opinion of the Attorney General, Vol. 2, 1921, page 1095, where it was stated at page 1096:

> "Thus it would seem that while the legislature had bestowed upon the director of public safety the power and authority to have entire control of the municipal hospital as contemplated by this section, and the fixing of the salary and compensation of the employes thereof, it would likewise seem evident that the limitations conferred simultaneously offset the positive powers of the director of public safety in such matters as the section covers, by conferring in reality upon council, the power and authority apparently bestowed upon the director of public safety in the matter of the fixing of the compensation of the employes of this department."

I am assuming for the purpose of this opinion that the hospital established by the city is not a free one.

It is my opinion, in specific answer to your question, that in the absence of any charter provision relating thereto, the director of public safety should fix the rates charged for services to patients in municipally owned hospitals if there be no municipal ordinance with reference thereto, but if there be ordinances in existence or if at any time the council passes ordinances regulating the rates to be charged, then such ordinance would be controlling.

Respectfully,
JOHN W. BRICKER,
Attorney General.

884.

APPROPRIATION—LEGALLY MADE FOR SALARIES OF POLICEMEN AND FIREMEN—IF REVENUES FOR PAYMENT THEREFOR INSUFFICIENT, CLAIM EXISTS AGAINST MUNICIPALITY WHEN—NO CLAIM IF NO APPROPRIATION MADE.

SYLLABUS:

1. *Where a lawful appropriation exists for the payment of the salaries of policemen and firemen in a city operating under general laws, but those salaries can not be paid because of a failure of anticipated revenues to meet the appropriation, the said policemen and firemen have a legal claim against the municipality for their salaries so long as they continue to fill their positions and satisfactorily render service to the municipality.*

2. *In the event no appropriation is made for the payment of the salaries of policemen and firemen in a city operating under general laws, the said policemen and firemen have no claim against the said municipality for their salaries, although they continue in the service.*

COLUMBUS, OHIO, May 26, 1933.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion with reference to the right of policemen and firemen in the city of Campbell,

to be paid their salaries for certain portions of the years 1931 and 1932. You state that the council of the city of Campbell made appropriations for the compensation of the members of the police and fire departments, of a sufficient amount to cover their entire salaries for the year 1931, such appropriations being made in pursuance of the amended certificate of estimated resources received from the Budget Commission of Mahoning County.

Owing to delinquent taxes, and the fact that other revenues were reduced, the compensation of the policemen and firemen could not be paid for the last three months of the year, but these officers performed their duties as usual, during that period.

In 1932, with a reduced tax duplicate, reduced tax levy and additional sinking fund needs, the amended certificate of estimated resources received from the budget commission indicated that funds would be available for operating the city for only three months of the year and the city council made appropriations accordingly. No additional appropriation of funds was later made. The members of the police and fire departments continued to perform their regular duties during the entire year, but received no compensation from March 1, 1932, to December 31, 1932. The specific questions submitted are as follows:

> "1. Have the members of the police and fire departments a legal claim against the city for the compensation earned but not received during October, November and December of 1931?
>
> 2. Since no appropriation was made by council for compensation of members of the police and fire departments for the period from April 1 to the end of 1932, have these officers a legal claim against the city for compensation from April 1 to December 31, 1932, when such officers performed their regular duties as usual during that period?"

The police and fire departments in cities are each composed of a chief of the department and such subordinate officers and employes as are provided by ordinance or resolution of the municipal council or other legislative authority. See Sections 4374 and 4377, General Code. Section 4378, General Code, provides:

> "* * The police and fire departments in every city shall be maintained under the civil service system, as provided in this subdivision."

The laws relating to civil service provide that the civil service of the state and of certain subdivisions thereof, including cities, shall be divided into the classified and unclassified civil service. In Section 486-8, General Code, there are enumerated twelve classes of positions in the public service which are placed in the unclassified civil service, and specific provision is made therein, to the effect that,

> "* * nothing contained in this act shall exempt the chiefs of police departments and chiefs of fire departments of municipalities from the competitive classified service as provided in this act. * *"

By force of this section (486-8, General Code) members of the police and fire departments, including the chiefs of the said departments, are placed in the competitive classified civil service, appointments to which, and promotions and demotions within which, are controlled by the laws and rules relating to that

branch of the civil service, in cities operating under general laws as is the city of Campbell.

Appointments to positions in the police and fire departments in cities are made by the Director of Public Safety in cities operating under general laws and by corresponding officers, as provided by charter, in charter cities, from certified lists of eligible persons prepared by the municipal civil service commission of the particular city, after competitive examination based on merit and fitness in accordance with the laws and rules relating to civil service unless by charter provision is made otherwise.

Section 486-17a, General Code, provides that the tenure of every officer, employe and subordinate in the classified civil service of the state, the counties, cities and city school districts thereof holding a position under the provisions of the civil service laws, shall be during good behavior and efficient service, and that no such officer, employe or subordinate may be removed from any such position after once having been duly appointed thereto, unless it be done for reasons recognized by the law as being sufficient and proper, and in the manner provided by law.

It is well settled that the permanent abolishment in good faith, of a position filled by an occupant who had been duly appointed thereto in pursuance of the civil service laws and regulations, amounts to his removal and that the temporary suspension of the position in good faith for purposes of economy or because of a lack of funds to pay the employe, is equivalent to the lay-off or suspension of the employe. *Curtis* vs. *State,* 108 O. S. 292; *Vansuch* vs. *State,* 112 O. S. 688; *State ex rel. Miller* vs. *Witter,* 114 O. S. 122. This rule, when applied to members of police and fire departments, upon the reduction of the number of the employes in those departments for lack of funds, is subject to certain modifications and limitations designed to favor those who have been longest in service. See Section 487-17b, General Code.

I assume that the members of the police and fire departments of the City of Campbell, to which your inquiry is directed, had been duly and regularly appointed to their respective positions pursuant to the civil service laws and rules, and I am informed that they had not been removed for cause nor had any action been taken to abolish their positions or to reduce the personnel in these departments for purposes of economy or on account of lack of funds to pay the employes unless the mere failure to appropriate for these purposes automatically abolished the positions or suspended the occupants thereof.

It appears from your statement that appropriations of sufficient amounts had been made, and I assume lawfully, to cover payrolls for the policemen and firemen of the city in question for the entire year of 1931 but because of the failure of anticipated revenues, funds were not available to pay these officers the last three months of that year. The mere failure of these revenues does not, in and of itself, in my opinion, serve to suspend these employes or abolish their positions. Having performed the service, I am of the opinion they have a legal claim for their salaries, in the absence of any affirmative action on the part of the municipal authorities to suspend them on account of a lack of funds or otherwise or to abolish their positions.

With respect to the year 1932, the situation is different. In that case no appropriation was made covering salaries for policemen and firemen after April 1, 1932, because of the inability of the appropriating authority to lawfully make such appropriation due to a lack of available resources upon which to base the appropriation.

A similar situation was under consideration by the Supreme Court in the case of *City of Fostoria et al* vs. *State ex rel. Binley,* 125 O. S. 1. In that case, the question of the payment of a public health nurse who had been duly appointed by the Board of Health of the City of Fostoria, but for the payment of whose salary no appropriation existed, was presented. Section 4411, General Code, authorizes a city board of health to appoint as many public health nurses as in its opinion, the public health and sanitary conditions require. The statute further provides:

> "The council may determine the maximum number of health nurses so to be appointed."

Relator, in the above case had been duly appointed by the board of health as public health nurse and a salary had been duly fixed for the position. Council did not make an appropriation for the payment of her salary because of its inability to do so within the limits of available resources as certified to it by the county budget commission. Suit in mandamus was instituted to compel the council to make an appropriation for the payment of her salary. The writ was refused. In the course of the opinion in the case Allen, J., said:

> "The conclusion of the majority of this court is strengthened by the fact that the statute gives the council a veto over the number of public health nurses to be employed, as provided in Section 4411, supra. If the board of health decides that ten nurses shall be employed, it is conceded that under the statute the council has authority to say that only one nurse shall be employed. Under the familiar principle that the power to do the greater thing includes the power to do the less, if the council may determine that one, five, or ten nurses may be employed, the council may also determine that no nurse may be employed.
>
> * * * *
>
> Under this state of the record, when the council omitted the item for the salary of the nurse from the appropriation ordinance, it determined that the maximum number of public health nurses should be zero."

I think the doctrine of the above case is directly applicable to the situation with reference to policemen and firemen in the city of Campbell in the year 1932, as stated in your inquiry.

Sections 4374 and 4377, General Code, give to a city council the right to determine the personnel of the police and fire departments in the city and to fix the number of such employes. By failing to appropriate any funds for the payment of these employes after April 1, 1932, council thereby determined that the number of such officers and employes during that period should be zero. The fact that the policemen and firemen continued to render service during the whole of that period does not give them any claim to their salaries where nothing has been appropriated therefor.

I am therefore of the opinion in specific answer to your questions:

1. The members of the police and fire departments of the city in question have a legal claim against the city for compensation earned during the months of October, November and December of 1931.

2. The policemen and firemen mentioned have no claim for compensation

against the city of Campbell for the period from April 1, 1932, to December 31, 1932.

Respectfully,
JOHN W. BRICKER,
Attorney General.

885.

BEER—PERMIT FROM OHIO LIQUOR CONTROL COMMISSION TO MANUFACTURE AND SELL IN MUNICIPALITY CONTROLS LOCAL ORDINANCES TO CONTRARY—PROHIBITING BY VOTE IN MUNICIPALITY CONTROLS LOCAL ORDINANCES TO CONTRARY—VOTING ON BEER ISSUE DISCUSSED.

SYLLABUS:

1. *Beer with an alcoholic content of not more than 3.2% of alcohol by weight, may be manufactured and sold lawfully in municipalities in the State of Ohio, when licenses or permits have been issued therefor by the Ohio Liquor Control Commission, regardless of the provisions of local ordinances to the contrary.*

2. *The method provided in Section 19 of Amended Substitute Senate Bill No. 346, of the 90th General Assembly, for prohibiting the sale of beer containing not more than 3.2% alcohol by weight in municipalities by vote of the people therein, is exclusive, local ordinances to the contrary notwithstanding.*

3. *The sale of beer with an alcoholic content of 3.2% by weight may be prohibited in a municipality by a vote of the people thereof, when the question is submitted at a proper election in the manner provided by law.*

COLUMBUS, OHIO, May 27, 1933.

HON. FRAZIER REAMS, *Prosecuting Attorney, Toledo, Ohio.*

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

> "An ordinance was passed some years ago prohibiting the sale of intoxicating liquors in conformity with the Volstead and Crabbe Acts. This ordinance has never been repealed.
>
> The City Solicitor of Sylvania has advised the Mayor and Council that the recent Ackerman-Lawrence Bill has no effect in that village unless the ordinance prohibiting the sale of beverages with alcoholic content greater than one-half of one percent is repealed. In other municipalities the Solicitors have advised their Mayor and Council that the recent Ackerman-Lawrence Bill overrides the local ordinance except under the local option provision of the Ackerman-Lawrence Bill.
>
> Since there is a conflict of opinion in this county and undoubtedly the same conflict has arisen all over the state, I will appreciate very much your opinion."

What is commonly known as the Second Crabbe Act, Sections 6212-13 to 6212-20, inclusive (108 O. L., Part II, p. 1182) entitled "An Act to prohibit the