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GOVERNOR OF OHIO—DOES NOT HAVE LEGAL POWER TO
REMOVE COUNCILMAN FROM OFFICE.

SYLLABUS:

The Governor of Ohio does not have the legal power to remove a councilman from office.

Columbus, Ohio, August 16, 1950

Hon. Frank J. Lausche, Governor of Ohio
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of your communication requesting my opinion, as follows:

“A group of citizens from Fairborn, Ohio, sent me a petition requesting that I ‘remove the Fairborn Councilmen from

office because of their wilful and repeated violation of the provisions of our "City Charter," "the Civil Service Rules and Regulations" and the General Code of Ohio.'

"I have not given any consideration to the merits of the complaint which has been made. My own opinion is that as Governor of Ohio I have no legal power of any character whatsoever to remove from office the duly elected Councilmen of any municipality.

"Will you please let me have your answers to the following questions:

"1. Does the Governor of Ohio have the legal power to remove a Councilman from office?

"2. If so, when and under what facts may such removal be made?"

At the outset it should be pointed out that the Governor, as all other public officials, has only such powers as have been expressly conferred upon him by the constitution and statutes and such implied or incidental powers as may be necessary to carry into effect those expressly conferred.

Section 5 of Article III of the Constitution of Ohio reads:

"The supreme executive power of this State shall be vested in the Governor."

Commenting on the power granted to the Governor by Section 5, Article III, *supra*, the Supreme Court of Ohio, through Marshall, C. J., in the case of *State, ex rel. vs. Baker*, 112 O. S. 356, at page 366, said:

"* * * We are of the opinion that supreme executive authority means the highest authority; that is to say, that there is no other authority pre-eminent or of equal eminence. It does not mean that all executive authority is lodged in the Governor, neither does it mean that 'supreme authority' is autocratic, absolute, despotic, or arbitrary. Such a construction would be inconsistent with the theory and the purposes of our republican institutions. It would be contrary to the traditions of American democracy. The Governor's authority is supreme in the sense that no other executive authority is higher or authorized to control his discretion, where discretion is lodged in him, and yet it is not supreme in the sense that he may dominate the course and dictate the action and control the discretion of other executive officers of inferior rank acting within the scope of the powers, duties, and authorities conferred upon them respectively. * * *"

With respect to the power of the Governor to remove public officials from office, it is said in 20 O. Jur., §17, p. 118, that :

“The power of a governor to remove public officers is not an incident of his executive office, but exists only where it is conferred by the Constitution or by statute, or is implied from the power of appointment. * * *”

Section 38 of Article II of the Constitution of Ohio provides :

“Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law ; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution.”

The specific provisions of law applicable to the question of removal of councilmen from office are found in Section 4238 and Section 4670 of the General Code of Ohio. Section 4238 provides that :

“Council shall determine its own rules and keep a journal of its proceedings. It may punish or expel any member for disorderly conduct or violation of its rules, and declare his seat vacant for absence without valid excuse, where such absence has continued for two months. No expulsion shall take place without the concurrence of two-thirds of all the members elected, and until the delinquent member has been notified of the charge or charges against him, and has had an opportunity to be heard.”

Section 4670 of the General Code of Ohio provides :

“When complaint under oath is filed with the probate judge of the county in which the municipality, or the larger part thereof is situated, by any elector of the corporation, signed and approved by four other electors thereof, charging any one or more of the following: That a member of council has received, directly or indirectly, compensation for his services as councilman, * * * contrary to law ; or that a member of the council * * * is or has been interested, directly or indirectly, in the profits of a contract, job, work or service, or is or has been acting as commissioner, architect, superintendent or engineer in work undertaken or prosecuted by the corporation, contrary to law ; or that a member of council * * * has been guilty of misfeasance or malfeasance in office, such probate judge shall forthwith issue a citation to the parties charged in such complaint for his appearance before him within ten days from the filing thereof, and also furnish the

accused and city solicitor with a copy thereof, but, before acting upon such complaint, such judge shall require the party complaining to furnish sufficient surety (security) for costs."

It is therefore apparent that neither of the above sections furnishes authority for you to take action against the councilmen in the case you present.

In addition to the statutes hereinabove referred to, section 10-1 and including Section 10-4 of the General Code, furnish a complete and adequate remedy for the removal of any state, county, municipal or township official who is guilty of gross neglect of duty or malfeasance, misfeasance or nonfeasance in office. Said sections provide for the removal for cause of such officials after a judicial hearing initiated by the filing of a petition setting forth the charges and signed by 15% of the electors of the appropriate subdivision.

It is true that Section 12303 of the General Code provides that an action in quo warranto may be instituted against a "public officer * * * who does or suffers an act which, by the provisions of law, work a forfeiture of his office," and Section 12305, General Code, provides that when directed by the Governor, the Attorney General or a prosecuting attorney shall commence such action. However, it has been held by the courts that quo warranto is not the proper remedy for the removal of a public official who has been guilty of misconduct in office. In the case of *State ex rel Attorney General v. McLain*, 58 O. S. 313, the second branch of the syllabus reads:

"Where the causes of removal from office are prescribed by statute which also provides a special mode of procedure for such removal, the statutory remedy is the exclusive one, and quo warranto will not lie."

It was said in the opinion of the case of *State ex rel. Attorney General v. McLain*, supra, at pp. 323 and 324, that:

"So, by Sections 1732—to and including 1736 (§§ 4670-4675, inclusive) of the Revised Statutes, a complete and speedy remedy is provided for the removal of *** officers of municipal corporations, for any misfeasance or malfeasance in office. Complaint may be filed in the probate court by any elector of the corporation, and a trial thereon be had in that court, by jury, if demanded, followed, if the complaint be sustained, by judgment of removal; in which case, the vacancy is required to be filled as

is generally provided by law for the filling of vacancies in those offices. Error may be prosecuted by the accused, but he is not permitted to exercise the functions of the office until the judgment is reversed or vacated.

“It can hardly be supposed that the legislature intended the remedy thus specifically provided, to be concurrent merely, with that of quo warranto. True, the one is instituted on complaint of the individual elector, and the other prosecuted in the name of the state; but the state, as well as the individual, is bound by the statute, which was enacted, we apprehend, with the twofold purpose of affording the accused in all such cases the right of a speedy trial by jury, and of relieving courts, invested with original jurisdiction in quo warranto, of the trial of that class of cases. And as the statute prescribes the causes for the removal from office and also provides the mode of procedure to accomplish the removal, under the well established rule the remedy thus provided must be regarded as the exclusive one in those cases. We are therefore constrained to hold that the charges against these defendants cannot be inquired into in this proceeding.”

In view of the foregoing, and in specific answer to your question, it is my opinion that the Governor of Ohio does not have the legal power to remove a councilman from office.

Respectfully,

HERBERT S. DUFFY,
Attorney General.