

particular issue authorized by the board of directors and that the consideration for subsequent issues may be such as may be determined in any one of the methods prescribed by that sub-paragraph. This is, of course, subject to the limitation that the articles of incorporation may, under sub-paragraph (a) of Section 17, make specific provision that all of the non par shares shall be issued at a fixed valuation. Such a limitation would, in my opinion, be permissible and authorized by the general terms of Section 4. I believe, however, that sub-paragraph 6 of Section 4 has reference particularly to the amount of consideration for which original subscriptions to shares without par value may be received and that a provision for amount so incorporated would ordinarily apply only to the subscriptions incident to the organization of the company and would not be binding as to subsequent issues within the maximum number prescribed by the articles. Thereafter, the amount of consideration may be fixed in accordance with the provisions of sub-paragraph (b) of Section 17.

Respectfully,
 EDWARD C. TURNER,
Attorney General.

720.

OFFICES—MEMBER OF MUNICIPAL FIRE DEPARTMENT NOT DISQUALIFIED FROM BEING ELECTED COUNCILMAN—CANNOT RECEIVE PRIVILEGES OR EMOLUMENTS OF FIREMAN.

SYLLABUS:

Membership in a municipal fire department does not disqualify such a fireman from being elected to the office of councilman of the municipality, and if after being elected councilman and accepting the position and qualifying for the same such person should continue to perform the duties of a fireman, that fact would not in and of itself operate to cause a forfeiture of his office as councilman but would serve only to disqualify him from receiving the privileges or emoluments of the position of fireman.

COLUMBUS, OHIO, July, 11, 1927.

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

GENTLEMEN:—I am in receipt of your communication in which you set out certain data with reference to the relation existing between certain members of the city council of the city of Martins Ferry, Ohio, and the fire department of the city as shown by the report of your examiner who audited the accounts of the city.

It appears from the report that the fire department of the city consists of what is known as a volunteer fire department, that is, it was not organized as a regularly paid fire department in accordance with the statutory regulations therefor, but consisted of several so-called fire companies who elect their own officers, pass on the qualifications of their members and serve as firemen without pay.

Some time prior to the making of this report, the chief of the fire department and eight of its members were elected city councilmen and were serving as such during the period covered by the report. Their terms as councilmen will not expire until December 31, 1927. No compensation is paid to or provided for the fire department or its members except as provided by an ordinance passed, April 1, 1922, which reads in part, as follows:

"Each fire company shall receive the sum of \$150.00 per annum and in addition thereto each company shall receive the sum of \$3.00 for each run that is made by it in answer to an alarm."

You call my attention to section 4207, General Code, wherein the qualifications of members of city council are set out as follows:

"Each member of council shall be an elector of the city, shall not hold any other public office or employment, except that of notary public or member of the state militia, and shall not be interested in any contract with the city. A member who ceases to possess any of the qualifications herein required, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office."

In view of the provisions of the statute above quoted, and an opinion of this department found in Opinions, Attorney General, 1918, page 636, wherein it was held that a councilman accepting any public office or employment other than those specified in Section 4207, General Code, forfeits his office as councilman, your examiner made findings against each one of the members of the city council of Martins Ferry, who was also a member of the fire department, in the amount of the compensation paid to him for his services as councilman from October 1, 1923, to June 30, 1926, this being the period covered by the audit, and recommended that "the vacancies caused by the forfeiture of office should be filled in accordance with the provisions of Section 4236, General Code."

As a result of this report you have submitted for my consideration two questions as follows:

"1. Is such membership in said voluntary fire department, 'a holding of a public office or employment' such as would under the provisions of Section 4207, General Code, disqualify a man from at the same time holding the office of member of council of said city?"

2. In case that they are held to be disqualified, can they legally proceed and do business as a council de facto, until the expiration of their present term of office, to which they were elected?"

You also enclose a communication from the city solicitor of Martins Ferry which describes the situation as follows:

"The said fire department has been authorized by ordinance, and is organized into four companies of 20 men each including a captain and secretary-treasurer for each company.

The city furnishes the hose houses and fire fighting equipment.

The members only serve when called upon to attend fires.

They receive no salary, they make their own rules for the conduct of the department. Their rights and general duties, prescribed by ordinance.

Elect their own chief, and all other officers and new members by vote of the members.

Neither their officers or members are confirmed by council, or by any other officer of the corporation.

In other words, they are run like a lodge or other private organization.

The city allows to each company the sum of \$150.00 per annum, and in addition each company receives the sum of \$3.00 for each run that they make to a fire.

This money is placed in the company treasury, and used to pay for janitor service, buying rubber coats, boots and hats for use of members while on duty, and for other company incidentals, such as furnishing rooms where they meet."

At my request, the city solicitor of Martins Ferry has forwarded me certain other information which is pertinent to your inquiry, and which must be considered in answering your question. He states:

"In answer would say, First:—That we are not and never have been a charter city.

Second: I have hunted over all the records for over 35 years back, and all I can find about an ordinance providing for a fire department is contained in the minutes of council for the years 1889 and 1890, and also a copy of an ordinance passed May 13, 1890.

I enclose copy of the minutes, and also copy of the ordinance which provides rules and regulations for the Fire Department.

But in actual practice the facts are as I submitted them to you, the Clerk of Council tells me that never has he heard of a Chief or Fireman being confirmed by Council and he has been clerk for many years.

They elect their own officers and members, like a lodge. And have a lot of what they call "Cadets" on the waiting list, who are voted in as the other members drop out for various reason.

And all that council does is to provide them with equipment, and allow to each company the amount stated in my former letter to you."

The copy of the minutes of council meetings, which was enclosed, discloses that at meetings held on December 21, 1888, and January 7, 1890, written offers were made by fire companies to the city council tendering their services as volunteer firemen for the coming year. In the offer it was proposed that each fireman was to "furnish his own suit and protection", the city to "keep the apparatus in repair and to clean and dry the same" and pay to each company \$75.00 per year. These offers were accepted by council on May 13, 1890, and an ordinance was passed, entitled "an ordinance defining the rights and duties of the fire department." This ordinance set out certain rules with reference to the duties of the members of the fire companies as to reporting for duty and making reports to council. It authorized the adoption of signals and a system of fire alarms and granted certain police powers to the members of the department. So far as your inquiry is concerned, the ordinance is not otherwise important. It appears that there has never been any further legislation by the city council with reference to the fire department.

Section 4377, General Code, found under the provisions for the department of public safety in cities, provides for the organization of the fire department consisting of a chief, captains, marshals, etc.

Among the sections relating to villages are found Sections 4390 and 4391, General Code, which respectively read as follows:

"Sec. 4390. Council may provide for the employment of such firemen as it deems best and fix their compensation, or for the services of volunteer firemen. All firemen, other than volunteers, shall be appointed by the mayor for terms of one year, with the advice and consent of the council."

"Sec. 4391. The council may purchase for its own use or for the use of such companies, necessary fire engines, either steam or hand, hose carriages and hose, and all such other apparatus and instruments as is deemed necessary

for the extinguishment of fires, and establish lines of fire alarm telegraph within the limits of the corporation."

Section 4393, General Code, relating to both cities and villages, gives authority to municipal councils to establish all necessary regulations to guard against the occurrence of fires and to protect the property and lives of the citizens against fire.

In an opinion of this department found in Annual Report, Attorney General, 1912, page 1034 it is said:

"There is no specific mention of volunteer firemen in any of the present statutes relating to cities. Village volunteer firemen are recognized, and their status is fixed by Section 4390 of the General Code which I did not quote. Apparently, however, volunteer firemen in cities have no present status."

Even though the statutes specifically referring to volunteer firemen are found under the provisions of the code which particularly refer to villages and there are no such provisions to be found in the statutes which have particular reference to cities, it is my judgment that cities may under the broad powers given to them by Sections 4377 and 4393, General Code, provide for the maintenance of volunteer fire departments and expend public moneys for equipment and apparatus for such departments as has been done at Martins Ferry. Especially is this so in view of the home rule provisions of the Constitution of Ohio.

It appears from the statement of the solicitor that the individual members of the fire department receive no direct, personal, pecuniary benefit from the funds allotted to the department by council. It is stated that council makes certain allowances to each company and for each run, but it is not stated whether or not council directs what should be done with these funds. If the resolution of April 1, 1922, above set out is the only legislation with reference to the matter, council has not directed what should be done with the allowances made, and if that be the case, there is nothing to prevent the members of each company from dividing the money among themselves if they see fit. From the facts furnished, they have not done this in this case, but I see nothing to prevent them from doing so. However, there are some benefits attached to the position of fireman, such as exemption from jury and military duty and labor on the highways (Section 4394, General Code), and it was held in Opinion No. 5 of this department rendered on January 15, 1927, that volunteer firemen are members of the fire department in contemplation of the law providing for a fireman's indemnity fund (Sections 4647-1 to 4647-9 inclusive, General Code).

It is said in Cyc., Vol. 28, page 541:

"Municipalities which do not maintain an entire paid department usually rely upon the services of volunteer companies, the officers being in some instances salaried, while the members in general serve without compensation save certain exceptions, such as from militia and jury duty, or from poll and general municipal taxes. And these companies are regarded as a portion of the municipal government. The facts that the fire department of a city is voluntary to the extent that no person is compelled to become a member, and that no member is under a legal obligation to continue his membership, does not render it a mere voluntary association; yet it may be regarded as a branch of the city government. The members and officers of a volunteer fire department are not, as a mere result of such membership, civil and public officers."

See also *Empire Hook, etc., Co. No. 1, vs. Phoenix Ins. Co.*, 12 N. Y. St. 510; *People vs. San Francisco Fire Dept.*, 14 Cal. 479; *People vs. Pinkney*, 32 N. Y. 377; *People vs. Auburn Fire Com'rs*, 50 N. Y. Suppl. 506.

It was held by the Supreme Court of Ohio in the case of *State ex rel., Attorney General vs. Jennings*, 54 O. S. 415, that municipal firemen are not public officers, but whether public officers or not, the nature of the work they perform and their relation to the public is such as to make them public employees. The fact that that employment is subject to regulations by city council, which is authorized to appropriate money for fire departments, makes such employment incompatible with the office of councilman, and in my opinion a court would find it necessary, if proper action in quo warranto were instituted to oust a member of council from office, if it was shown that such councilman after being elected and qualifying for the office of councilman had accepted a position with the volunteer fire department, even though we did not have the provisions of Section 4207, General Code, set out in your letter.

The general rule with reference to the acceptance, by a person holding a public office, of an incompatible office is stated in Ruling Case Law, Vol. 17, Municipal Corporations, Section 238 as follows:

“The rule that acceptance of one office vacates another office previously held by the person accepting the same when the two offices are incompatible applies to municipal offices. In such case the first office becomes vacant ipso facto upon the acceptance of the second, and no judicial proceeding is necessary to end the tenure of the incumbent, although as long as the officer continues to exercise the functions of his original office he continues to be an officer de facto.”

While as has been stated, a member of a volunteer fire department is not a public officer but merely a public employee, I think that the rule stated above is applicable to our situation. Section 4207, supra, provides that a city councilman shall not hold any other public office or employment and that if he does, he shall forthwith forfeit his office as councilman. The question then arises whether or not under the circumstances, such as we have at Martins Ferry, do these councilmen hold any other public office or employment?

Before a member of city council can become such, he must qualify by taking an oath and giving the necessary bond. He thereby accepts the office and by so doing vacates any former incompatible office or quits any incompatible public employment in which he was formerly engaged as the case may be. The men here involved were all firemen before they were councilmen, and they must be considered as having resigned or given up their positions as firemen by accepting the office of councilman. It is true that they continued to act as firemen as before, but as a matter of act, they are not members of the department, but only acting in a *de facto* capacity. If they received any compensation for their services in acting as firemen since their acceptance of the position of councilman, they received it illegally.

The opinion of the Attorney General to which you refer, Opinions, Attorney General, 1918, page 636, is not applicable to the situation at Martins Ferry. That opinion was prompted by the fact that a member of city council, after his election thereto, and while so acting, accepted another public employment for which he was paid, and the opinion held that by accepting the position he had forfeited his office as councilman, and that he was entitled to the compensation attached to the second position. The facts are entirely different here. These men, by accepting the position of councilman and qualifying therefor, thereby surrendered their position as firemen and thereafter were not entitled to any of the emoluments or privileges of the position of firemen. For instance, if they should undertake to take advantage of the rights which are those of a fireman such as exemption from jury or military duty it would and should be denied them.

If they had been elected to membership in one of the fire companies and had accepted it after their election and qualification as councilman I would say that they thereby forfeited the office of councilman, but under the circumstances it is my opinion that their membership in a fire company which was a part of the fire department of the city of Martins Ferry did not disqualify them from being elected as members of city council and their continuance of the performance of the duties of firemen after their election to council the same as before did not operate to cause a forfeiture of the office of councilman, although they were not eligible to receive any of the privileges or emoluments of the position of firemen. For these reasons it is my opinion that the findings of your examiner against the members of the city council at Martins Ferry who are acting as volunteer firemen should be rescinded.

The conclusions herein reached render unnecessary specific answers to the two questions asked in your letter.

Respectfully,
EDWARD C. TURNER,
Attorney General.

721.

WITNESS BEFORE MAYOR—FEES—FEE OF MAYOR OR MARSHAL OF MUNICIPALITY IN STATE CASES CANNOT BE PAID FROM COUNTY TREASURY—SUCH FEES ARE INSERTED IN JUDGMENT AND WHEN COLLECTED ARE DISBURSED BY COUNTY CLERK OF COURTS.

SYLLABUS:

1. *Each witness in a state case attending before a mayor under subpoena is entitled to receive one dollar for each day's attendance, and five cents for each mile necessarily traveled from his place of residence to the place of giving testimony and return, provided the distance be more than one mile, to be paid out of the county treasury upon the certificate of the mayor whether the defendant be discharged upon preliminary hearing or bound over to the grand jury.*

2. *There is no authority of law for the payment from the county treasury of fees of the mayor and marshal of a municipal corporation, incurred in any state case, whether the defendant be convicted or acquitted. By the terms of Section 3016, General Code, in felonies, and in minor state cases which have come to the Court of Common Pleas through a mayor's court, where the defendant is convicted, the fees of such mayor and his officers should be inserted in the judgment of conviction and when collected should be disbursed by the clerk of courts to the persons entitled thereto.*

COLUMBUS, OHIO, July 11, 1927.

MR. G. O. MCGONAGLE, *Prosecuting Attorney, McConnellsville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date which reads as follows:

"In a case here before the Mayor the defendants were arrested charged with robbery. No security for costs was taken or required by the Mayor. A large number of witnesses were subpoenaed. Upon the preliminary hearing defendants were, by the Mayor discharged from custody. Now as to