

The application for a reduction in the amount of the annual rental provided for in this lease, was filed with you on or about the 27th day of November, 1933, pursuant to the provisions of House Bill No. 467, which was passed by the 90th General Assembly, under date of June 8, 1933, and which became effective on the 11th day of October, 1933. 115 O. L. 512.

By the provisions of this act, the Superintendent of Public Works, with the approval of the Governor and Attorney General, is authorized to make a rental adjustment on existing canal land leases for a period of one year in advance, beginning with the next semi-annual rental payment date provided for in such leases. Such rental adjustment can be made by the Superintendent of Public Works only upon an application therefor made by the lessee in the manner and form provided for in Section 3 of said Act, in and by which application, among other things the lessee is required to set forth the reasons why the annual rental provided for in said lease should be revised.

In the application filed by the lessee with you as Superintendent of Public Works, the reason assigned for the reduction in the annual rental, provided for in this lease, requested by the lessee, is economic conditions affecting railroad earnings.

Acting upon this application and presumably making the investigation which the statute contemplates, you have made a finding in and by which you have granted said lessee a reduction in the annual rental under said lease for a period of time between May 1, 1934, and May 1, 1935, and have fixed the annual rental to be paid by said lessee for this period, at the sum of \$822.00.

Upon examination of the proceedings relating to this matter, including the application for the reduction in rental, above referred to, I am inclined to the view that they are in substantial conformity with the statutory provisions outlined in House Bill 467 and the same are accordingly approved by me as to legality and form, as is evidenced by my approval endorsed in and upon the resolution of approval, which is made a part of the proceedings, relating to the reduction of said rental, and upon the copies thereof, all of which, together with the duplicate copies of your finding and the application, are herewith returned.

Respectfully,

JOHN W. BRICKER,
Attorney General.

2691.

OFFICES INCOMPATIBLE—VILLAGE MARSHAL AND TOWNSHIP
CONSTABLE WHEN—DEPUTY VILLAGE MARSHAL AND CON-
STABLE COMPATIBLE WHEN.

SYLLABUS:

1. *A village marshal may not at the same time serve as constable of a township where the limits of the township extend beyond the limits of the village, or where the limits of the township are identical with the corporate limits of the village.*

2. *A deputy village marshal, with the consent of the mayor and council of the village, may at the same time serve as constable of the township where the limits of the township extend beyond the limits of the village, or where the limits of the township are identical with the corporate limits of the village.*

COLUMBUS, OHIO, May 19, 1934.

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

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

“We respectfully request your written opinion on the following question of compatibility of offices:

Question. May a marshal or deputy marshal of a village also serve as constable (1) when the township line extends beyond the limits of the village; (2) when the corporate limits of the village are identical with the township, (see section 3512 G. C.)

Opinion of your predecessor No. 2013, page 991 of the 1928 Opinions, may be pertinent.”

Public offices are said to be incompatible when they are made so by statute, or when by reason of the common law rule of incompatibility they are rendered incompatible. The best definition of the common law rule of incompatibility to be found in Ohio is the one stated by the court in the case of *State, ex rel., vs. Gebert*, 12 O. C. C. (N. S.) 274 at page 275, as follows:

“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.”

Section 4384 and 4385, General Code, read as follows:

Section 4384.

“The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. When provided for by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special policemen, and may remove them for cause, which shall be stated in writing to council.”

Section 4385.

“The marshall 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.”

Section 4386, General Code, provides that the marshal shall arrest disorderly persons in the corporation and shall pursue fugitives from justice in any part of the state.

Section 4387, General Code, reads 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 * * *.”

The powers and duties of constable are enumerated in Sections 3327, et seq., General Code.

In your letter you refer to an opinion to be found in Opinions of the Attorney General for 1928, Volume II, page 991. The syllabus of that opinion reads as follows:

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

The following appears at pages 993 and 994:

“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.

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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.”

This opinion, if correct, seems to hold that a village marshal is a full time officer and therefore may not hold any other public position. This opinion, if correct, would be dispositive of part of your first question. After a careful examination of the same, I am constrained to hold that a village marshal may not at the same time serve as constable of a township that extends beyond the limits of the village.

The question of whether or not a deputy marshal might serve as constable under the same circumstances raises a different question. As noted in section 4384, supra, the mayor, with the consent of the village council, appoints the deputy marshals. Certainly, the terms of the deputy’s employment might require that he spend only part time at the duties of such employment. In such a situation, with the consent of the mayor and council, he might act as constable. Recognition of the principle that a deputy marshal might serve in other public employment at the same time, has been given by this office in former opinions. In an opinion to be found in Opinions of the Attorney General for 1927, Volume I, page 66, it was held as disclosed by the first, second and fourth branches of the syllabus:

“1. A deputy village marshal may be appointed and may serve as temporary state prohibition inspector.

2. A deputy village marshal who has been appointed temporary prohibition inspector, may be paid a salary from the state treasury for his services as temporary prohibition inspector in any county in the

state other than the one in which the village of which he is such a deputy is situated.

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4. The duties of a deputy village marshal require that he be available at all times. Before absenting himself, he should obtain the consent thereto from his village authorities."

In an opinion to be found in the Annual Report of the Attorney General for 1910-1911, the following was stated at page 965: -

"From the above quoted section the officer serving as policeman for the Carnegie Steel Company has the same authority as a constable. Therefore, the answer to your inquiry rests upon determining whether the office of constable and that of village policeman are incompatible. The above two offices are not in any way a check upon the other, nor does one exercise a supervision over the other, nor does the statutory law of this state prohibit the holding of the two offices."

A constable has been permitted to hold other public employment. In an opinion to be found in Opinions of the Attorney General for 1920, Volume II, page 1083, it was held as disclosed by the fifth branch of the syllabus:

"Constable and humane agent or officer are offices not incompatible where a physical impossibility to perform the duties of each by one person is not apparent."

It would seem that after an examination of the statutes relative to the duties of these positions, that a deputy marshal, with the consent of the mayor and council, might act as constable of a township that extends beyond the limits of the village.

Your second question is raised because of the provisions of section 3512, General Code. This section reads as follows:

"When the corporate limits of a city or village became identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes. Such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of such city or village. All rights, interests, or claims in favor of or against the township may be enforced by or against the corporation."

It is to be noticed that justices of the peace and constables are expressly exempt from the provisions of this section. After an examination of the above section, I am unable to say that the existence of the conditions provided for by that section will in any way change the answer to the first question.

Summarizing, and in answer to your questions, it is my opinion that:

1. A village marshal may not at the same time serve as constable of a

township where the limits of the township extend beyond the limits of the village, or where the limits of the township are identical with the corporate limits of the village.

2. A deputy village marshal, with the consent of the mayor and council of the village, may at the same time serve as constable of the township where the limits of the township extend beyond the limits of the village, or where the limits of the township are identical with the corporate limits of the village.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

2692.

CRIMINAL—TWENTY YEARS OF AGE PREVIOUSLY INCARCERATED IN OHIO STATE REFORMATORY—UPON SUBSEQUENT CONVICTION OF FELONY SENTENCED TO OHIO PENITENTIARY.

SYLLABUS:

A male person twenty years of age who previously had been convicted and sentenced to the Ohio State Reformatory, must be sentenced to the Ohio Penitentiary on being convicted and sentenced for a subsequent felony.

COLUMBUS, OHIO, May 19, 1934.

HON. JOHN MCSWEENEY, *Director, Department of Public Welfare, Columbus, Ohio.*
 DEAR SIR:—This will acknowledge your letter which reads:

“We respectfully request your interpretation of the meaning of Section 2131 G. C., and your opinion of the following question:

One F. G. was sentenced on February 6, 1930, to the Ohio State Reformatory from Carroll County on a charge of Attempted Burglary—1 to 15 years. On April 1, 1931, this man was paroled from the Ohio State Reformatory. On January 12, 1932, he was declared a parole violator but was not apprehended. While on parole, April 28, 1933, he was sentenced to the Ohio Penitentiary from Stark County on a charge of Assault to Rob—1 to 15 years. At the time of his sentence to the Penitentiary, he was only twenty years of age.

Query: Was the Penitentiary sentence in this case illegal, and should the prisoner be transferred to the Ohio State Reformatory under the provisions of Section 2210-2 G. C.?

Does Section 2131 G. C. mean that any and all male persons between the ages of sixteen and twenty-one years convicted of felony, except murder in the first and second degree, shall be sentenced to the