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1. ARMED FORCES, UNITED STATES — MEMBER BOARD OF ELECTIONS — ENTITLED TO RECEIVE COMPENSATION FOR THAT OFFICE WHILE IN SERVICE.
2. DEPUTY APPOINTED BY COUNTY OFFICER CANNOT RECEIVE COMPENSATION WHILE ABSENT FROM DUTIES BY REASON OF SUCH SERVICE.

## SYLLABUS:

1. A member of the board of elections is entitled to receive compensation for that office while in the armed forces of the United States.
2. A deputy appointed by a county officer cannot receive compensation while absent from his duties by reason of being in the armed forces of the United States.

Columbus, Ohio, May 31, 1944

Hon. Paul A. Baden, Prosecuting Attorney  
Hamilton, Ohio

Dear Sir:

I acknowledge receipt of your communication requesting my opinion and reading as follows:

“The County Auditor has asked me to get an opinion from you in answer to the following questions:

1. Can a member of the Board of Elections receive compensation for that office while in the armed service of the United States?
2. Can a deputy in a county office (auditor, treasurer, clerk, etc.) remain on the payroll and be paid while in the armed forces of the United States?”

Questions as to the right of various public officers, both elective and appointive, to hold their offices or positions while serving in the armed forces of the United States and to receive the compensation pertaining to such offices, have been before this office on a number of occasions.

In an opinion which I rendered August 28, 1942, found in 1942 Opinions, Attorney General, p. 637, it was held:

“Where a county prosecuting attorney or a county engineer enlists in some branch of the military service or is drafted into the service of the United States Government during the present war, each would carry the responsibility for his position during his absence in such service and would be entitled to receive the salary pertaining thereto.”

Reference was there made to several previous opinions to like effect, among others, 1940 Opinions, Attorney General, p. 982; 1922 Opinions, Attorney General, p. 477 and 1918 Opinions, Attorney General, p. 970. There would appear to be no inherent incompatibility between military service in the United States Army and any public office or employment under the state or any of its political subdivisions. In the case of *State, ex rel. Cooper v. Roth*, 140 O. S., p. 377, the court held that a member of a city council forfeited his office by entrance into the military service of the United States. This holding was not based upon any suggestion of incompatibility but solely upon the provisions of Section 4207 of the General Code, which provides:

“Each member of council shall be an elector of the city, shall not hold any other public office or employment, except that of notary public or member of the state militia \* \* \*.”

The court held that service in the military forces of the United States is public employment.

Your inquiry raises directly the question as to the right of a member of the board of elections in one case and a deputy in a county office, such as treasurer, auditor or clerk, to remain on the payroll and receive his compensation while serving in the armed forces of the United States. This question as applied to an elected officer was involved, as you will note, in the opinion from which I have quoted (1942 Opinions, Attorney General p. 637) and it also entered into the other opinions to which reference has been made. At the time those opinions were rendered, there had been no definite holding by the courts of Ohio as to the right of an officer to receive his salary or compensation while absent for an extended period from his duties by reason of military service or for other causes. That question, however, was specifically decided in the recent case of *State, ex rel. v.*

White, 143 O. S., 175, where the court held:

“Where there is no specific provision of statute on the subject, the incumbent of a county office does not lose title to his office or his right to the salary or compensation connected therewith by reason of mere absence from the county.”

That was a case where the relator had been elected prosecuting attorney and had thereafter enlisted in the United States Army, and had been for a considerable period absent from his duties as prosecuting attorney. He brought action in mandamus to require the county commissioners to appropriate sufficient funds to pay his salary, the county auditor to issue a warrant on the county treasurer therefor, and the county treasurer to honor and pay the same. The court ordered the writ of mandamus issued. In a previous case involving the same situation, the Court of Appeals of Adams County had refused to grant a writ of mandamus, holding that while the prosecuting attorney did retain his office he could not compel payment of his salary because of his absence from his duties. *State, ex rel. Clinger v. Shell*, 71 Oh. App., 555.

In the *Clinger* case, the Supreme Court noted that the relator after being duly elected had enlisted in the army and had been absent from his post approximately a year. The court called attention to the fact that he had been elected, pursuant to law, for a term of four years; that his compensation was fixed by law and that the only way a vacancy could be brought about by the public authorities was by charges and removal pursuant to Section 2913, General Code. The court said at page 180 of the opinion:

“This case presents a situation where the office has not been abolished by law or abandoned by the officer. It is conceded there is no vacancy and no ground for declaring a vacancy. And yet it is urged that the respondent county officers, without legislative authority, may not merely reduce the compensation of the incumbent prosecuting attorney but may abolish his salary during the period in question.

However, in the disposition of the issue presented in this case, we need go no further than to apply elementary principles of construction to the statutory provisions heretofore set forth. We may assume that the General Assembly, being authorized to fix the compensation of the prosecuting attorney, also had power to condition the retention of his office beyond a designated period of absence upon a reduction or surrender of com-

pensation. But by virtue of the provisions heretofore recited, the relator is unconditionally continued in his office as prosecuting attorney, with no condition attached and no provision as to any change in his salary or compensation; and no power conferred upon any board or officer to withhold or reduce the prescribed compensation during the period of absence."

The above holding and the reasons given will answer your question as to the member of the board of elections, provided he is an officer with a fixed tenure of office and a compensation fixed by law. This calls for a brief examination of the laws relating to boards of elections.

Section 4785-6, General Code, makes the Secretary of State the chief election officer of the State, and Section 4785-7 authorizes him to appoint all members of boards of elections.

Section 4785-8 provides for the appointment of a board of elections in each county consisting of four members. No qualifications for such appointees are prescribed except that they must be electors of the county, and must represent equally the two leading political parties. Their term of office is fixed at four years.

By Section 4785-18 the compensation of such board members is fixed, based on the population of the county as determined by the next preceding federal census.

Section 4785-13 and following sections of the General Code define the duties of the board, which, without going into detail, cover the whole scope of the conduct of elections, with widespread and important powers, which certainly give to the members the essential characteristics of officers. They are given extensive powers of appointment, not only of their clerical force but also of judges and clerks of elections. They have authority to make rules and regulations relative to the conduct of elections, to make investigations, pass on the sufficiency of petitions, issue certificates of election, and perform many other duties of important character. The outstanding feature of a public office is that it carries with it some portion of the sovereign functions of the government. As stated in 32 O. Jur., p. 855:

"Generally, according to legal definition, an office is an employment on behalf of the government, in any station or

public trust, not merely transient, occasional, or incidental. As a general rule, the term 'office' embraces the ideas of tenure, duration, emolument, and duties. In accordance therewith, it is said that a public office is the right, authority, and duty created and conferred by law by which, for a given period — either fixed by law or enduring at the pleasure of the creating power — an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

Measured by these standards, a member of a board of elections has all the characteristics of an officer.

The courts generally refer to members of such a board as "officers", and emphasize the importance of the office. In *State, ex rel. v. Brown*, 113 O. S. 386, 393, the court said:

"The office of deputy state supervisor of elections is a very important office. The members of that board select the judges and clerks of election that receive, count, and tabulate the votes cast, and it is of the highest importance to all that persons shall be selected for these important duties who are possessed of the highest integrity and are accustomed to act in accordance therewith."

It is true that under Section 4785-11, General Code, the Secretary of State may remove a member of the Board for certain sufficient causes, but if the Secretary of State does not see fit to exercise his power, the member of a board of elections would appear to have the same right to claim his compensation while he continues to hold the office though absent in the military service, as did the relator in the case of *State, ex rel. v. White*, supra.

I find nothing in the statute relating to the appointment and qualifications of the members of a board of elections which would disqualify them from holding any other public office and there is nothing inherent in service in the military forces of the United States that would appear to interfere in any way with one holding at the same time the position of member of the board of elections.

Your second question, relating to a deputy of any of the county officers leads to a very different result, as a deputy has none of the characteristics such as we have been discussing as pertaining to an

officer. A deputy, according to Section 9 of the General Code is thus described:

“A deputy, when duly qualified, may perform all and singular the duties of his principal. A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him. The principal may take from his deputy or clerk a bond, with sureties, conditioned for the faithful performance of the duties of the appointment. In all cases the principal shall be answerable for the neglect or misconduct in office of his deputy or clerk.”

The fact that the deputy may perform all and singular the duties of his principal does not give him any of the sovereign powers that may be lodged by law in his principal. His acts are merely the acts of his principal and must be done in the principal's name. *Lessee of Anderson v. Brown*, 9 Ohio 151; *Warwick v. State*, 25 O. S. 21; *Mellinger v. Mellinger*, 73 O. S. 221.

A deputy is in no sense a public officer. 32 O. Jur., 877; *State v. Meyers*, 56 O. S. 340. It would follow that such deputies would have none of the characteristics that the court regarded as decisive in holding an officer to be entitled not only to his position for his legal term, but as an incident to his title to the office, to receive the salary provided by law.

Aside from these principles the legislature has laid down a rule relative to deputies and other assistants of county officers that would effectually prevent such employe from receiving compensation for services which he had not performed. Section 2988 provides that before the auditor may issue a warrant to any such employe for his compensation, he must procure the written receipt of such employe, reciting among other things:

“I hereby certify that I have rendered the services as herein stated, and that I have received the full sum set forth in the above receipt for my own use and benefit, \* \* \*”

Specifically answering your questions it is my opinion:

1. A member of the board of elections is entitled to receive compensation for that office while in the armed forces of the United States.

2. A deputy appointed by a county officer cannot receive compensation while absent from his duties by reason of being in the armed forces of the United States.

Respectfully,

THOMAS J. HERBERT

Attorney General