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SHERIFF—APPOINTMENT OF DEPUTIES—§311.04 R.C.—AP-
POINTEES MAY PAY COSTS OF APPOINTMENT FEES AND
CREDENTIALS—NEGLIGENCE OF DEPUTIES CHARGEABLE
TO SHERIFF; QUESTION OF FACT WHETHER DEPUTY WAS
ACTING IN HIS OFFICIAL CAPACITY—*N. Y., C AND ST. L.
R.R. Co. v. FIEBACK*, 87 Ohio St., 254.

SYLLABUS:

1. A sheriff is, under the provisions of Section 311.04, Revised Code, empowered to appoint, subject to the approval of a judge of the Court of Common Pleas, such deputies sheriff as he, in the exercise of his discretion, considers it necessary or proper to appoint.

2. When a sheriff appoints deputies sheriff under the provisions of Section 311.04, Revised Code, he may require of such appointees reimbursement of his actual expenses in paying court fees incident to the appointment and in providing them with credentials and badges.

3. Whether the negligence or other misconduct of a deputy sheriff imposes civil liability upon the sheriff depends on whether the deputy's act was committed in his capacity as a public officer, which in turn is a question of fact to be decided by the trier of fact, subject to the rebuttable presumption that he was so acting. *New York, Chicago and St. Louis R.R. Co. v. Fieback*, 87 Ohio St., 254.

Columbus, Ohio, January 29, 1958

Hon. Samuel L. Devine, Prosecuting Attorney
Franklin County, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The Sheriff of Franklin County, in accordance with the usual practice in this County and others, has issued numerous 'special deputy sheriff' commissions and receives frequent additional requests for such commissions. In most cases these commissions are issued to men who are employed as industrial plant guards, funeral escorts, shopping center policemen, and similar occupations where the holding of such a commission, and the attendant uniform, badge, and right to carry a gun, are instrumental to the performance of their duties. Generally speaking, these men are not employed by the Sheriff, nor do they receive any compensation from County funds. They are not under the supervision of the Sheriff with regard to their employment; however, they do constitute a reserve of deputies subject to call by the Sheriff if needed.

"As you are aware, the Ohio statutes make no provision for 'special deputy sheriffs' but the courts have, in a number of cases, recognized such special deputies and distinguished them from 'regular deputies' employed by the Sheriff and paid by the County.

"The special deputies purchase their own uniforms, firearms, and vehicles, but there are also certain minor expenses incidental to the issuance of the commissions such as cost of credentials, badges, notary and filing fees, etc. It is our understanding that in some counties a flat fee is charged the applicant to cover these expenses, while in others these incidental expenses are borne by the county, either from the appropriation for operation of the Sheriff's Office, or from a special appropriation from the general fund. This procedure apparently varies with the number of such commissions in a particular county.

"Because your ruling would have a uniform state-wide application as to the eighty-eight (88) Sheriffs' Offices, and upon other state and local governmental agencies which are concerned with the fiscal aspects of the issuance of such commissions, we respectfully request your opinion on the following questions:

"1. Is a County Sheriff authorized to issue 'special' commissions to persons employed by private employers as plant guards, etc., an incidental result of which is to create a ready reserve of deputy sheriffs in the event of emergency?

"2. If so, may the Sheriff charge a reasonable fee in connection with the issuance of such commissions to cover the expenses thereof?

"3. In the event the fee collected exceeds the actual expense of issuing such commission, what disposition should be made of any surplus?

"4. If no such fee may be charged, may the expense of issuing such commissions be properly paid from county funds, either the appropriation for operation of the Sheriff's Office or a special appropriation from the general fund?

"5. What civil liability, if any, attaches to the Sheriff for any negligence or other activity of a person holding such a 'special' deputy's commission?"

Section 311.04, Revised Code, reads:

"The sheriff may appoint, in writing, one or more deputies. If such appointment is approved by a judge of the court of common pleas, the approval, at the time it is given, shall be indorsed on such writing by the judge. Thereupon such writing and indorsement shall be filed by the sheriff with the clerk of the court of common pleas, who shall enter it upon the journal of such court. The clerk's fees for such filing and journal entry shall be paid by the sheriff. Each deputy so appointed shall be a qualified elector of such county. No judge of a county court or mayor shall be appointed a deputy."

I refer you initially to the case, *State, ex rel. Geyer v. Griffin*, 80 Ohio App., 447; decided by the Court of Appeals of Allen County in 1946. The first headnote to that decision reads as follows:

"There is no statutory restriction upon the right of a county sheriff to appoint special and general deputies, except that the appointments must be approved by the common pleas judge of the county of which the sheriff is an officer, and, therefore, the common law prevails authorizing the sheriff to make such appointments."

The sheriff of Allen County had at the time ninety-three special deputies, most of whom were employed as plant guards, *etc.* The court said at page 458:

"A sheriff being a public officer is presumed to act in good faith and within the scope of his authority. Accordingly, his appointment of deputies who are not then assigned to duty by him is presumed to be done for the purpose of providing a reserve of

persons qualified as deputy sheriffs whom he can employ as and when he deems their employment necessary or advisable to perform any part of the duties of his office.”

In specific response to your first enumerated question, it would appear that the sheriff in the exercise of his discretion may appoint such deputies as in his opinion the public welfare requires. Such appointments are, of course, subject to the approval of a judge of the court of common pleas.

In response to your second question, you will note that Section 311.04, *supra*, requires the sheriff to pay the fees incident to appointment of a deputy. I see no objection to his being reimbursed for such payments. It is the responsibility of the deputy to furnish his badge and credentials, and if the sheriff supplies them he may, in my opinion, be reimbursed.

In response to your third question, it is my opinion that the fee charged may not exceed the actual expenses incurred by the sheriff in paying the fees and in securing a badge and credentials, since if the sheriff should receive any additional amount of money an implication might arise that he was selling the appointment.

As to your fifth question, you are, of course, aware that Section 311.05, Revised Code, provides as follows:

“The sheriff shall be responsible for the neglect of duty or misconduct in office of each of his deputies.”

I invite your attention to the case of *Duff v. Corn*, 84 Ohio App., 403, the headnote of which reads:

“Where, in an action for wrongful death, it is disclosed that defendant, the proprietor of a night club, employed persons to keep order on the premises, that one of such persons, shortly after being so employed, was appointed deputy sheriff, that thereafter he continued in such night club employment and while on duty at the premises ejected therefrom decedent who had come to induce his wife, a patron, to go home, and when decedent had proceeded from the premises into the street such employee assaulted and shot decedent, which caused his death, the question whether such employee, at the time of the assault, was acting in discharge of his public duty as a deputy sheriff or as an employee or agent of the defendant, or in a dual capacity is for the jury to determine, excepting where it so clearly appears that the employee was acting only in his capacity as an officer or beyond the limits of his authority from his employer that but one conclusion could be reached.”

In the case of *Republic Steel Corp. v. Sontag*, 21 Ohio Law Abs., 358, the headnote reads:

"1. A duly deputized sheriff is a public officer.

"2. A private corporation is not liable for the wrongful acts of a police officer while acting by virtue of his office, unless such wrongful acts occur in the performance of an act outside of the police duties of a policeman which are authorized or ratified by the corporation.

"3. A deputy sheriff paid by a private corporation as a policeman to protect its plant, who exercised no official functions outside of the plant property, and whose immediate superior was a lieutenant in the plant police force, who with the knowledge of the lieutenant, in seeking to protect company property in the plant, assaulted the plaintiff in attempting to apprehend another man discovered stealing property, cannot as a matter of law, be said to have been acting in the capacity of a public official.

"4. Improper remarks in the closing argument by counsel will not warrant reversal, where the record shows only a part of the argument of plaintiff and none of the defendant, and the trial court made no ruling thereon."

Perhaps the leading case on this issue is that of *New York, Chicago and St. Louis R. R. Co. v. Fieback*, 87 Ohio St., 254 (1912), which is not directly in point upon the facts here involved, but which established applicable principles. The first paragraph of the syllabus reads:

"A policeman who is appointed and commissioned by the Governor, under Sections 3427 and 3428, Revised Statutes (General Code, Sections 9150 and 9151), although his appointment was upon the application of a railroad company and his salary is paid by such company, is a public officer, deriving his authority directly from the state; and his acts will be presumed to have been performed in his capacity as such officer, until such presumption is overcome by sufficient evidence."

At page 265 the court said:

"We start then with the clear presumption of the law that the policeman was acting officially and in the line of his duty. The foundation of this rule is that one who is invested with authority by the sovereign, commissioned and sworn to faithfully perform the duties pertaining to such commission, must necessarily be supposed to be acting in conformity thereto; and anyone who claims that the officer was not so acting must show affirmatively that such was the case. * * *"

It is thus apparent that the liability of the sheriff for the misconduct of these deputies is a question of fact for the jury, subject to the operation of a presumption.

You are undoubtedly aware that it has been held that negligence in operating a motor vehicle is "official misconduct." *Haurathy v. Godfred*, 44 Ohio App., 360. Thus it appears that misconduct in office is not by definition limited to positive acts, but negligence may constitute misconduct within the terms of the statute.

In sum, it is my opinion, and you are advised:

(1) A sheriff is, under the provisions of Section 311.04, Revised Code, empowered to appoint, subject to the approval of a judge of the court of common pleas, such deputies sheriff as he, in the exercise of his discretion, considers it necessary or proper to appoint.

(2) When a sheriff appoints deputies sheriff under the provisions of Section 311.04, Revised Code, he may require of such appointees reimbursement of his actual expenses in paying court fees incident to the appointment and in providing them with credentials and badges.

(3) Whether the negligence or other misconduct of a deputy sheriff imposes civil liability upon the sheriff depends on whether the deputy's act was committed in his capacity as a public officer, which in turn is a question of fact to be decided by the trier of fact, subject to the rebuttable presumption that he was so acting. *New York, Chicago and St. Louis R. R. Co. v. Fieback*, 87 Ohio St., 254.

Respectfully,
WILLIAM SAXBE
Attorney General