A similar situation to that existing at Barberton at that time does not exist in the village about which you inquire as the proposal here is not to fix a salary which had never been fixed before, but to increase the salaries which had theretofore been fixed.

I am, therefore, of the opinion that an ordinance cannot now be enacted by the council of the village about which you inquire increasing the salaries of its mayor and marshal so as to make the increase available to the incoming officials whose term begins on January 1, 1930, unless the ordinance be passed as an emergency measure. Whether or not such an ordinance may be made an emergency measure is a question of fact upon which I, as Attorney General, cannot pass.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1296.

ELECTION—JUDGE OF ELECTIONS, NOT A CANDIDATE, ELECTED TO OFFICE BY VOTERS WRITING HIS NAME ON BALLOTS—VOTES SHOULD BE COUNTED.

SYLLABUS:

Where votes are cast for a person for office who has not been regularly nominated therefor, and who has not sought or aspired to such office, such votes should be counted for such person, even though he is a judge or clerk at the election at which said votes are cast.

COLUMBUS, OHIO, December 14, 1929.

HON. F. H. BUCKINGHAM, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion which reads as follows:

> "General Code Section 5092 provides that no person being a candidate for an office to be filled at an election shall serve as clerk or judge of elections in any precinct at such election, and that any person serving as a judge contrary to this section shall be ineligible to any office to which he may be elected.
>
> At an election held this week there was a man in Scott Township, Sandusky County, Ohio, who served as a judge of elections and who was elected to the office of justice of the peace by having the voters write his name in on the ballot.
>
> He has never filed a declaration of candidacy, nor has he ever declared himself to be a candidate for the office, and this move is made by the electors of the township without any solicitation on his part. The ballots for justice of the peace were also misprinted in that they were marked 'vote for not more than one candidate' and they should have been marked 'vote for not more than two'. It seems that no names appeared upon the ballots and all names were written in by the electors.
>
> These people have been in my office inquiring whether in view of this misprinted ballot the man who is elected and served as judge of elections shall be allowed to qualify."

Section 5092, General Code, to which you refer, reads as follows:

> "No person, being a candidate for an office to be filled at an election, other than for committeman (committeman) or delegate or alternate to

any convention, shall serve as deputy state supervisor or clerk thereof, or as a judge or clerk of elections, in any precinct at such election. A person serving as deputy state supervisor or clerk thereof, judge or clerk of elections contrary to this section shall be ineligible to any office to which he may be elected at such election."

Said section prohibits a candidate for an office to be filled at an election, other than those named, serving as a judge or clerk of elections in any precinct at such election. The word "candidate" must be given its popular meaning. Lexicographers usually define a candidate as one who seeks or aspires to some office or privilege, or who offers himself for the same.

In *Leonard* vs. *Com.*, 112 Pa., 607, the court, in discussing what constitutes candidacy for office, said:

> "He may in his own mind be in that venturesome state for many years before anyone else is apprised of such intention and in such case his ambition would not make him a candidate, nor does he become such if he merely counsel with friends on the subject. His candidacy must be manifested by some act of his own, the gist of which is that he holds himself out as a candidate."

In *Morris* vs. *Burdett*, 2 M. & S., 212, 216, 105 Reprint 361, Lord Ellenborough, C. J., said:

> "* * * Therefore a person cannot be in that sense of the word a candidate by the mere act of others, who propose him without his assent."

Indeed, the word "candidate" is derived from the Latin word "candidus", meaning "white", through an ancient custom of Roman candidates of clothing themselves in a white tunic, which indicated to their countrymen that they sought office.

Section 5092, supra, further provides that a person serving as a judge or clerk of elections, contrary to the section, shall be ineligible to any office to which he may be elected at such election.

Under Section 5071, General Code, if there were no nomination for a particular office, or if by inadvertence or otherwise, the name of the candidate regularly nominated is omitted from the ballot, the elector may write in the name of a person for whom he desires to vote, and properly mark it.

Now, while it is true that this person while serving as an election officer received a sufficient number of votes to elect him justice of the peace, there is nothing in the facts before me to show that he was seeking or aspiring to the office or was a candidate in the usual acceptation of the term.

A similar question was considered by this office in 1917 (see Opinions of the Attorney General for 1917, Vol. III, p. 2108), and it was held:

> "Where votes are cast for a person for office who has not been regularly nominated therefor, and who has not sought or aspired to such office, such votes should be counted for such person even though he is a judge or clerk at the election at which said votes are cast, and such person so receiving the highest number of votes would be eligible to the office to which he was elected, notwithstanding the provisions of 5092, G. C."

I concur in this view.

I also note that you refer to an error made in the printing of the ballots in that they state: "Vote for not more than one candidate", whereas they should have been marked: "Vote for not more than two."

You do not specifically inquire concerning this situation, but I am today addressing

an opinion to the Secretary of State, in which is considered this question, as well as others of a similar character. A copy of that opinion has been forwarded to you under separate cover.

Specifically answering the question which you have presented to me, I am of the opinion that where votes are cast for a person for office who has not been regularly nominated therefor, and who has not sought or aspired to such office, such votes should be counted for such person, even though he is a judge or clerk at the election at which said votes are cast.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1297.

APPROVAL, FINAL RESOLUTION ON EXTRA WORK CONTRACT, DEFIANCE COUNTY.

COLUMBUS, OHIO, December 14, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

1298.

PRISONER—SENTENCED BY COURT TO SERVE FOR ROBBERY A MINIMUM TERM THAT IS THE STATUTORY MAXIMUM FOR SUCH CRIME—WHEN ELIGIBLE FOR PAROLE.

SYLLABUS:

Where a person is convicted of the crime of robbery and the court sentences such person to serve a minimum term of twenty-five years in the Ohio Penitentiary, which term is the same as the maximum term provided by statute defining the offense, such prisoner is eligible to parole after he serves ten years which is the minimum term fixed by the statute defining the offense of robbery.

COLUMBUS, OHIO, December 16, 1929.

HON. RAY T. MILLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date which is as follows:

"Will you please give us an official opinion as to the effect of a sentence imposed after conviction of felony, wherein the trial court fixes the minimum sentence in the same term and number of years as provided by the statute for the maximum sentence.

We have a case in this county wherein the defendant was found guilty of robbery and the court sentenced him to serve a minimum term in the Ohio Penitentiary of twenty-five years, which is also the maximum provided by the statute."