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1. ARMED SERVICES OF UNITED STATES—CLERK OF BOARD OF ELECTIONS—WHERE CLERK ENTERED SERVICE AND BOARD OF ELECTIONS DECLARED OFFICE VACANT—NEW CLERK APPOINTED—PERSON WHO LEFT OFFICE NOT ENTITLED TO COMPENSATION DURING PERIOD OF SERVICE.
2. NO MANDATORY DUTY UPON POLITICAL SUBDIVISION OF STATE TO REEMPLOY PERSON WHO LEFT EMPLOYMENT OF THAT POLITICAL SUBDIVISION TO ENTER ARMED SERVICES—SELECTIVE TRAINING AND SERVICE ACT OF 1940, SECTION 8.

SYLLABUS:

1. Where a person holding the position of clerk of the board of elections enters the armed services and the board of elections declares the office vacant and appoints a new clerk, the person leaving the office to enter the armed services is not entitled to the compensation of the office of clerk of the board of elections during his period in the armed services.

2. Section 8 of the Selective Training and Service Act of 1940 does not impose a mandatory duty upon a political subdivision of the state to reemploy a person who left the employment of that political subdivision to enter the armed services.

Columbus, Ohio, July 28, 1945

Hon. Roland Pontius, Prosecuting Attorney
Jefferson, Ohio

Dear Sir:

I have two communications signed by Frank M. Cornwell, Assistant Prosecuting Attorney, the first of which reads as follows:

"It has been the custom of the Board of Elections of Ash-tabula County to appoint a clerk for a period of two years. On March 1, 1942, the Board appointed Mr. J. R. to this position. He had previously served as Deputy Clerk from March 3, 1936.

On August 20, 1942, Mr. R. was inducted into the Armed Services of the United States. By motion duly adopted on October 6, 1942, the Board of Elections declared the office of clerk to be vacant. The motion set forth the fact of the induction of Mr. R. into the Armed Forces, and recited that because of such services, it was impossible for him to perform his duties as Clerk, and made this the sole basis for its act in declaring the vacancy.

Thereupon, a new clerk was appointed. Mr. R. is now making a claim for salary from October 6, 1942, to February 29, 1944.

Will you please advise, whether or not, in your opinion, the Election Board should now approve such claim."

The second letter refers to the above letter and continues as follows:

"We now wish to supplement that letter, and would like you to advise us further whether or not such Clerk may now demand and receive the appointment to the position of Clerk of the Board under Section 8 of the Selective Training and Service Act of 1940 as amended, a demand for such reinstatement having been made within ninety days from his discharge."

An examination of so much of Section 4785-13, General Code, as is quoted below indicates the answer to your first question:

"The boards of election within their respective jurisdictions by a majority vote shall exercise, in the manner herein provided, all powers granted to such boards in this act, and shall perform all the duties imposed by law which shall include the following: * * *

d. To appoint and remove its clerk, assistant clerks, and employes, * * *.”

It will be noted that the statute allows the board of elections to remove its clerk. Reference to Section 486-8 (a) 2, General Code, discloses that the following persons are in the unclassified civil service:

“All election officers and the employes and clerks of persons appointed by boards of deputy supervisors and inspectors of elections.”

The above two sections, read together, brings one to the conclusion that the board of elections may remove its clerk at will. You have stated in your letter that the board of elections declared the office vacant after J. R. entered the armed services and appointed a new clerk. Nothing could amount to a clearer and more unequivocal removal of J. R. from office. There can, of course, under the statutes be but one clerk of the board of elections. The appointment of the new clerk by the board after the board had declared the office vacant was a removal of J. R. from the office of clerk of the board of elections. Since, after such action by the board J. R. no longer held the office, he was no longer entitled to the compensation attached thereto and, in my view, the board of elections, by its own act, has deprived itself of the authority now to allow J. R. compensation for the period he was absent from his employment and with the armed forces.

Because of the above, I do not have before me the question of whether or not the clerk of the board of elections is a true public officer and entitled to the emoluments of the office even though absent from the office and I do not express myself on that question.

Coming now to your second question, Sub-section (a) of Section 8 of the Selective Training and Service Act of 1940, which is found as Title 50, Appx. 5 in Federal Code Annotated, provides for the issuance of a certificate showing the satisfactory completion of the training and service period. The remainder of the section which is pertinent, with amendments, is as follows:

“(b) In case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reem-

ployment within forty days after he is relieved from such training and service—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay ;

(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so ;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(d) Section 3 (c) of the joint resolution entitled 'Joint Resolution to strengthen the common defense and to authorize the President to order members and units of reserve components and retired personnel of the Regular Army into active military service,' approved August 27, 1940 (Appx. 3), is amended to read as follows :

'(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with

the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration.'

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: Provided, That no fees or court costs shall be taxed against the person so applying for such benefits."

By the Service Extension Act of 1941, found as Title 15, Appx. 18, Federal Code Annotated, the benefits of the above are extended to any person who enters the military or naval service subsequent to May 1, 1940.

By an act of December 8, 1944 (58 Stat. 798), the time for making an application for reemployment was extended by the following language:

"(3) Makes application for reemployment within ninety days after he is released from such training and service or from hospitalization continuing after discharge for a period of not more than one year."

I believe that the following can plainly be taken from the above Section 8 of the Selective Training and Service Act of 1940: If a person has a necessary certificate, is still qualified to perform the duties of his former employment and applies for reemployment within the requisite period, he is, as of right, entitled to restoration to his former or a similar employment with the Federal Government or a private employer. If such

person was in the employ of a state or a political subdivision of a state, subsection (C), as above quoted, says that "it is the sense of the Congress that such person should be restored" to his position or a similar employment. The language last quoted clearly is only suggestive and apparently was not made mandatory or even directive in recognition by the Congress of the fact that the states are independent sovereignties, wholly free of federal regulation in such matters. That recognition appears also in subsection (e), above quoted, wherein the Congress made private employments subject to the compulsion of the appropriate federal district court in the reemployment concerned, but omitted to do so in the case of the states.

In the case of *McLaughlin v. Retherford*, 184 S. W. (2) 461 (Ark.), decided by the Arkansas Supreme Court on January 22, 1945, the same question as is considered here is discussed and answered. The court said at page 464 of the opinion:

"Finally the appellee claims that he is an honorably discharged service man and is entitled to his former employment, claiming that the Federal Selective Training and Service Act guarantees that employment. An investigation of the law discloses otherwise. The pertinent section of the act may be found in U. S. C. A., Title 50, Appendix Section 308. The act does not mandatorily apply to a case like this one where the soldier was in the employ of a political subdivision of a state. The Federal Government did not attempt to make the act mandatory on states and political subdivisions."

It is obvious from all of the above that it is not mandatory that the person about whom you inquire be restored to the position of clerk of the board of elections.

Answering your questions in the order asked, it is my opinion that J. R. is not entitled to the compensation of the clerk of the board of elections for Ashtabula County for the period from October 6, 1942 to February 29, 1944 because of his removal from that position by the action of the board declaring the office vacant and appointing a new clerk. You are also advised that Section 8 of the Selective Training and Service Act of 1940 does not make mandatory such person's reemployment by the board of elections.

Respectfully,

HUGH S. JENKINS

Attorney General