

CITIES OF THE THIRD CLASS: Chief of Police may attain authority of Constable to serve State process and collect constable fees in a particular case, but not generally so.

March 22, 1935.

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Honorable Elliott M. Dampf  
Prosecuting Attorney  
Cole County  
Jefferson City, Missouri

Dear Sir:

Your request for an opinion as of March 7, 1934, is as follows:

"Will you kindly give me your opinion as to whether the Chief of Police of Jefferson City, as ex-officio constable, has the power and authority to serve state warrants and to make a return on the same, in criminal cases? Also whether he has the right to receive the fee on serving said warrants?"

As to your request, there can be no doubt but that the Legislature was authorized to create the office of City Marshal, for cities of the first class for Missouri Constitution, and provide for his fees and compensation.

Article IX, Section 14, of the Missouri Constitution provides:

"Except as otherwise directed by this Constitution, the General Assembly shall provide for the election or appointment of such other county, township and municipal officers as public convenience may require; and their terms of office and duties shall be prescribed by law; but no term of office shall exceed four years."

Section 6723 R. S. Mo. 1929, provides for the election of marshal and reads as follows:

"The following officers shall be elected by the qualified voters of the city, and shall hold their offices for two years, and until their successors are duly elected and qualified, to-wit: A mayor, marshal, attorney, police judge, assessor, collector and treasurer. The attorney shall be a person learned in the law."

Thus we see that the office is a creation of the Legislature and as such all of the authority and power of the city marshal must be founded upon legislative act or necessarily incident to performing the duties of said office.

Article X, Section 20, of the Missouri Constitution provides:

"The moneys arising from any loan, debt or liability, contracted by the State, or any county, city, town or other municipal corporation, shall be applied to the purposes for which they were obtained, or to the repayment of such debt or liability, and not otherwise."

In *Givens v. Daviess County*, 107 Mo. 603 l. c. 608; 17 S. W. 998, the Court said:

"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 creation of law, and as an incident to the office."

In *Lamar Township v. City of Lamar*, 261 Mo. 171; 169 S. W. 12, l. c. 15, the Court said:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way

they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. \* \* \* \* In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority."

Section 6752 R. S. Mo. 1929, makes the City Marshal the Chief of Police, and outlines some of his duties 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."

Section 6757 R. S. Mo. gives him power to execute city warrants from the police judge and make him a conservator of the peace within the city limits, in the following language:

"The marshal shall, in the discharge of his duty, be subject to the orders of the mayor only; the assistant marshal and policemen shall, in the discharge of their duties, be subject to the orders of the mayor

and marshal only. The marshal assistant marshal and policemen shall have power to serve and execute all warrants, subpoenas, writs, or other process, issued by the police judge of the city, at any place within the limits of the county within which the city is located. The marshal, assistant marshal and all policemen of the city shall be conservators of the peace, and shall be active and vigilant in the preservation of good order within the city."

When the marshal finds occasion to be acting as ex-officio constable, then he has power to perform all duties which a constable could legally perform in the same premises. If the constable in the premises could "serve a state warrant and make a return on same," so could the marshal acting as ex-officio constable.

There can be no doubt but what a constable has statutory powers and duties in the premises because Section 11756 R. S. Mo. 1929, provides:

"Constables may serve warrants, writs of attachments, subpoenas and all other process, both civil and criminal, and exercise all other authority conferred upon them by law throughout their respective counties."

Section 6766 R. S. Mo. 1929, provides as follows:

"The police judge shall be ex-officio a justice of the peace within the limits of the city, with jurisdiction as to crimes and misdemeanors, but shall have no jurisdiction to hear or determine civil matters. The marshal, or in his absence the assistant marshal or any regular policeman, shall be ex-officio a constable to wait upon the police judge when acting as a justice of the peace."

Section 6767 R. S. Mo. 1929, should be construed with Section 6766, supra, for it also provides a circumstance where the police judge must act as justice of the peace or call in a justice of the peace in which case it is also the duty of the marshal to act as ex-officio constable. If he proceed with the case as a justice of the peace, then it becomes the duty of the marshal to wait on the Court as a constable. Said Section provides:

"If, in the progress of any trial before the police judge, it shall appear that the accused ought to be put upon his trial for an offense against the criminal laws of the state and not cognizable before him as police judge, he shall immediately stop all further proceedings before him as police judge, and shall cause the complaint to be made before himself as a justice of the peace, or before some other justice of the peace, and the accused shall thereupon be proceeded against in the manner provided by general law. The police judge and marshal, when acting as justice of the peace and constable respectively, shall be entitled to receive therefor the same fees allowed by law for such services."

#### CONCLUSION.

It is the opinion of this office that the Chief of Police of Jefferson City, as ex-officio constable, has the power within the limits of Cole County to serve State warrants and make a return on the same. He is not to consider himself at all times with powers of an ex-officio constable, because the Statute limits this ex-officio capacity to serve and return State warrants to where he is waiting on the police judge when the police judge is acting as a justice of the peace. The Statutes provide for only one occasion

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where the police judge, by virtue of said office, can act as a justice of the peace, and concurrent with that occasion goes the right of the Chief of Police to act with powers of a constable. If the Legislature intended the Chief of Police to be ex-officio constable at all times, ~~they~~<sup>it</sup> would have said so.

It is our further opinion that where the Chief of Police has legally performed his office as ex-officio constable, as allowed by Statute, he is in that case entitled to the same fee for serving and returning said warrant as a constable would have been entitled had the charge been filed before a Justice of the Peace in fact. The Legislature has so provided.

Respectfully submitted

WM. ORR SAWYERS;  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

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