

127.

ASSISTANT TO DIRECTOR OF DEPARTMENT OF LIQUOR CONTROL—NOT A CIVIL OFFICER—AN EMPLOYEE UNDER ARTICLE II, SECTION 19, CONSTITUTION OF OHIO.

SYLLABUS:

An Assistant to the Director of the Department of Liquor Control, having no duties prescribed by statute and holding office at the will of the Director of the Department of Liquor Control, is not a "civil officer" within the meaning of Article II, Section 19 of the Constitution of the State of Ohio, but is merely an employee.

COLUMBUS, OHIO, February 15, 1937.

HON. JOSEPH T. FERGUSON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: I have your letters of recent date as follows:

"We have been asked informally, whether, we would approve for payment the salary of Mr. Jesse Gilbert, who has been appointed to the position of Assistant to the Liquor Control Director.

Mr. Gilbert, you will recall, was a member of the Legislature that passed the act creating the position of Liquor Control Director, and this act provided for the appointment of one member of the Liquor Control Board and the Liquor Control Director. The members of Legislature having the rights to establish the necessary positions to carry on the work.

You will recall, that Governor Davey some two years ago attempted to appoint two different members of the Legislature to positions of Lquor Control Director. The Attorney General held that they could not serve, because members of Legislature create law and positions.

The Liquor Control Department has abolished a position in their department, that of Executive Secretary and Secretary, and in their place have created the position of Assistant to the Director and have appointed Mr. Jesse Gilbert a member of Legislature, which created the act.

In your opinion, could we honor voucher of Mr. Gilbert for payment since perhaps the position, was not directly created by the Legislature but merely established by a Board created by law?"

In reply to our request to you for further information you wrote under date of February 9th, as follows:

“Replying to yours-of the 9th inst. with reference to our request for your official opinion relative to the legality of the appointment of Mr. Jesse Gilbert as Assistant to the Director of Liquor Control, you are hereby advised that our investigation discloses that Mr. Gilbert acts as Contact Man for the Director, making appointments and, in other words, attending to all duties of a secretarial nature.”

The question contained in your letters centers around the provisions of Article II, section 19 of the Constitution of Ohio, which reads as follows:

“No Senator or Representative shall, during the term for which he shall have been elected, or for one year thereafter, be appointed to any civil office under this State, which shall be created or the emoluments of which, shall have been increased, during the term, for which he shall have been elected.”

At the outset I would like to make clear the distinction between an Assistant *to the* Director and an Assistant Director. The latter position is authorized by Section 154-5, General Code of Ohio, and generally entails certain responsibilities and duties of considerable importance, and upon vacancy in the Directorship the Assistant Director assumes full responsibility for the Department. An Assistant to the Director functioning in the manner set out in your second letter would have no such responsibilities and much more menial duties, and apparently is appointed on the authority of Section 486-8, paragraph 8, General Code of Ohio.

In my opinion the issue narrows down to whether or not the position of Assistant to the Director of the Department of Liquor Control is a “civil office” or merely employment.

Despite the fact that the construction of the word “office” is a constant legal problem, the courts of this state have never laid down any hard and fast definition, but have preferred to follow the rule set forth in *State, ex rel. Hogan vs. Hunt*, 84 O.S., 143, at page 149 as follows:

“Manifestly, however, each case should be decided on its peculiar facts. * * *.”

However, the courts, in determining the "peculiar facts," have generally considered certain elements, namely, length and durability of tenure, whether or not an oath or bond is required, emoluments, independency of functions exercised by the holder of the position, whether or not the holder of the position exercises any of the sovereign powers of the state and the general character of the duties to be performed by the holder of the position. *State, ex rel. Attorney General vs. Keenen, et al.*, 7 O. S., 546, 556; *State, ex rel. vs. Wilson*, 29 O. S. 347, 347-349; *State, ex rel. vs. Jennings*, 57 O.S., 415, second syllabus; *State, ex rel. Landis vs. Commissioners, et al.*, 95 O. S., 157, 159; *State, ex rel. vs. Skinner*, 128 O.S., 325; and *State, ex rel. vs. Gessner*, 129 O.S., 290, 293-294.

It is quite clear that the holder of the position mentioned in your letter would be subservient to the will of the Director of the Department of Liquor Control; is not required by law to take an oath or give bond, has no independency of action, performs no duties having the tinge of officialdom, and most important of all, exercises none of the sovereign power of the state. As pointed out by the court in *State, ex rel. vs. Sinner, supra*, in determining the question of whether a position is an office or merely employment, this last named element should be given greater weight than any other. The court at page 327, said:

"A public officer, as distinguished from an employe, must possess some sovereign functions of government to be exercised by him for the benefit of the public, either of an executive, legislative or judicial character. It is well stated in the Landis case supra (State, ex rel Landis vs. Commissioners, cited supra) that 'the chief and most decisive characteristic of public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute and their performance involves the exercise of continuing independent political or governmental functions, then the position is a public office and not an employment.'"

(Italics and parenthetical matter ours).

I might further point out that nowhere does the Liquor Control Act (Sections 6064-1, et seq., General Code of Ohio), or any other statute prescribe the duties and responsibilities of an Assistant to the Director.

Whereas not all of the above cited cases have been concerned with the words "office" as it appears in Article II, section 19 of the Constitution of Ohio, nevertheless the problems confronting the courts which have decided them, have been substantially the same and have been used

heretofore in the construction of this particular section of the Constitution. Opinions of the Attorney General for 1914, Vol. I, page 427, and Opinions of the Attorney General for 1927, Vol II, page 1304.

It is therefore my opinion that inasmuch as the holder of the position described in your letters (1) has no independency of functions (his actions in my opinion are to be entirely dominated by the will of the Director of the Department of Liquor Control), (2) performs duties substantially routine in their nature, (3) is not required to take an oath or give bond, (4) does not exercise any of the sovereign powers of the state, (5) holds his position at the will of superior officers and can be discharged at any time for any reason, he is an employee and not a civil officer within the provisions of Article II, section 19 of the Constitution of the State of Ohio.

Were a contrary conclusion reached, a further question might arise as to whether the position was created in the 90th General Assembly by the enactment of the Liquor Control Act (Sections 6064-1, et seq., General Code of Ohio), or by the 91st General Assembly in its amendments to said Liquor Control Act and to Sections 154-3 and 154-6, General Code, in Amended Substitute Senate Bill No. 2. However, due to my opinion as above outlined that the office of Assistant to the Director of the Department of Liquor Control is not a civil office, it is not necessary to consider this further question at this time.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

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APPROVAL—BONDS OF AKRON CITY SCHOOL DISTRICT,
SUMMIT COUNTY, OHIO, \$5,000.00.

COLUMBUS, OHIO, February 15, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.