refuse or fail to testify is one which relates to the extent of the authority and not to the duty. Since the courts have held that notary public is a public officer, it follows that a person such as the executive secretary of the milk commission who has been invested with powers and functions similar to those exercised by a notary public is likewise a public officer.

In reaching the conclusion that the position of executive secretary of the milk commission is a civil office, I am not unmindful of or overlooking the recent case of *State, ex rel. vs. Conley, supra*, wherein it was held that an official shorthand reporter appointed by virtue of the provisions of section 1546 was not a public officer who might have his right of office determined by a proceeding in quo warranto. An examination of the statutes (sections 1546 to 1553, inclusive, and section 11529) relating to the position of official shorthand reporter clearly indicates that there is a vast difference between the functions and duties performed by an official shorthand reporter and the executive secretary of the milk commission. The only function or power that is similar to both positions is that of taking depositions, which both the official shorthand reporter and the executive secretary of the milk commission are authorized by the legislature to take. An official shorthand reporter has not been invested by the legislature with all or the same powers conferred upon the executive secretary of the milk com-

mission and for that reason the holding in the case of *State, ex rel., vs. Conley, supra*, is not applicable to the position of executive secretary of the milk commission.

That the position of executive secretary of the milk commission is a civil office and not an employment would seem to be clear from the fact that the executive secretary, in administering oaths, taking depositions, compelling the attendance of witnesses and the production of books and other records, is exercising some portion of the sovereign power and functions of the government. The exercise or discharge of those powers and functions constitutes the position a civil office and not a mere employment.

In view of the conclusion that I have reached in respect to the position of executive secretary of the milk commission, it is not necessary to answer your second question.

Specifically answering your first question, I am of the opinion that a person who is a member of the 90th General Assembly cannot lawfully be appointed to the position of executive secretary of the Ohio Milk Marketing Commission, because the position is a civil office within the meaning of that phrase as used in section 19 of article II of the Constitution of the State of Ohio.

Respectfully.

JOHN W. BRICKER,  
*Attorney General.*

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1013.

APPROVAL, BONDS OF VILLAGE OF FAIRVIEW, CUYAHOGA COUNTY, OHIO—\$71,000.00.

COLUMBUS, OHIO, July 5, 1933.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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1014.

APPROVAL, LEASES TO RESERVOIR LAND AT PORTAGE LAKES, SUMMIT COUNTY, OHIO, FOR RIGHT TO OCCUPY AND USE FOR BOATHOUSE, DOCKLANDING AND WALKWAY PURPOSES—H. A. DICKERHOOF.

COLUMBUS, OHIO, July 5, 1933.

HON. EARL H. HANEFELD, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—The Chief of the Bureau of Inland Lakes and Parks recently submitted for my examination and approval two certain reservoir land leases in triplicate, executed by the Conservation Commissioners, under the authority conferred upon him by section 471, General Code, to E. C. Oberholtz of Barberton, Ohio, and H. A. Dickerhoof of North Barberton, Ohio, respectively. Each of these leases is for a stated term of fifteen years and each calls for an annual rental of \$6.00, payable in semi-annual installments of \$3.00 each.