

5315.

APPROVAL—BONDS OF ORANGE VILLAGE SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO, \$4,500.00.

COLUMBUS, OHIO, April 1, 1936.

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

5316.

APPROVAL—BONDS OF SOUTH EUCLID-LYNDHURST VILLAGE SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO, \$1,900.00.

COLUMBUS, OHIO, April 1, 1936.

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

5317.

APPROVAL—BONDS OF ORANGE VILLAGE SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO, \$3,500.00.

COLUMBUS, OHIO, April 1, 1936.

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

5318.

CLERK OF PORTSMOUTH MUNICIPAL COURT—MAY NOT BE A CANDIDATE FOR PUBLIC OFFICE UNDER CITY CHARTER—LEGALITY OF PAYING SALARY DISCUSSED.

SYLLABUS:

1. *The incumbent of the position of clerk of the Municipal Court of the city of Portsmouth, Ohio, is included within the provision of section 85 of the charter of such city, stating that "any appointive officer or employe of the city who shall become a candidate for nomination or elec-*

tion to any public office shall immediately forfeit the office or employment held under the city."

2. *Question of legality of payment by the city council of salary to the incumbent of such position referred to in syllabus 1 for services rendered after becoming such a candidate contrary to section 85 of the city charter, discussed.*

COLUMBUS, OHIO, April 2, 1936.

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

GENTLEMEN: I am in receipt of your recent communication as follows:

"Will you kindly furnish this office an opinion on the questions contained in the inclosed letter from Walter L. Dickey, City Solicitor of Portsmouth, Ohio."

The letter enclosed with your communication reads as follows:

"The Municipal Court of Portsmouth, Ohio, was created by statutes, being section 1579-459 of the General Code and section 1579-482 created the position of a clerk for said Municipal Court.

The section creating the position of clerk, providing for the appointment and salary, reads as follows:

'Sec. 1579-482. Appointment of clerk; compensation—A clerk for said municipal court shall be chosen and appointed by the judge thereof to serve as such during his pleasure. The clerk shall give bond to the city of Portsmouth, in such sum as the city council may determine and he shall receive an annual salary, payable monthly, to be fixed by the city council in a sum of not less than ten hundred dollars (\$1,000) per year.'

The present clerk of said court is now running for Sheriff of Scioto County and is unopposed in the Primaries.

Section 85 of the Charter of the City of Portsmouth, Ohio, reads as follows:

'Section 85. No person elected to the council shall, during the time for which elected, be appointed to any office or position in the service of the city. If a member of the council shall become a candidate for nomination or election to any public office,

other than that of councilman, he shall immediately forfeit his place in the Council; and any appointive officer or employe of the city who shall become a candidate for nomination or election to any public office shall immediately forfeit the office or employment held under the city."

As you note in the code section creating the position of clerk of the Municipal Court, he is paid by the Council of said city. He has been drawing his salary since he certified as a candidate and will continue to draw this salary unless it is found to be an illegal payment.

I. We would like to have an opinion from the Attorney General's office, if possible, determining whether or not the present clerk of said court can run for an elective office, and whether or not the provisions of the charter as set out herein will apply to employees of said municipal court.

II. If it is found that he can not legally become a candidate for elective office and hold his present position, can he legally be paid by said city council for services rendered?

An early opinion from you in this matter will be very helpful as we are continuing to pay his salary."

At the outset, I assume that the clerk of the municipal court of the city of Portsmouth is not in the classified civil service of the state or municipality, as the case may be, if it should be decided that he is an officer or employe of the state or municipality. Of course, if he were in the classified civil service, the answer to your first question would require consideration of the provisions of section 486-23, General Code, as this office has in many opinions held that an officer or employe is taking part in politics in violation of such section if he becomes a candidate for a public office.

However, from an examination of section 1579-482, General Code, which is quoted in the enclosed letter, the language stating that the appointed clerk is to serve as such "during his (the judge's) pleasure" seems to show definitely that it was the intention of the legislature that he (the clerk) should be in the unclassified civil service. The Portsmouth Municipal Court Act was created by special act of the legislature in 1919 (108 O. L. Pt. 1, page 462, et seq.). The civil service law, section 486-1, et seq., General Code, was enacted in 1913, (103 O. L. 698 et seq.).

In Opinions of the Attorney General for 1929, Vol. I, page 375, at page 377, it is said:

"When such an employe is designated as a deputy, and his term is fixed at the pleasure of the appointing power, the conclusion is irresistible that such an employe is in the unclassified

service. Likewise, if the legislature in statutes later in the order of time of enactment than section 486-8 of the civil service law, clearly fixes the term of an employe at a period which is inconsistent with the civil service law (see section 486-17a, General Code, providing that the tenure of every officer and employe in the civil service shall be during good behaviour and efficient service), it is, in the absence of some other language or circumstance indicating a different intent, conclusive as to the legislature's intention that such a position is to be regarded as in the unclassified service." (Words in parenthesis the writer's.)

Moreover, it may be pointed out that the legislature has provided in paragraph (10) of section 486-8a, General Code, in stating what the unclassified civil service shall include:

"10. Bailiffs, constables, official stenographers and commissioners of courts of record, *and such officers and employes of courts of record* as the commission may find it impracticable to determine their merit and fitness by competitive examination." (Italics mine.)

The Municipal Court of Portsmouth is a court of record. See section 1579-459, General Code. I have been advised by the State Civil Service Commission that the municipal civil service commissions of various cities in which there are municipal court acts stating that the clerk of the municipal court is appointed during the pleasure of the appointing power, have never found it practicable to determine such clerk's merit and fitness by competitive examination.

Since the clerk of the municipal court is not in the classified civil service of the state or city, as the case may be, there would appear to be no legal provision preventing him from being a candidate for public office while serving as such clerk, unless his office or position could be said to come within the language of the charter provision quoted in your enclosed letter.

The question thus arises—is the clerk of the Municipal Court of Portsmouth an "appointive officer or employe" of the city.

In the Supreme Court case of *State, ex rel., v. Bernon*, 127 O. S. 204, it was held in the fourth paragraph of the syllabus:

"4. A judge of the Police Court of the City of Cleveland Heights is an elective municipal officer, whose nomination is governed by the charter of that city."

In this case the court was construing the language of Article VII of the charter of the city of Cleveland Heights, which stated how candidates for any elective office in the city shall be nominated, and had to determine whether or not the police judge of the police court of the city of Cleveland Heights, was amenable to such provision. In the course of the majority opinion, at page 208, it was stated:

“However, the relatrix insists that the provision is inapplicable because a police judge is a state and not a municipal officer. She lays particular stress upon the fact that the court here involved is now a creature of the statute. Neither she nor the respondents cite Ohio authority with reference to this contention. Nevertheless, in 28 Ohio Jurisprudence, 302, appears the statement that ‘a judge of a municipal court is a municipal and not a state officer.’ Likewise in the case of *State, ex rel. Thompson, v. Wall, Dir. of Finance*, 17 N. P. (N. S.), 33, 28 O. D. (N. P.), 631, it was held that a judge of a municipal court is a municipal and not a state officer. Of course this is a decision of a *nisi prius* court, but the cogency of its reasoning and the recognized authorities upon which it relies entitle it to consideration, especially in view of the fact that the judgment was affirmed by the Court of Appeals. Of the same import are two decisions cited by the respondents. In the case of *Franklin v. Westfall*, 273 Ill., 402, 112 N. E., 974, it was held that a judge of a city court is an officer of the city, as distinguished from a state or county officer. In *Buckner v. Gordon*, 81 Ky., 665, a police judge was held to be a city officer whose election was governed by the charter.”

Obviously, the court’s language showed that it considered the cited authorities holding a judge of a municipal court to be an officer of the city, decisive of the question of whether or not the police court judge of the city of Cleveland Heights was a municipal officer, and it carried such principle into the syllabus.

The police court of Cleveland Heights was created by a special act of the legislature (111 O. L. 270) just as municipal courts are established pursuant to authorization of sections 1 and 15 of Article IV of the Ohio Constitution. Such constitutional sections obviously empower the legislature to establish courts inferior to the courts of appeals. Hence, it would seem that the law as laid down in the court’s fourth syllabus has settled the law in Ohio on the point that a judge of a municipal court is a municipal officer. Of course, it would follow that all officers and employes connected with the municipal court are municipal officers and employes.

Even prior to the decision of the Supreme Court, *supra*, another court of appeals (the first district), other than the court of appeals that

affirmed without opinion the Thompson case (the second district) held in effect that a judge of a municipal court was a municipal officer. I refer to the case of *State ex rel. v. Beaman*, 16 O. App., 70. In this case, the statutes fixing the salaries of the judges of the superior and municipal courts of Cincinnati had been amended to fix an increased amount, and the question was whether or not such increase could be given to the judges of these courts then in office. After concluding that the inhibition of Article II, Section 20, Ohio Constitution, prevented the said judges from receiving such increase, the court stated at pages 73 and 74:

“Section 4213, General Code, relating to municipal officers, provides that the salary of any officer shall not be increased or diminished during the term for which he was elected or appointed. If, by any process of reasoning, it could be found that the relators are not debarred by the inhibition of the constitution from receiving the increased salary, during the respective terms of office held by them when the statute fixing the increased compensation was enacted, it is difficult to see how they can get by the provisions of the section of the General Code just cited; *and this is especially true of judges of the municipal court.*” (Italics the writer’s.)

Obviously, the court’s language seemed to clearly show that it considered a judge of the municipal court of Cincinnati was an officer of the city of Cincinnati, as such section 4213 only covers *city* officers and employes. The Supreme Court affirmed the judgment of the Court of Appeals, merely stating in the very short entry, that the statute had no application to the facts involved because of section 20, Article II, Ohio Constitution. See 105 O. S. 652. While the Supreme Court did not affirm the appellate court’s holding on the question of the application of section 4213, General Code, it did not overrule such holding, being silent thereon, and therefore the language of the Court of Appeals must be regarded with great weight.

In my Opinion No. 5082, rendered January 10, 1936, addressed to your Bureau, it was stated in the course of the opinion:

“In *State, ex rel. vs. Bernon*, 127 O. S. 204, it was held that a judge of the police court of the city of Cleveland Heights is an elective municipal officer whose nomination is governed by the charter of the city.

In the case of *State, ex rel. vs. Wall*, 17 N. P. (N. S.) 33, affirmed by the court of appeals and referred to with approval in *State, ex rel. vs. Bernon*, *supra*, it was held that a judge of the

municipal court of Dayton is a municipal officer and that the legislature may delegate to council the power to fix his compensation.

I am of the view that neither of these cases is applicable to the question here involved. *While judges of such courts are municipal officers*, nevertheless such officers are creatures of the legislature, which may either fix the compensation thereof or delegate that power to the legislative power of the municipality." (Italics mine.)

The language in italics, *supra*, shows that this office has squarely taken the stand that all judges of municipal courts are municipal officers, in view of the authorities cited.

It may be well to point out that the boundaries of the city of Portsmouth are coextensive with the boundaries of the township of Wayne, Scioto County, Ohio, so that the legislature created a municipal court for the boundaries of the city of Portsmouth by section 1579-459, General Code, similar to the case in creating the police court for the boundaries of Cleveland Heights, section 1579-651, second, in creating the municipal court for the boundaries of Dayton, section 1579-46, General Code, and, third, in creating the municipal court for the city of Cincinnati, section 1558-1, General Code. The police court of Cleveland Heights, the municipal court of Dayton and the municipal court of Cincinnati were involved in the Ohio authorities cited.

Hence I am of the view, in specific answer to your first question, that the present clerk of the municipal court of Portsmouth can legally be a candidate for the nomination for a public office, but forfeited his position of clerk when he became such a candidate. Also I am of the opinion that the provisions of the charter as set out in section 85 apply to the various appointive employes of said municipal court.

The conclusion to your first question impels a consideration of your second question. I presume you mean by this question whether or not the clerk of the municipal court can be paid "for services rendered" from the moment when he became a candidate. Your enclosed letter states that the municipal authorities are continuing to pay the salary to the clerk.

It has been held by this office in Opinions of the Attorney General for 1930, Vol. II, page 906, that a person becomes a candidate for the nomination for a public office at a primary election when he executes his formal declaration of candidacy and starts to circulate his petitions. Hence, it would seem that under section 85 of the Portsmouth charter, the clerk of the municipal court legally *forfeited* his position as clerk on the date of his execution of his declaration of candidacy for sheriff and the starting of the circulation of his petitions, and would have no legal right to any salary from such date for services rendered as clerk.

It is a well known principle of law that salary is attached to an office, and if a person has no legal right to an office, he is not entitled to the salary attached thereto. See 46 C. J., 1016; 32 Ohio Jurisprudence, 1093.

The law as to right of a *de facto* officer to demand salary for services rendered and the rights of a political subdivision to recover back salary paid to a *de facto* officer is set out concisely in Ohio Jurisprudence. It is stated in Vol. 32 Ohio Jurisprudence, 1092, under the topic "Public Officers", sub-topic "De Facto", "Right to Compensation":

"As a general rule, a *de facto* officer is not entitled to maintain an action for the salary, fees, or other compensation pertaining to an office. This general rule has been followed in a decision rendered by the former Cincinnati Superior Court and one court of common pleas, while another court of common pleas has declared that a *de facto* officer is entitled to compensation. And it would seem to follow from this holding that a *de facto* officer could maintain an action for the salary, fees, or other compensation pertaining to an office.

The reason for the general doctrine is that the right to the salary and emoluments of a public office attach to the true, not merely the colorable title; and in an action brought by a person claiming to be a public officer for the fees or compensation given by law, his title to the office is in issue, and if that is defective and another had the real right, although not in possession, the plaintiff cannot recover. Actual incumbency alone gives no right to the salary or compensation. The right to recover is denied, not upon the ground of actual fraud upon his fault, for it often happens that he is not under a claim of right but under a *prima facie* title which he cannot or may not know to be invalid. Nor is it denied upon the ground that he is a mere volunteer and that the government should not be obliged to pay him for his services, for in most cases they are rendered in good faith and under the expectation, both on his part and on the part of the public, that he is to receive the emoluments of the office. The principle is that the right follows the true title, and the court will not aid him by permitting him to recover the compensation which rightfully belongs to another. *But a salary which has been paid to a de facto officer cannot be recovered back by the public corporation which has made payment thereof, at least where he has actually rendered the services for which he was paid.*" (Italics mine.)

Under the prevailing rules, *supra*, it would seem that a *de facto* officer is not entitled to be paid for services rendered, but if he has been

paid, the political subdivision cannot recover the money back, in the absence of fraud, collusion or excess payments.

In Opinions of the Attorney General for 1932, Vol. II, page 858, it is stated, as disclosed by the third paragraph of the syllabus:

“3. Payments made to a de facto officer for services rendered may not be made the subject of a finding for recovery in the absence of fraud, collusion or excess payments for such services.”

It is believed that the principles set forth above will provide an adequate answer to your second question.

Respectfully,

JOHN W. BRICKER,
Attorney General.

5319.

APPROVAL—PROPOSED AGREEMENT WITH THE C. AND O.
RAILWAY COMPANY, FOR ELIMINATION OF GRADE
CROSSING IN CITY OF COLUMBUS, FRANKLIN COUNTY,
OHIO.

COLUMBUS, OHIO, April 2, 1936.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR: You have submitted for my consideration a proposed agreement by and between the Director of Highways, the City of Columbus, the County of Franklin and The Chesapeake and Ohio Railway Company, covering the elimination of the grade crossing at Fifth Avenue (S. H. 48) and King Avenue in the City of Columbus and Chambers Road in Franklin County, over the tracks of The Chesapeake and Ohio Railway Company, and the raising of the Third Avenue bridge superstructure in Columbus, Franklin County, Ohio.

After examination, it is my opinion that said proposed agreement is in proper legal form and when the same is properly executed it will constitute a valid and binding contract.

Said proposed contract is being returned herewith.

Respectfully,

JOHN W. BRICKER,
Attorney General.