

2013.

OFFICES—VILLAGE MARSHAL AND COUNTY DOG WARDEN INCOMPATIBLE.

SYLLABUS:

The office of village marshal and position of county dog warden are incompatible and a village marshal may not be appointed county dog warden.

COLUMBUS, OHIO, April 25, 1928.

HON. E. P. MCGINNIS, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date in which you submit the following question and request my opinion thereon:

“At the present time the man who is holding the office of village Marshal here has been appointed Dog Warden and is acting in that capacity. In your opinion would these two offices be incompatible under the rule laid down in *State vs. Taylor*, 12 O. S. 130?”

Section 4384, General Code, provides:

“The marshal shall be elected for a term of two years * * * and shall serve until his successor is elected and qualified. He shall be an elector of the corporation * * *.”

By the terms of Section 4385, General Code,

“The marshal shall be the peace officer of the village and the executive head under the mayor of the police force. The marshal, the deputy marshals, policemen or nightwatchmen under him shall have the powers conferred by law upon police officers in all villages of the state, and such other powers not inconsistent with the nature of their offices as are conferred by ordinance.”

As provided by Section 4386, General Code,

“He shall suppress all riots, disturbances and breaches of the peace and to that end may call upon the citizens to aid him. He shall arrest all disorderly persons in the corporation and pursue and arrest any person fleeing from justice in any part of the state. He shall arrest any person in the act of committing any offense against the laws of the state or the ordinances of the corporation, and forthwith bring such person before the mayor or other competent authority for examination or trial, and he shall receive and execute any proper authority for the arrest and detention of criminals fleeing or escaping from other places or states.”

Section 4387, General Code, provides in part as follows:

“In the discharge of his proper duties, the marshal shall have like powers and be subject to like responsibilities as constables * * *.”

By an act passed April 21, 1927 (112 v. 348), the Legislature amended Section 5652-7, General Code, to read as follows:

"County commissioners shall appoint or employ a county dog warden and deputies to such number, for such periods of time, and at such compensation, as such county commissioners shall deem necessary to enforce the provisions of the General Code relative to the licensing of dogs, the impounding and destruction of unlicensed dogs, and the payment of compensation for damages to live stock inflicted by dogs.

Such county dog warden and deputies shall each give bond in a sum not less than five hundred dollars and not more than two thousand dollars conditioned for the faithful performance of their duties. Such bonds to be filed with the county auditor of their respective counties. Such county dog warden and deputies shall make a record of all dogs owned, kept and harbored in their respective counties. They shall patrol their respective counties, seize and impound on sight all dogs more than three months of age, found not wearing a valid registration tag, except dogs kept constantly confined in a registered dog kennel. They shall also investigate all claims for damages to live stock inflicted by dogs. They shall make weekly reports, in writing, to the county commissioners of their respective counties of all dogs seized, impounded, redeemed and destroyed, also, all claims for damage to live stock inflicted by dogs. County dog wardens and deputies shall have the same police powers as are conferred upon sheriffs and police officers in the performance of their duties as prescribed by this act. They shall, likewise, have power to summon the assistance of bystanders in performing their duties and may serve writs and other legal processes issued by any court in their respective counties with reference to enforcing the provisions of this act. County auditors may deputize such county dog wardens or deputies to issue dog licenses as provided in Section 5652 and 5652-7a of the General Code. Whenever any person shall file an affidavit in a court of competent jurisdiction that there is a dog more than three months of age, running at large that is not kept constantly confined in a registered dog kennel, and not wearing a valid registration tag, or is kept or harbored in his jurisdiction, such court shall forthwith order the county dog warden to seize and impound such animal. Thereupon such dog warden shall immediately seize and impound such dog so complained of. Such officer shall forthwith give notice to the owner of such dog, if such owner is known to the officer, that such dog has been impounded, and that the same will be sold or destroyed if not redeemed within three days. If the owner of such dog be not known to the dog warden, he shall post a notice in the county court house describing the dog and place where seized and advising the unknown owner that such dog will be sold or destroyed if not redeemed within three days.

Whoever steals a dog which has been registered under the provision of this chapter shall be fined not less than \$50.00 nor more than \$500.00 or be sentenced to not less than ten days nor more than thirty days in the county jail."

It is stated in 36 Cyc. at page 1381:

"It may be laid down as a rule of the common law that the holding of one office does not in and of itself disqualify the incumbent from holding another office at the same time provided there is no inconsistency in the functions of the two offices in question. But at common law two offices whose functions are inconsistent are regarded as incompatible. The inconsistency which at common law makes offices incompatible does not consist in the physical impossibility to discharge the duties of both offices; but rather in a con-

flict of interest, as where the incumbent of one office has the power to remove the incumbent of another, or to audit the accounts of another, or to exercise a supervision over another as in the case of a judicial officer and his subordinate ministerial officer. * * *

In the case of *State, ex rel. Attorney General vs. Gebert*, 12 O. C. C. (N. S.) 274, 275, the rule of incompatibility is stated thus:

"Offices are considered incompatible when one is subordinate to, or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both."

Judge Killits, in the case of *State, ex rel. Wolf vs. Shaffer*, 6 O. N. P. (N. S.) 219, at page 221, used the following language:

"It was early settled at common law that it was not unlawful *per se* for a man to hold two offices; if the offices were incompatible with each other, that is, if the attempt to fill one disqualified the officer from performing the duties of the other, so that, for instance, in one position the officer was superior in functions to himself filling the other, as in the case of a man attempting to fill at one time the office of councilman and village clerk, then he could hold but one, but if the duties of one were not in conflict with the duties of the other, then both could be held. And it was early held that the test of incompatibility was not that it was physically impossible for the officer to perform the duties of one office because he was at that time elsewhere performing the duties of the other, but the distinction was in an inconsistency in the functions of the offices, as in the example above given."

Your attention is directed to a former opinion of this office which appears in Vol. I, Opinions, Attorney General, 1915, at page 758, the syllabus of which reads:

"It is against public policy for a person acting as sheriff to be appointed as humane officer."

The following language appears therein:

"There is no statutory inhibition against a sheriff acting as humane officer, nor against a humane officer acting as sheriff; nor am I able to find that the one office is in any way a check upon the other.

However, under the provisions of Section 2833, G. C., the sheriff is required to 'preserve the public peace.' In view of the fact that the sheriff is made the conservator of the public peace of his county, he should be accessible both day and night and be at all times subject to call.

The law making it the duty of the sheriff to preserve the public peace and, therefore, be at all times subject to call differentiates said officer from the other county officers, and being so subject I am of the opinion that it is against public policy that he should hold any other public office which would interfere with his duties as sheriff, as above indicated."

You will note that by the provisions of Section 4385, *supra*, "the marshal shall be the peace officer of the village and the executive head under the mayor of the police force." His duties are specifically enjoined by law and in view of the provisions of

Sections 4385 and 4386, *supra*, the marshal should be readily accessible both day and night and at all times subject to call.

By the terms of Section 5652-7, *supra*, the board of county commissioners appoint or employ the county dog warden. A county dog warden is required to give a substantial bond conditioned for the faithful performance of his duties. He is required to make a record of all dogs owned, kept or harbored in his county. He is required to patrol his county and seize and impound on sight all dogs more than three months of age, found not wearing a valid registration tag. He must investigate all claims for damages to live stock inflicted by dogs and may be required to go into adjoining counties to make such investigations. County auditors may deputize county dog wardens to issue dog licenses. Whenever any person shall file an affidavit in a court of competent jurisdiction that there is a dog more than three months of age running at large, and not wearing a valid registration tag, such court shall forthwith order the county dog warden to seize and impound such animal. In other words, this statute enjoins upon a county dog warden, duties which are county wide in their nature.

The electors of a village elect a marshal as their peace officer and as provided by Section 4384, *supra*, his term of office is for two years. Being subject to duties specifically enjoined by statute, I am of the opinion that it is against public policy that a village marshal should hold any other office or position which would interfere to so great an extent with such duties.

In this connection your attention is directed to Section 4363, General Code, which provides in part as follows:

“* * * In any village the marshal shall be eligible to appointment as street commissioner.”

In other words, the Legislature has expressed its intent that a village marshal might lawfully be appointed as street commissioner. The duties of street commissioner as defined by Section 4364, General Code, are purely local in character and co-extensive with the limits of the village and in no wise would interfere with the proper performance of the duties of village marshal.

In an opinion of this office, being Opinion No. 802, dated July 28, 1927, addressed to the Prosecuting Attorney of Tuscarawas County, it was held that:

“The sheriff of a county cannot legally be appointed to the position of dog warden.”

In that opinion the following language appears:

“The cardinal rule for construction of all laws is to determine and give effect to the intention of the Legislature which enacted the law. It seems to me that when the Legislature in specific terms repeals a law which provides that certain duties shall be performed by a certain public officer and simultaneously enacts a law charging another officer with the performance of these same duties, we can get no other meaning from its action in so doing than that it intended that the two offices should be filled by two different distinct persons. * * *

There is no specific statutory inhibition upon a sheriff acting as dog warden or upon a dog warden acting as sheriff; nor do I think the duties of the two positions are such as to make them incompatible at common law. Upon consideration, however, of the apparent intent of the Legislature, I am constrained to the opinion that a county sheriff can not legally hold the position of dog warden, and it of course follows that the deputy sheriffs as such are not empowered to perform the duties of dog warden or deputy dog warden.”

Summarizing and answering your question specifically, I am of the opinion that the office of village marshal and the position of county dog warden are incompatible and may not be held by the same person.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2014.

APPROVAL, BONDS OF MORGAN COUNTY, OHIO, \$14,000.00.

COLUMBUS, OHIO, April 25, 1928.

Industrial Commission of Ohio, Columbus, Ohio.

2015.

BOARD OF EDUCATION—AUTHORITY TO TRANSFER TERRITORY—
CENTRALIZED SCHOOL DISTRICTS.

SYLLABUS:

1. *The mandatory provisions of Section 4696, General Code, have no application to centralized school districts.*
2. *The transfer of territory to a centralized school district does not effect a decentralization of the schools of the district to which the transfer is made.*
3. *The provisions of Section 4727, General Code, to the effect that centralization shall not be discontinued within three years, and thereafter, only by a vote of the people, does not prevent transfers of territory from such district, if a petition be filed therefor with the board of education of the county school district of which such centralized district is a part, signed by two-thirds of the qualified electors residing in the territory seeking to be transferred.*
4. *Under the provisions of Sections 4696, et seq., General Code, a board of education of a county school district is authorized to transfer territory from a centralized school district to another district, upon the petition of two-thirds of the qualified electors of the territory sought to be transferred, but it is not required to make such transfer, although the petition therefor be signed by seventy-five per cent. or more of such qualified electors.*
5. *When, in the creation of a new school district, under the provisions of Section 4736, General Code, the entire territory of a previously existing school district is incorporated in the newly created district, the board of education of the previously existing district so incorporated is thereby abolished, and a board of education for the newly created district should be appointed in the manner set forth in said Section 4736, General Code.*
6. *There is no authority for a board of education of a county school district to transfer school territory to a school district of another county school district.*