

4268

MARSHAL, VILLAGE—APPOINTED BY MAYOR WITH ADVICE AND CONSENT OF COUNCIL—SERVED PROBATIONARY PERIOD OF SIX MONTHS—CONTINUOUS SERVICE—WHERE AT END OF PROBATIONARY PERIOD MAYOR PROPOSES TO APPOINT MARSHAL, FINAL APPOINTMENT NOT CONCURRED IN BY COUNCIL—OFFICE NOT VACATED—APPOINTEE MAY CONTINUE TO SERVE UNTIL REMOVED BY MAYOR WITH CONCURRENCE OF COUNCIL—MAY BE REMOVED FOR CAUSE—SECTIONS 737.17 TO 733.35, 733.39 RC.

SYLLABUS:

Where a village marshal has been appointed by the mayor with the advice and consent of council and has served the probationary period of six months continuous service as provided in Section 737.17, Revised Code, and where at the end of such probationary period the mayor proposes to finally appoint such marshal but such final appointment is not concurred in by the council, the office of marshal is not thereby vacated, but such appointee will continue to serve until removed by the mayor with the concurrence of council or removed for cause as provided in Sections 733.35 to 733.39, Revised Code.

Columbus, Ohio, August 25, 1954

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your letter of recent date sets forth the following facts. On January 15, 1954, in accordance with the provisions of Section 737.15, Revised Code, the mayor of the village of X with the advice and consent of the village council appointed A to the position of village marshal. A served as village marshal on a probationary status as provided in Section 737.17 for a period of six months continuous service. At the end of six months, the mayor purported to permanently appoint A as marshal. The council, however, failed to give its consent or concur in such permanent appointment. A has continued to serve as marshal since that time at the instructions of the mayor.

You request my opinion as to the authority of A to continue to serve as marshal and the authority of the village to pay him for any services

rendered after July 15, 1954, (six months from the date of his original appointment.)

Prior to September 5, 1941, the statutes provided for the election of a village marshal for a two year term. Since that time, the statutes provide for the appointment of a marshal. Sections 737.15 and 737.17, Revised Code, read as follows:

Section 737.15, Revised Code:

“Each village shall have a marshal, designated chief of police, appointed by the mayor with the advice and consent of the legislative authority of the village, who is an elector thereof, and who shall continue in office until removed therefrom as provided by sections 733.35 to 733.39, inclusive, of the Revised Code. In case of the removal of a marshal or chief of police of a village, an appeal may be had from the decision of the legislative authority to the court of common pleas to determine the sufficiency of the cause of removal. Such appeal shall be taken within ten days from the finding of such legislative authority.”

Section 737.17, Revised Code:

“All appointments made under sections 737.15 and 737.16 of the Revised Code shall be for a probationary period of six months' continuous service, and none shall be finally made until the appointee has satisfactorily served his probationary period. At the end of the probationary period the mayor shall transmit to the legislative authority of the village a record of such employee's service with his recommendations thereon and he may, with the concurrence of the legislative authority, remove or finally appoint the employee.”

Sections 733.35 to 733.39, Revised Code, referred to in the text of Section 737.15, pertain to removal of municipal officers for misfeasance, malfeasance, nonfeasance, etc. in office and require the filing of official charges followed by a formal hearing before the village council. Reading Sections 737.15 and 737.17 in *pari materia*, it is clear that in order to obtain permanent tenure or be “finally” appointed, the concurrent action of both the mayor and the council is required on two different occasions—both at the time of the original appointment and at the termination of the probationary period of six months continuous service. Here such concurrent action was taken at the time of the original appointment in January, 1954, but was not taken at the end of the probationary period

in July, 1954. It follows that A has not been "finally" appointed so as to authorize his future dismissal only upon the filing of charges as provided in Sections 733.35 to 733.39, Revised Code.

Does the failure of council to concur in the "final" or "permanent" appointment automatically terminate the previous "temporary" appointment to which council did concur? I do not believe so.

If this were so, there would be no reason for the statute providing, as Section 737.17 does provide, that at the end of the probationary period the mayor "may, with a concurrence of the legislative authority, *remove* * * * the employee." In the same way the concurrence of *both* the mayor and council is required to "finally appoint" a village marshal, I believe it clear that the concurrence of *both* is required to *remove* him from office as provided by Section 737.17. Until such time as he is removed under the provisions of Section 737.17 or of Sections 733.35 to 733.39, I believe that A is the lawful incumbent of the office of village marshal, required to perform the duties of such office, and entitled to receive the salary therefor. The same result, of course, would follow if the mayor at the end of the probationary period chose to remove the marshal and the council failed to concur in such removal.

While in my opinion the plain language of Section 737.17 requires such a conclusion regardless of the consequences that may result therefrom, I perhaps should point out that in situations such as this, where the mayor and the council apparently are not in accord, any other conclusion would mean that the village would be without a marshal until such time as the mayor and council should agree on a successor. The language of the statute has the effect of preventing such a void. While A may still be removed either for cause as provided in Sections 733.35 to 733.39, Revised Code, or by concurrence of the mayor and council as provided in Section 737.17, Revised Code, he will continue to occupy the office of marshal until so removed.

In specific answer to your question, it is my opinion that where a village marshal has been appointed by the mayor with the advice and consent of council and has served the probationary period of six months continuous service as provided in Section 737.17, Revised Code, and where at the end of such probationary period the mayor proposes to finally appoint such marshal but such final appointment is not concurred in by the council, the office of marshal is not thereby vacated, but such appointee will con-

tinue to serve until removed by the mayor with the concurrence of council or removed for cause as provided in Sections 733.35 to 733.39, Revised Code.

Respectfully,

C. WILLIAM O'NEILL

Attorney General