

Ohio certain rooms in the Nasby Building in the city of Toledo, for the term beginning July 15, 1924, and ending on July 1, 1925, under the terms of which the state is to pay the sum of \$125.00 per month.

It is suggested that the better practice would be to have such leases made to the State of Ohio for the use and benefit of the Department of Industrial Relations. However, the language used perhaps would be sufficient without a change of the form of the present lease.

It is further suggested that the certificate of the Director of Finance to the effect that there are funds available for the purpose should be secured before this lease is finally accepted on behalf of the state.

Finding said lease in proper legal form, I have this day noted my approval thereon, and am returning the same herewith to you.

Respectfully,  
C. C. CRABBE,  
*Attorney-General.*

1389.

DEPUTY MARSHALL—MUST BE ELECTOR OF VILLAGE IN WHICH HE IS APPOINTED.

*SYLLABUS:*

*A deputy marshal of a village must be an elector of such village.*

COLUMBUS, OHIO, April 21, 1924.

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

GENTLEMEN:—This will acknowledge receipt of your letter of March 24, 1924, in which you inquire as to whether or not deputy marshals must be electors of the village in which they are appointed.

Article XV, section 4, of the Constitution of Ohio, reads as follows:

“No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector; provided that women who are citizens may be appointed as members of boards of, or to positions in, those departments and institutions established by the state or any political subdivision thereof involving the interests or care of women or children or both.”

Section 4666, General Code, reads:

“Each officer of the corporation, or of any department or board thereof, whether elected or appointed as a substitute for a regular officer, shall be an elector within the corporation, except as otherwise expressly provided, and before entering upon his official duties shall take an oath to support the Constitution of the United States and the Constitution of Ohio, and an oath that he will faithfully, honestly and impartially discharge the duties of the office. Such provisions as to official oaths shall extend to deputies, but they need not be electors.”

Section 4384, General Code, is as follows:

"The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. When provided for by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special policemen, and may remove them for cause, which shall be stated in writing to council."

Section 4385 is in the following language:

"The marshal shall be the peace officer of the village and the executive head under the mayor of the police force. The marshal, the deputy marshals, policemen or night watchmen under him shall have the powers conferred by law upon police officers in all villages of the state, and such other powers not inconsistent with the nature of their offices as are conferred by ordinance."

The answer to your question depends upon whether the deputy marshal holds an office and thereby becomes an officer within the meaning of Article XV, section 4, of the Constitution, or whether he is a deputy exempted from being an elector under section 4666 of the General Code.

In the case of *DeRomedis vs. Village of Yorkville*, 21 Nisi Prius (N. S.) 340, which was an action to determine whether a village policeman had to be an elector or not, Smith, J., said:

"Section 4385 defines the general powers of police officers. Under the provisions of these two sections council has the right to provide for the employment and appointment of police officers. These sections determine the only method by which these policemen receive their appointment.

"Council must first by appropriate legislation create the offices of policemen or deputy marshals and fix their salaries and terms of office. After the offices are created the mayor may then appoint the deputies or policemen and this action must be confirmed by council. From the minutes of council it appears that it hired James Parkinson as a policeman for the village at a salary of \$135 per month, straight time. This is clearly beyond its power. It has the right only to create this office. The mayor must then appoint and the council must confirm that appointment as provided in section 4384. It follows, therefore, that this action of council in its attempt to employ Parkinson as police officer without having first created the office and fixed its salary was beyond its authority. The right to appoint vests in the mayor, subject to the subsequent confirmation by council."

Further along in his opinion he quotes the following from the case of *State vs. Hunt*, 84 O. S., 149, wherein Spear J., said:

"We have not undertaken to enter the field of definition of office or officer. As given in the books they are multitudinous not to say multifarious. Indeed so varied are they scattered through the books that the ingenious barrister may find support to almost any proposition relating to the general subject, which the necessities of his case may seem to demand. But like maxims of the law when used indiscriminately and without judgment, they are apt to mislead. One which seems to have met with most favor perhaps is that an office is a public position to which a portion of the state

sovereignty of the country attaches, and which is exercised for the benefit of the public.”

And again, quoting from *State, ex rel., vs. Brennan*, 49 O. S., 33:

“It is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation of title, the position so created is a public office.”

On page 343, Smith, J., uses the following language:

“Applying what has been said to the instant case it clearly appears that a policeman regularly employed by proper legislation, appointed by the mayor and confirmed by council as provided for in sections 4384 and 4385 is a public officer. Does he not exercise a portion of the sovereignty of the people delegated to him by law? He has public duties to perform. He is charged with the duty of preserving public and private property and protecting the people’s interests. He has authority to make arrests on view. He has the right to go outside of his municipality and make arrests throughout the state. He not only has this authority but is charged with this duty, and upon the acceptance of his office he takes an oath to this effect and gives bond for the faithful discharge of these duties. He is clothed with functions to be exercised in the interests of the people. His services are compensated by a stated yearly salary.”

“In our own state it has been held that the chief of police is a public officer (8 C. C. (n. s.), 293; 25 O. C. C., 762). Also, that the chief of the fire department is a public officer (20 C. C. (n. s.), 478), and that a member of the municipal board of health is an officer of the municipality (*State, ex rel. Wind, vs. Wichgar*, 27 O. C. C., 743). It is held in the cases cited that the chief of police and chief of the fire department are clothed with public functions and vested with a portion of the sovereignty of the people. The same principle applies with equal force to a policeman in a village.”

In *W. L. B. & Rep.*, of July 30, 1923, Vol. 21, No. 19, at page 344, we find the following:

“A municipal corporation can under ordinary conditions incur no liability by reason of the defaults of its police department. The prevention of crime is a purely governmental function, undertaken for the benefit of the public at large, and, if police officers are appointed and paid by the various municipalities, this is done merely as a matter of convenient administration. Their duties are ordinarily prescribed by law, and they are public officers and not the servants or agents of the city or town in which they serve.” 19 Ruling Case Law, 1119, Section 399.

A deputy marshal is given the same authority as a policeman; his position is created in the same way. He is a creature of the law and derives his powers from the same source. Section 4385, General Code, further provides that deputy marshals shall have “such other powers not inconsistent with the nature of their offices as are conferred by ordinance.”

Such deputy marshal does not receive his appointment from the marshal nor does he derive any authority from him. He is not responsible to the marshal, nor is the marshal responsible for the acts of a deputy marshal. He may act independently of orders of the marshal in making arrest or in serving of process in the enforcement of the laws of the state or village.

The marshal is merely the executive head, under the mayor, of the police force, and cannot add to nor take away any of the legal rights or duties of a deputy marshal. The marshal cannot remove a deputy marshal.

In those and other respects, the case of deputy marshals is vastly different from other deputies, such as deputy clerks of probate courts or of other deputy positions, as mentioned in 25 Ohio St. 21, and 56 Ohio St. 340.

True, section 4584, General Code, uses the word "deputy," but when we take into consideration the way in which his office is created, the source of his appointment and authority, we are led to the conclusion that he is not a deputy within the meaning of section 4666, General Code, but is an officer, filling a legally created office within the meaning of Article XV, section 4, of the Constitution of Ohio, and as such must be an elector of the village in which he is appointed.

Respectfully,

C. C. CRABBE,

*Attorney General.*

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1390.

APPROVAL, BONDS OF MADISON TOWNSHIP RURAL SCHOOL DISTRICT, MONTGOMERY COUNTY, \$11,500.12, TO FUND CERTAIN INDEBTEDNESS.

COLUMBUS, OHIO, April 21, 1924.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.*

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1391.

APPROVAL, BONDS OF SOUTH BLOOMFIELD TOWNSHIP RURAL SCHOOL DISTRICT, MORROW COUNTY, \$2,076.60, TO FUND CERTAIN INDEBTEDNESS.

COLUMBUS, OHIO, April 21, 1924.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.*