

1803.

OATH—WHO MAY ADMINISTER—EMPLOYEE NOT AUTHORIZED—TAX COMMISSION OF OHIO HAS NO AUTHORITY TO APPOINT CIVIL SERVICE EMPLOYEE AGENT TO ADMINISTER OATH ON TAX RETURNS—COUNTY AUDITOR, HAMILTON COUNTY, OHIO.

SYLLABUS:

1. *Employees in the office of the County Auditor of Hamilton County, who have qualified for such positions under the civil service laws of this state are not authorized by law to administer oaths to tax returns required to be filed under Section 5372, General Code, and cannot be classified as deputy county auditors for the purpose of administering oaths to any tax returns required to be filed in the office of the county auditor, or with the Tax Commission of Ohio.*

2. *The Tax Commission of Ohio has no authority to appoint civil service employes in the office of the County Auditor of Hamilton County as agents of the State Tax Commission for the purpose of administering oaths on tax returns, the original or duplicate copies of which are required to be filed with the county auditor or the State Tax Commission.*

COLUMBUS, OHIO, January 24, 1938.

HON. DUDLEY M. OUTCALT, *Prosecuting Attorney, Hamilton County, Cincinnati, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion which reads as follows:

"We are enclosing herewith copy of a request from the Auditor of Hamilton County, Ohio, for an opinion relative to the authority of employees in his office to administer the necessary oaths and acknowledgments to tax returns and other papers that properly come before them. The letter speaks for itself.

As this is a matter of general application throughout the state, and particularly with reference to the civil service rules, we deem it advisable to refer this request to your office for an opinion.

Will you kindly give an opinion at your earliest convenience?

The enclosure from the Hamilton County Auditor, to which you refer in your letter, reads as follows:

"In Case Nos. 25649-50, decided September, 1936, by the Supreme Court of Ohio, it was held that the employees in the Classified or Intangible Tax Division of this office were to be placed under Civil Service. We have followed out this decision.

There is considerable doubt in what capacity and by what authority the employees so classified may take oaths and acknowledgments to tax returns and other papers that properly come before them. To forestall any difficulty, particularly in collection of delinquent tax amounts, we request a written opinion from the Attorney General of the State of Ohio covering the following points:

1. Have the employees under Civil Service in the Intangible Tax Division of this office authority to take oaths and acknowledgments?

2. In case no authority can be found, what procedure should be followed?

In view of the fact that approximately 60,000 tax returns and 5,000 other papers, which require affidavits, are presented yearly, and because of the amounts of tax money that might be involved if the question were raised by an unfriendly individual (as the Tax Examiners who accept these returns have no commission as notaries) an immediate decision is requested."

The case to which the County Auditor refers is that of *State, ex rel. Emmons, et al., State Civil Service Commission, vs. Guckenberger, County Auditor, State, ex rel. Emmons et al., State Civil Service Commission, vs. Lutz, Sheriff*, 131 O. S., 466, decided by the Supreme Court of Ohio July 15, 1936. This was an action in mandamus brought by the State Civil Service Commission against the County Auditor and the Sheriff of Hamilton County, for the purpose of compelling these officials to recognize the designation of certain positions in their offices as coming within the classified civil service provisions of our state civil service laws. The only part of this case with which we are concerned in considering the matter before us is that which refers to the employees in the county auditor's office. Included in this group of employees are tax clerks, tellers, typists, and bookkeeping machine operators. A peremptory writ was allowed by the Supreme Court compelling the county auditor and the sheriff to recognize the right of the State Civil Service Commission to make a survey and classify positions in these offices, and to prepare and hold competitive examinations to secure lists of employees to fill such positions. The positions were then filled as required by law.

The question you now ask is, whether or not the employees under civil service, in the Intangible Tax Division of the County Auditor's

Office, have authority to take oaths and acknowledgments on tax returns. I presume the employees to whom you refer are those who are designated "tax clerks" in the case of *State ex rel. Emmons vs. Guckenbergger, Auditor; State, ex rel. Emmons vs. Lutz, Sheriff, supra.*

Section 2563, General Code, provides as follows:

The county auditor may appoint one or more deputies to aid him in the performance of his duties. The auditor and his sureties shall be liable for the acts and conduct of such deputy or deputies. When a county auditor appoints a deputy, he shall make a record thereof in his office and file a certificate thereof with the county treasurer, who shall record and preserve it. When a county auditor removes a deputy, he shall record such removal in his office and file a certificate thereof with the county treasurer, who shall record and preserve it."

Section 2564, General Code, provides:

"The county auditor and his deputies may administer any oath necessary in the discharge of the duties of their respective offices, or proper in the authentication of any return, voucher or document to be filed in the county auditor's office."

In the case of *Harmon vs. Stockwell*, 9 Ohio, 93, it was held:

"The power to administer oaths is incidental to a judicial office but not to ministerial offices. Unless it is conferred by statute, either expressly or by implication, ministerial officers do not have power to administer oaths." (Italics, the writers).

Under Section 2564, supra, the county auditor and his deputies are authorized to administer oaths necessary in the discharge of the duties of the county auditor's office, or that may be necessary in the authentication of any return, voucher or document required to be filed in that office. There is no express authority for any employees in the county auditor's office except deputies, to administer oaths. The question as to when an employe is a deputy of a public official was discussed in the case of *State ex rel. Emmons vs. Guckenbergger, Auditor; State, ex rel. Emmons vs. Lutz, Sheriff, supra.* I quote from the opinion of the court in that case, as follows:

"The third ground upon which the respondents rely is that the persons who hold the positions in question bear the title of 'deputy' and therefore are placed within the unclassified service by virtue of Section 486-8(a), General Code. However, it

must be clear that a mere title is not at all conclusive. The true test is the duty actually delegated to and performed by an employee. This view was expressed by this court in the case of *State, ex rel. Miller vs. Witter, Dir.*, 114 Ohio St., 122, 150 N. E., 431.

Furthermore, it must be observed that under the statute a deputy may not be placed in the unclassified service unless (1) he is 'authorized by law to act for and in the place of' his principal, and (2) holds 'a fiduciary relation to such' principal. Both of these qualifications must be present. The respondents contend that 'and' should be read as 'or,' but there is nothing in the context to either suggest or permit this construction. 'It is to be observed that the law does not place in the unclassified service every officer or employee who is given the title of deputy, but only those who are authorized by law to act for and in the place of their principals and who hold a fiduciary relation to such principals. On the other hand the fact that an officer or employee does not bear the title of 'deputy' will not bar him from inclusion in the unclassified service under this provision provided he is so authorized and holds such a fiduciary position. In other words the name is not of the essence of the place.' 7 Ohio Jurisprudence, 551. Therefore the next and important question here presented is whether these persons are in fact deputies.

When is an employee a deputy? Section 9, General Code, provides that 'a deputy, when duly qualified, may perform all and singular the duties of his principal.' In Volume 2 of McQuillin on Municipal Corporations on page 446, it is stated that 'in general a deputy has the power to do everything which his principal may do.' In Volume 5 of the American and English Encyclopedia of Law on page 623, it is said that a 'deputy is one who by appointment, exercises an office in another's right' and 'he must be one whose acts are of equal force with those of the officer himself.' In 22 Ruling Case Law, 584, appears the statement that 'deputies are usually invested with all the power and authority of the principal.'

Can it be said that any of the persons who hold the positions in question 'may perform all and singular the duties of his principal,' or that they have 'the power to do everything which' their 'principal may do,' or that they exercise 'an office in another's right' and their 'acts are of equal force with those of the officer himself,' or that they 'are invested with all the power and authority of the principal'? It is extremely inter-

esting to note the complete absence of any contention by either respondent that any of these employees meet these tests. Patently it could not logically be urged that one employed as a typist thereby becomes empowered to 'perform all and singular the duties of his principal' who is a county auditor; nor can it properly be said that one employed as a bookkeeping machine operator is thereby 'invested with all the power and authority of the principal'; and it is equally clear that a person employed by a sheriff to guard prisoners or to patrol roads does not thereby acquire 'the power to do everything which his principal may do.' Thus it is apparent that the crux of this litigation is a misconception of the term 'deputy.' In the popular sense it seems to connote any person who is employed to perform some part of an official's duty. However, this is not the law, as is cogently demonstrated by the statute and by the authorities."

The case of *State, ex rel. Emmons vs. Guckenberger, Auditor; State ex rel. Emmons vs. Lutz, Sheriff, supra*, therefore seems to definitely establish the fact that no employee of the county auditor who comes under a civil service classification can hereafter be considered as a deputy of the county official. Therefore, it is my opinion that employees in the office of the County Auditor of Hamilton County, who have qualified for such positions under the Civil Service Laws of this state, are not authorized by law to administer oaths to tax returns required to be filed under Section 5372, General Code, and cannot be classified as deputy county auditors for the purpose of administering oaths to any tax returns required to be filed in the office of the county auditor or with the Tax Commission of Ohio.

In your second question, you ask:

"In case no authority can be found, what procedure should be followed?"

Section 5371, General Code, requires personal property used in business, to be listed and assessed in the taxing district in which such business is carried on. In addition, domestic animals and other taxable property both tangible and intangible, are required to be listed and assessed for taxation in the taxing district or county in which the owner thereof resides.

Under Section 5372, General Code, each taxpayer is required to make a return annually, *to the county auditor* of each county in which he has taxable property which he is required to return to be listed for

taxation under Section 5371, General Code. In addition to preparing and filing the return required by Section 5372, supra, with the county auditor "the individual required to make the return * * shall subscribe and make oath or affirmation to the truth and correctness of all matters contained therein, *before any officer authorized to administer oaths.*"

It should be noted that these personal property tax returns are required to be made to the county auditor. However, under Section 5372-3, General Code, if a return required to be filed under this chapter shows an income yield from private investments in an aggregate assessable amount of \$500.00 or more, or shows taxable property in an aggregate assessable amount and/or value of \$5,000 or more, such return shall be made in duplicate. One copy of each such return is required to be retained by the county auditor and the other shall be for the use of the Tax Commission of Ohio. The county auditor is required to stamp the date of making each such return upon each return and the copy thereof.

The question now arises as to whether or not tax clerks and/or other employees in the office of the county auditor, who are working in the classified or intangible tax division under civil service rules and regulations, can be appointed as agents of the State Tax Commission and therefore be authorized or empowered to administer oaths to tax returns which are required by law to be filed with the county auditor and/or the State Tax Commission.

Section 5372-1, General Code, provides:

"The commission (tax) shall administer the provisions of this chapter which shall be deemed to be one of the laws which the commission is required to administer, within the meaning of Sections 1465-9, 1465-12 to 1465-30, inclusive, 1465-32, 1465-34 and 12924-3, of the General Code. It shall have power to adopt and promulgate regulations not inconsistent with any of the express provisions of this chapter, to the end that all taxable property shall be listed and assessed for taxation. * *"

Section 1465-21, General Code, provides:

"Each commissioner (tax), the secretary *and every agent* provided for in this act, for the purposes therein mentioned, shall have power to administer oaths, certify to official acts, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony." (Italics, the writer's.)

Section 1465-14, General Code, authorizes the appointment of "agents" by the State Tax Commission. It provides as follows:

"For the purpose of making any investigation with regard to any company, firm, corporation, person, association, co-partnership or public utility, subject to the provisions of the laws which the commission is required to administer, the commission shall have power to appoint, by an order in writing, an agent whose duties shall be prescribed in such order."

Section 1465-15, General Code, defines the "powers of agents", appointed by the State Tax Commission under authority of Section 1465-14, *supra*, as follows:

"In the discharge of his duties such agent shall have every power whatsoever of an inquisitorial nature granted by law to the commission and the same powers as a notary public, with regard to the taking of depositions; and all powers given by law to a notary public relative to depositions are hereby given to such agent."

It should be noted that the State Tax Commission is only authorized to appoint agents "*for the purpose of making any investigation with regard to any company, * * subject to the provisions of the laws which the commission is required to administer.*" And further, when such an agent is appointed the commission must make the appointment by an order in writing, and the duties of the agent so appointed must be prescribed in such order. Then, Section 1465-15, *supra*, provides that "such agent in the discharge of his duties shall have every power whatsoever of an inquisitorial nature, granted by law to the commission and the same powers as a notary public, *with regard to the taking of depositions.*" However, there is no specific statutory authority given therein for the appointment of agents "by the State Tax Commission," merely for the purpose of administering oaths to tax returns. Under the ruling of the Supreme Court, in the case of *Harmon vs. Stockwell*, *supra*, the power to administer oaths by ministerial officers, must be conferred by statute, either expressly or by implication, or there is no authority.

A further question for consideration is whether or not the State Tax Commission has authority by the adoption and promulgation of a special regulation to appoint and authorize employees in the office of the county auditor who are under civil service as agents of the State Tax Commission for the administering of oaths to tax returns which are required by law to be filed with the intangible tax division in said office. Bouvier's Law Dictionary, Volume 3, page 2687, has defined the term "agent" as:

“One who undertakes to transact some business, or to manage some affair for another by the authority and on account of the latter and to render an account of it.”

The same authority defines the term, “agency” as:

“A relation between two or more persons by which one party usually called the agent or attorney is authorized to do certain acts for or in relation to the rights or property of the other, who is denominated the principal, constituent or employer.”

There is no relationship of master and servant between the Tax Commission of Ohio and employees in the office of the County Auditor of Hamilton County. At best, there can be only a mutual working agreement which serves the best interests of all parties concerned. In the instant case the Tax Commission of Ohio has no authority or direction over any of these classified civil service employees in the office of the County Auditor of Hamilton County, and therefore, it is my opinion that the Tax Commission of Ohio has no authority to appoint tax clerks or other employee under civil service rules and regulations in the County Auditor's office, as agents of the Tax Commission of Ohio, for the purpose of administering oaths on tax returns which are required by law to be filed with the County Auditor of Hamilton County, the Tax Commission of Ohio, or otherwise.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1804.

DOGS—REGISTRATION AND FEE—WHEN SECTION 5652 G. C. AUTHORIZES COUNTY AUDITOR TO ASSESS PENALTY—FAILURE TO APPLY FOR REGISTRATION.

SYLLABUS:

Section 5652, General Code, authorizes county auditors to assess the penalty therein provided only in cases where a person who owns, keeps or harbors a dog more than three months of age before the first day of January of any year fails to apply for the registration of such