

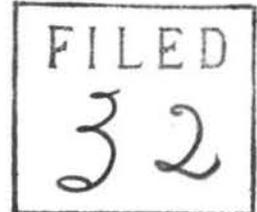
MUNICIPAL CORPORATIONS:
MARSHAL: VACANCY -

Marshal of City of the third class
does not forfeit office by being
drafted into the Army.

December 30, 1942

Honorable J. R. Garrison
Prosecuting Attorney
Johnson County
Warrensburg, Missouri

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Dear Sir:

We are in receipt of your request for an opinion,
under date of December 28, 1942, which reads as follows:

"The Mayor and City Council of the
City of Warrensburg have requested
me to write you for an opinion con-
cerning their City Marshal.

"The facts are as follows: The
Marshal was drafted into the Army
last week. His term does not expire
until April of 1943. He appointed
no deputy and there is no Marshal at
this time. The Mayor and Council
desire to know whether they will have
to pay the Marshal his salary for the
next four months even though he is not
here and has appointed no deputy. I
might add that Warrensburg is a City
of the third class. They are also going
to appoint a marshal.

"I am writing you at the request of
Mayor Shelton and am sure that he and
the City Council will appreciate it if
you will forward an opinion concerning
this matter."

Section 6869 R. S. Missouri, 1939, reads as follows:

"The following officers shall be elected by the qualified voters of the city, to wit: Mayor, police judge, attorney, marshal, assessor, collector, and treasurer. The terms of office of each of the said officers shall be two years, except the office of mayor, which shall be a four-year term. This section shall not apply to any of said officers elected prior to the date it becomes effective, but any person holding any of the said offices at the time this section becomes effective shall serve the term for which he was elected. All officers shall hold office until their successors are duly elected and qualified. The attorney shall be a person learned in the law."

The above section specifically states that the term of office of the marshal in a city of the third class is two years.

In your request you state that the city marshal of the city of Warrensburg was drafted into the Army. It has been held by the Supreme Court of this State, that where a county officer has been drafted into the Army he does not forfeit his office. It was so held in the case of State of Missouri, ex inf. Roy McKittrick, Attorney General of the State of Missouri, Relator v. Wade Wilson, Respondent, No. 38087, (not reported). In that opinion the court in stating the facts of that particular case, and in holding that the officer did not forfeit his office by being drafted into the Army said:

"At the general election in 1938 one John R. Wall was elected circuit clerk for the usual term of four years. He discharged the duties of his office until February 16, 1942 when he was inducted under the Selective Service Act into the Army of the United States as a private. He was sent to Fort Leavenworth, Kansas and later to Camp Roberts, California. After Wall's induction the circuit clerk's office was carried on by his deputy until April 7, 1942 when she turned over the office to respondent under threat of being held in contempt of the circuit court.

"The question for decision is whether Wall's induction into the army under the Selective Service Act resulting in his inability personally to perform the duties of his office caused him automatically to forfeit his office.

"It is our judgment that Wall did not forfeit his office by being drafted into the military service of his country. This would be equally true if he had volunteered for the duration, particularly in view of our universal military service."

Under Section 6875 R. S. Missouri, 1939, the mayor may, with the consent of the majority of all the members elected to the city council, remove from office for cause shown, any elected officer of the city.

Section 6904 R. S. Missouri, 1939, reads as follows:

"The council shall, by ordinance, provide for the removal of any marshal, assistant marshal or policeman guilty of misbehavior in office."

Under this section an ordinance must be passed to provide for the removal of the marshal.

In Section 6875, supra, which provides for the removal of an elected officer, it is specifically stated, "for cause." But, under the holding of the case of State of Missouri, ex inf. Roy McKittrick, Attorney General of the State of Missouri v. Wade Wilson, supra, the drafting of an elected officer into the United States Army is not a "cause" sufficient to forfeit the office. The Court in the Wade Wilson case, further, in construing Section 18, of Article II of the Constitution of Missouri, said:

"We have held in a case similar to this where a circuit judge was called into active military service that Art. II, Sec. 18 of our Constitution, 'that no person elected or appointed to any office shall hold such office without personally devoting his time to the performance of the duties to the same belonging,' was designed to prevent 'farming out' the performance of the duties of an office to another for the convenience or profit of the officer and did not apply to the situation we were there considering. State ex rel. McGaughey v. Grayston Mo. , 163 S. W. (2d) 963. * * * * * ."

It is true, that under Section 6875, supra, the mayor and council may remove an elected officer in cities of the third class for cause, but the Supreme Court of this State, in the case of State ex rel. v. Bright, 224 Mo. 514, l. c. 529, in passing upon such an ordinance, said:

"The ordinance in question provided for the suspension of any officer of the city for such acts of malfeasance and misfeasance and of official incompetency, as are contained in these charges against the city marshal.

"These constitutional questions are really outside of a discussion necessary to determine this case. The question here is what is the real character of this court of impeachment? If it is a court within the meaning of the Constitution, then all questions as to constitutionality of the laws under which the court acts can be determined in a proceeding in prohibition, but if it is not such court, then relief must be sought in some other proceeding. So that after all the sole question to be determined is the character of the body which was trying McNeill for his official life. To our mind it is not such a body to which a writ of prohibition can be directed."

In the above holding, it is very significant that the suspension of the officer must be for malfeasance, misfeasance or incompetency.

Section 6898 R. S. Missouri, 1939, reads as follows:

"The marshal shall be chief of police, and shall have power at all times to make or order an arrest with proper process, for any offense against the laws of the city, and keep the offender in the city prison or other proper place to prevent his escape, until a trial can be had before the proper officer, unless such offender shall give a good and sufficient bond for his appearance for trial. The marshal shall also have power to make arrests without process in all cases in which any offense against the laws of the city shall be committed in his presence. He shall collect all fines assessed in the police court, and pay the same into the city treasury."

Under this section the marshal of a city of the third class, such as Warrensburg, shall be the chief of police.

Section 6899 R. S. Missouri, 1939, reads as follows:

"There may be one assistant marshal, who shall serve for a term of one year, and shall perform the duties of the marshal at such times as the marshal may be absent, disqualified or unable to act. At other times, the assistant marshal shall render services as a regular member of the police force."

Section 6901 R. S. Missouri, 1939, reads as follows:

"The manner of appointing the assistant marshal and all policemen of the city, as well as the duties of the same, shall be defined by ordinance."

Under the above two sections there may be an assistant marshal, who may be appointed under an ordinance which has been passed by the city council. In the Wade Wilson case, supra, the court, in its opinion said:

"We come to the conclusion that there is nothing in the law, constitutional, statutory or common, which requires us to hold that Wall has forfeited his office by becoming a soldier in the army. Therefore, the office was not vacant and the appointment of respondent was unauthorized. * * * * *

"We can readily anticipate that local inconvenience can result where an officeholder goes to war. It seems to us that some provision might be made, where there is none at present, for a substitute, an officer locum tenens, to fill the office while the regular officer is performing the greater duty of defending his country. Wounded soldiers are already returning to civilian life. Supposing there is an office-holder among them, would there be anyone who would not agree but that he should serve out his term of office if he were able? So it should be with every soldier who has the good luck to return. (We use the term soldier to include all ser-

vice men.)

"However, the matter of providing for substitute officers is for the attention of the Legislature which will convene within a month. The Supreme Court of Florida recently held constitutional an act which secured to all state and county officers their tenure in case they were called to the armed forces and which authorized the governor to designate another to perform the duties of the office during such absences but not longer than the remainder of the term. Re Advisory Opinion, Fla. , 8 So. (2d) 26, 140 ALR 1481. * * * "

In the matter above set out, in the first paragraph, the court specifically held that the office of circuit clerk was not forfeited by reason of his being drafted into the Army.

In the second paragraph above set out, the court, in reviewing its holding, suggested that the legislature next convening should make some arrangement for the appointment of a temporary officer during the absence of the elected officer.

Under the facts set out in your request and under this holding as above set out, the legislature of this State saw fit to enact Section 6899, supra, which provided that the assistant marshal shall perform all of the duties of the marshal when he may be absent, disqualified or unable to act.

Under Section 6901 R. S. Missouri, 1939, the legislature provided that the manner of appointment of the assistant marshal should be covered and defined by ordinance.

I am assuming that the city of Warrensburg has such an ordinance.

In your request, you also state that the mayor and city council will appoint a marshal. Under the holding in the Wade Wilson case, supra, there is no vacancy in the office of the marshal of Warrensburg, but the mayor and council may appoint an assistant marshal who shall perform the same duties as the marshal.

Also, under the holding of the Wade Wilson case, supra, no proceeding can be had at this time to oust the marshal. The holding specifically states:

" * * * 'An office presently filled cannot become vacant without a removal either voluntary or involuntary.' State v. McClinton, 5 Nev. 329. Wall has not voluntarily removed himself from his office. In fact the contrary has been indicated by him. No involuntary proceeding to remove him from office was had. Nor could such a proceeding be carried on over objection because of the Soldiers' and Sailors' Civil Relief Act so long as Wall is on active duty. 50 U. S. C. A. Appendix, Sec. 501 et seq."

You also ask whether the city will have to pay the marshal his salary for the next four months, even though he is not here and has appointed no deputy. The Supreme Court of this State has held that so long as an elective officer holds his office, has not forfeited it, and has not been ousted by any proper procedure, he is entitled to a salary.

In the case of Bates v. St. Louis, 153 Mo. 18, 1. c. 20, the court said:

"It is well settled law that 'a public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creature of law, and as an incident to the office

"The salary belongs to him as an incident to his office, and so long as he holds it; and, when improperly withheld, he may sue for and recover it. When he does so he is entitled to its full amount, not by force of any contract, but because the law attaches it to the office."

(Givens v. Daviess Co., 107 Mo. loc. cit. 608, 610; Fitzsimmons v. Brooklyn, 102 N. Y. 536; State ex rel. Chapman v. Walbridge, 153 Mo. 194.)

"As is well said in Throop on Public Officers, sec. 500, quoting from Robinson, J., in People v. Green, 5 Daly (N. Y.), pp. 268, 269:

"The right of an officer to his fees, emoluments, or salary, is such only as is prescribed by statute; and while he holds the office, such right is in no way impaired by his occasional or protracted absence from his post, or neglect of his duties. Such derelictions find their corrections in the power of removal, impeachment, and punishment, provided by law. The compensations for official services are not fixed upon any mere principle of quantum meruit, but upon the judgment and consideration of the legislature, as a just medium for the services which the officer may be called upon to perform. This may in many cases be extravagant for the specific services, while in others

they may furnish a remuneration which is wholly inadequate. The time and occasion may, from change of circumstances, render the service onerous and oppressive, and the legislature may also increase the duties to any extent it chooses; yet nothing additional to the statutory reward can be claimed by the officer. He accepts the office "for better or worse;" and whether oppressed with constant and overburdening cares, or enabled from absence of claim upon his services, to devote his time to his own pursuits, his fees, salary, or statutory compensation constitutes what he can claim therefor, and is yet to be accorded, although he performs no substantial service, or neglects his duties The fees or salary of office are "quicquid honorarium," and accrue from mere possession of the office!" (Underscoring ours.)

Also, in the case of *Cavane v. City of Milan*, 99 Mo. App. 672, which is a case where a marshal had sued the city of Milan for his salary which he claimed due him, even though, through illness, he had not performed his duties, at page 674, the court said:

"And plaintiff was entitled to his salary for the time during which he was sick and unable to perform the duties of the office. *Bates v. St. Louis*, 153 Mo. 18; *State v. Walbridge, idem*, 194."

Honorable J. R. Garrison

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CONCLUSION

It is, therefore, the opinion of this department, that the marshal of the city of Warrensburg has not forfeited his office by reason of his having been drafted into the Army, and the mayor and city council of the city of Warrensburg cannot appoint a marshal where there is no vacancy.

It is further the opinion of this department that the mayor and city council of the city of Warrensburg may appoint an assistant marshal who shall perform the same duties as the marshal.

It is further the opinion of this department, that the city of Warrensburg should pay the marshal his salary for the next four months, providing he retains his office as marshal.

Respectfully submitted

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Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

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