1402

1. CIVIL SERVICE—CHARTER PROVISION ADOPTED BY MUNICIPALITY—CONTROL OF CIVIL SERVICE IN HANDS OF COUNCIL OR COMMISSION—FEDERAL CENSUS CHANGED MUNICIPALITY FROM VILLAGE TO CITY—COUNCIL OF CITY WITHOUT POWER TO PLACE VILLAGE EMPLOYES IN CLASSIFIED CIVIL SERVICE—SECTIONS 3498, 3499 G. C.

2. VILLAGE ADVANCED TO STATUS OF CITY—PERSONS DULY APPOINTED TO POSITIONS OF EMPLOYMENT IN VILLAGE PRIOR TO TRANSITION— EXCEPTION, POLICEMEN AND FIREMEN—MAY CONTINUE AS PROVISIONAL EMPLOYES UNTIL CIVIL SERVICE COMMISSION APPOINTED FOR CITY AND COMMISSION IS ABLE TO PRESENT LISTS OF ELIGIBLE PERSONS FOR APPOINTMENTS.

3. TRANSITION, VILLAGE TO CITY—WILL NOT AFFECT TENURE, POLICE OFFICERS AND FIREMEN PREVIOUSLY APPOINTED IN VILLAGE—ESTABLISHED UNDER SECTIONS 4384, 4384-1, 4389 G.C.—POLICEMEN AND FIREMEN EMPLOYES OF CITY—PROMOTION AND REMOVAL REGULATED BY SECTIONS 486-15a, 486-17 ET SEQ., G.C.

SYLLABUS:

1. Where no charter provision has been adopted by a municipality placing the control of civil service in the hands of the council or commission, and such municipality has, as the result of a federal census, been changed from a village to a city,

as provided in Sections 3498 and 3499 of the General Code, the council of such city is without power to place the village employes in the classified service of the civil service.

2. Where a village, as the result of a federal census, has been advanced to the status of a city, the persons who have been duly appointed to positions of employment in the village prior to such transition, other than policemen and firemen, may be continued as provisional employes until a civil service commission has been appointed for such city and such commission is able to present lists of eligible persons for appointment to such positions.

3. The transition of a village to the status of a city, under Sections 3498 and 3499, General Code, will not affect the tenure of police officers or firemen previously appointed in such village, such tenure having been established under the provisions of Sections 4384, 4384-1 and 4389 of the General Code, and such policemen and firemen having by reason of such transition, become employes of the city, their promotion and removal will be regulated by the provisions of Section 486-15a, General Code, relating to promotion and Section 486-17, et seq., General Code, relating to suspension and removal of city policemen and firemen.

Columbus, Ohio, May 8, 1952

Hon. Carl W. Smith, Chairman, Civil Service Commission of Ohio
Columbus, Ohio

Dear Sir:

I have before me your communication requesting my opinion, and reading as follows:

> "Will you kindly advise us on the question as to whether a city that has recently changed from a village has the authority to blanket its present employees into the classified service with permanent status, by action of the city council."

Article XVIII, Section 1 of the Constitution of Ohio, classifies municipal corporations into cities and villages. All such corporations having a population of 5,000 or more are classified as cities; all others as villages. In making this classification the constitution followed the pattern of Section 3497, General Code, which had been enacted in 1902. Said Section 1 of Article XVIII further provides: "The method of transition from one class to another shall be regulated by law."

This Article was adopted in 1912. Long prior thereto, to wit, in 1902, the General Assembly had enacted the only statutes which have ever been enacted providing for the transition of a village to the status of a city. These are Sections 3498 and 3499, General Code. We find these statutes

rather vague and inadequate in covering the questions that naturally arise when, as the result of a federal census, a village becomes a city, or a city becomes a village.

Section 3498, reads as follows:

> "When the result of any future federal census or an enumeration as provided in sections 3497-1 to 3497-4 of the General Code is officially made known to the secretary of state, he forthwith shall issue a proclamation, stating the names of all municipal corporations having a population of five thousand or more, and the names of all municipal corporations having a population of less than five thousand, together with the population of all such corporations. A copy of the proclamation shall forthwith be sent to the mayor of each municipal corporation, which copy shall be forthwith transmitted to council, read therein and made a part of the records thereof. *From and after thirty days* after the issuance of such proclamation each municipal corporation *shall be a city* or village, in accordance with the provisions of this title."
>
> (Emphasis added.)

Section 3499, reads as follows:

> "Officers of a village advanced to a city, or of a city reduced to a village, *shall continue in office until succeeded* by the proper officers of the new corporation at the next regular election, and the ordinances thereof not inconsistent with the laws relating to the new corporation shall continue in force until changed or repealed." (Emphasis added.)

Section 3498 underwent a slight amendment in the 99th General Assembly as a part of an act which relates to the return of a city to the status of a village as the result of a federal census, but except for the words which refer to that situation, the section is precisely as orginally enacted.

It will be observed that Section 3498, supra, provides that "from and after thirty days after the issuance of such proclamation, each municipal corporation shall be a city or village in accordance with the provisions of this title." This language might lead one to the conclusion that from and after the expiration of such thirty day period the municipal corporation would begin to function in all respects as a city. It will be observed, however, that the provisions of the accompanying Section 3499 are to the effect that "the officers shall continue in office until succeeded by the proper officers in the new corporation at the next regular election."

Our Supreme Court, in the case of State ex rel. Heffernan v. Serp, 125 Ohio St., 87, made it quite clear that officers of a village which has been so changed, cannot exercise the powers or perform the functions of city officers, but that the exercise of such powers must await the election and installation of city officers. It was held as shown by the third syllabus:

> "3. It is the true intent and meaning of Section 3499, General Code, that village officers shall continue in office, with the powers and duties only of village officers until the first regular election after the proclamation of the secretary of state has been filed with the mayor of the municipality as provided by Section 3498, General Code."

The question involved in that case was as to the right of the mayor of a village which was thus in process of advancement, to appoint a civil service commission. He undertook to do so, evidently relying upon the provision of Section 3498, that in thirty days after the proclamation of the Secretary of State the village "shall be a city." His reliance was further based on the case of Wise v. City of Barberton, 20 C. C., (N.S.), 390, which had held that the mayor of such village after the lapse of the thirty day period mentioned, became endowed with the veto power which was conferred by statute on the mayor of a city. This decision was affirmed without report by the Supreme Court in Wise v. Barberton, 88 Ohio St., 595. The court in the Serp case discussed the Barberton case, and stated very emphatically that it was not a correct statement of the law.

The case of State ex rel. Serp is not decisive of the question you raise, since it dealt with the interim powers of the mayor of a village which was in process of transition, whereas your question concerns the action of the city council after the transition has been fully accomplished. However, it appears to me to have a direct bearing, in that it points to the fact that on January 1, 1952, when the first elected officers of the newly created city came into office, they found their city as an operating entity, with a corps of employes duly appointed and performing their several duties. They also found certain laws in effect which relate to the civil service, particularly as it concerns and covers *city employees*. The Constitution, in Section 10 of Article XV which was adopted in 1912, contains the following provision:

> "Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by com-

petitive examinations. Laws shall be passed providing for the enforcement of this provision."

It will be observed that this language requires only appointment and promotion according to merit, but the laws that have been passed pursuant to the constitutional mandate go a step further and provide also for removal of employees, which in effect established an indefinite tenure which can only be terminated for the causes and by the procedure set out in the law. Section 486-1, General Code, provides in part as follows:

> "1. The term 'civil service' includes all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof."

Section 486-8, General Code, provides in part:

> "The civil service of the state of Ohio and the several counties, cities and city school districts thereof shall be divided into the unclassified service and the classified service."

Then follows a list of all the positions which are to be in the unclassified service, and a general statement found in paragraph (b) as follows:

> "(b) The classified service shall comprise all persons in the employ of the state, the several counties, cities and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class and the unskilled labor class."

Section 486-10, et seq., General Code, provides for examination and certification of applicants.

Section 486-17, et seq., General Code, provides for suspension and removal of employes in the classified service.

Section 486-19, General Code provides specifically for the operation of the civil service law in cities. It requires the mayor or other chief appointing authority of each city to appoint a civil service commission, and the duties of this commission as to rule-making, examinations, and certification of eligibles are fully set out. It also provides that the procedure for reduction, suspensions and removal as provided in the law relative to state and county employes, shall govern the civil service of the city. Said Section 486-19 was amended in 1941 (119 Ohio Laws,

543) by including within municipal civil service, the employes of city health districts. The pertinent portions of that section, as amended, read as follows:

> "The mayor or other chief appointing authority of each city in the state shall appoint three persons, one for a term of two years, one for four years, and one for six years, who shall constitute the municipal civil service commission of such city and of the city school district and city health district in which such city is located, * * *.
>
> *"Present employees of city health districts and city health departments shall continue to hold their positions until removed in accordance with the civil service law."* (Emphasis added.)

The paragraph emphasized shows a distinct purpose to bring the "present employes" of the city health district within the protection of the civil service law. In this, these employes were given especial favor. In the installation of the system, employes generally who were then in service were not given so complete protection as to their tenure.

The policy of the law as to employes then in service is further shown by the provision of Section 486-31 then in force, since repealed:

> "All officers, employes and subordinates in the classified service of the state, the several counties, cities and city school districts thereof, holding their positions under existing civil service laws, and who are holding such positions by virtue of having taken a regular competitive examination as provided by law, shall, when this act takes effect, be deemed appointees within the provisions of this act; but no person holding a position in the classified service by virtue of having taken a non-competitive examination shall be deemed to have been appointed or to be an appointee in conformity with the provisions of this act; provided, however, that all persons who have served the state or any political subdivision thereof continuously and satisfactorily for a period of not less than seven years next preceding January 1, 1915, shall be deemed appointees within the provisions of this act (G. C. Sec. 486-1 to 486-31).
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> "The name of each officer, employe and subordinate holding a position in the classified service of the state, the counties, cities and city school districts thereof at the time this act takes effect, who has not passed a regular competitive examination and who has not been in the service seven years as herein provided, shall, within ten days after this act becomes effective, be reported by the appointing authority to the commission and shall be certified to the appointing authority in addition to the three candidates for

> appointment to such position. If any such person is reappointed, he shall be deemed to have been appointed under the provisions of this act (G. C. 486-1 to 486-31). If no eligible list exists such person may be retained as a provisional employe until such time, consistent with reasonable diligence, as the commission can prepare eligible lists when such position shall be filled as prescribed in this act; provided that nothing contained in this section shall be deemed to vacate the office of existing chiefs of police departments or chiefs of fire departments of municipalities. All existing eligible lists of persons who have taken regular competitive examinations shall continue in force for the term of eligibility to be fixed by the commission as provided herein. All property of the existing state commission shall become the property of the commission to be appointed hereunder."

In view of this provision in the civil service law, as to persons who were already city employes, I cannot see how we can concede a more favorable position to those who become city employes by the process of change from a village to a city. It is to be remembered that civil service provisions do not apply in any respect to village employes. However desirable or convenient it might be, from a practical standpoint, for the council by a legislative act to declare that all previously appointed village employes should now be reappointed or continued in service as city employes under the laws and rules relating to civil service, that does not appear to me to be legally possible. Aside from the fact that no such authority can be found in the statutes, it appears obvious that such act of the municipal council would be in the nature of an administrative act and would amount in effect to an appointment. This is expressly forbidden by Section 4211, General Code, so far as the council of a city is concerned. This section, so far as pertinent, reads as follows:

> "The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title."

Furthermore, it seems reasonable that if any one were to have the privilege of "blanketing" these employes into the protection of the civil service law, and endowing them with an indefinite tenure, it would be those city officers who by law have the authority to appoint them. And the law certainly gives to the City Council no such power of appointment.

Since these employes were duly and legally appointed in the first instance, there would seem to be no reason why they might not be permitted to serve until the heads of the departments to which they are assigned under the city regime, see fit to dismiss them and replace them with persons duly qualified under civil service regulations. There would, of course, be no reason why they might not qualify by taking the required examination, and in the meantime might be regarded as provisional appointees under the provisions of Section 486-14, General Code, which authorizes such appointments when the commission is unable to certify a list of persons eligible for appointment.

I have not found any judicial decisions or opinions of the Attorney General, directly bearing on the question you raise. However, one of my predecessors had before him a problem somewhat related to that here under consideration. In Opinion No. 3354, Opinions of the Attorney General for 1941, page 9, it was held:

> "A village, the population of which has increased so as to make it a city thirty days after proclamation of the Secretary of State pursuant to Section 3498, General Code, continues to be part of the general health district until the election and qualification of a mayor and council of such municipal corporation as city officers. Opinions of the Attorney General, 1922, Vol. I, page 167, and Opinions of the Attorney General, 1931, Vol. I, page 85, overruled."

Reliance was placed largely on the decision of the Supreme Court in the case of State ex rel. Heffernan v. Serp, 125 Ohio St., 87, to which I have already referred. In a later opinion viz. No. 3846, Opinions of the Attorney General for 1941, page 426, it was held that where a village had adopted a charter which provided for a commission form of government and gave the commission all powers of appointment, such commission immediately after the result of the census was known could appoint a civil service commission. It was held that this situation did not fall within the rule of the Serp case, since that case dealt with a village and city which operated under the municipal code.

That a city or village has power, to provide by charter for a system of civil service differing from that set out in the acts of the legislature, so long as it preserves the constitutional requirement for appointments based on competitive merit, is well settled. State ex rel. Lentz, 90 Ohio St., 309; Hile v. Cleveland, 118 Ohio St., 99.

The conclusion which I have indicated as to the status of village employes generally, would not have the effect of disturbing the tenure of village police officers or firemen, since they are protected by Sections 4384 and 4384-1, General Code, as to police, and by Section 4389, General Code, as to firemen, being subject to removal only for cause and under the procedure set up by Sections 4263 to 4267, General Code, as to removal of officers. These statutes last named, contemplate the filing by the mayor of definite charges and trial by the council.

There is a manifest reason for the different conclusion as to village employes generally and village policemen and firemen, for the former emerge from a field where there is no tenure into a field where a tenure is established by law, based on employes having been appointed after competitive examination; whereas the village policemen and firemen were, prior to the transition, definitely protected by the statute and only removable for certain causes and after a hearing. They, therefore, pass from a field where there was tenure into one where there is also tenure, but provided for under different laws.

However, while the statutes above referred to give these village policemen and firemen a certain tenure, it appears to me that having become, by operation of law, city employes, they fall under control of the director of public safety, who is by law charged with the supervision and control of the police and fire department of a city, and should be governed as to their promotion, discipline and removal by the civil service laws set up by the legislature for the government of city employes. Therefore their promotion, if ordered, should be under the procedure set out in Section 486-15a of the General Code, and their removal should be in accordance with Section 486-17, et seq., General Code, relating to city employes rather than under the statutes (Section 4263, et seq.) relating to village employes.

In specific answer to the question you have submitted, it is my opinion, and you are advised:

1. Where no charter provision has been adopted by a municipality placing the control of civil service in the hands of the council or commission, and such municipality has, as the result of a federal census, been changed from a village to a city, as provided in Sections 3498 and 3499 of the General Code, the council of such city is without power to place the village employes in the classified service of the civil service.

2. Where a village, as the result of a federal census, has been advanced to the status of a city, the persons who have been duly appointed to positions of employment in the village prior to such transition, other than policemen and firemen, may be continued as provisional employes until a civil service commission has been appointed for such city and such commission is able to present lists of eligible persons for appointment to such positions.

3. The transition of a village to the status of a city, under Sections 3498 and 3499, General Code, will not affect the tenure of police officers or firemen previously appointed in such village, such tenure having been established under the provisions of Sections 4384, 4384-1 and 4389 of the General Code, and such policemen and firemen having by reason of such transition, become employes of the city, their promotion and removal will be regulated by the provisions of Section 486-15a, General Code, relating to promotion and Section 486-17, et seq., General Code, relating to suspension and removal of city policemen and firemen.

Respectfully submitted,

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