

POLICEMEN:  
"OFFICERS":  
MERIT SYSTEM POLICE  
DEPARTMENT:  
RESIDENCE AND VOTING  
REQUIREMENTS OF OFFICERS:

A chief of police under the Merit System Police Department is an officer under Section 77.400 RSMo 1949, and, consequently, would have to comply with the provisions of Section 77.380 RSMo 1949.



May 7, 1956

Honorable Bernard "Doc" Simcoe  
Callaway County  
Route 1  
Fulton, Missouri

Dear Mr. Simcoe:

This will acknowledge receipt of your opinion request of April 26, 1956, which reads as follows:

"The City Attorney of Fulton, Missouri, Clyde Burch, has requested me to request an opinion pertaining to a problem concerning the City of Fulton.

"I am enclosing his letter which states the facts and the question. I would appreciate the opinion being written for me but at his request, as it is a controversial matter and I am only requesting it as a duty of mine."

The answer to the question raised would seem to depend upon whether the party who is to be appointed will be an officer within the contemplation of Section 77.400 RSMo 1949. If so, said party would have to meet the requirements of Section 77.380 RSMo 1949. Said sections read as follows:

"77.400. The term 'officer,' whenever used in this chapter, shall include any person holding any situation under the city government or any of its departments, with an annual salary, or for a definite term of office."

"77.380. All officers elected or appointed to offices under the city government shall be qualified voters under the laws and constitution of this state and the ordinances of the city, and, except the city sextons, must be residents of the

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city. No person shall be elected or appointed to any office who shall at the time he be in arrears for any unpaid city taxes, or forfeiture or defalcation in office."

Notice that the prospective appointee will be an "officer" if he holds office with an annual salary, or has a definite term of office. The facts in the opinion request state that said party will not be paid an annual salary. Section 77.440, Cum. Supp. 1955 is cited as authority. Without deciding whether or not Section 77.440, supra, is authority for the statement, let it suffice to say that it is a question of fact which cannot be determined by the opinion request. It is further stated in the opinion request that the prospective police chief will have no definite term of office. If that is a legal conclusion along with the conclusion that said party will not be paid on the basis of an annual salary, then there is no question presented. Said party would not be an officer under Section 77.400, supra, and thus would not have to comply with the requirements of Section 77.380, supra. However, this writer cannot agree with the conclusion that the prospective police chief will not have a definite term of office.

See Section 85.541, Cum. Supp. 1955, which reads as follows:

"Any city of the third class may by ordinance adopt a merit system police department. Such police department shall have a chief of police, and may have a deputy chief of police, and such number of regular policemen of such rank or grade as may be prescribed by ordinance.

"2. Any ordinance adopting the merit system police department within the meaning of sections 85.541 to 85.571 shall include the following provisions for the appointment, promotion, suspension, demotion or discharge of members of the police department:

(1) A personnel board shall be created which shall be composed of members of the largest and second largest political parties in equal numbers;

(2) The personnel board shall be required to give examinations to candidates for appointment or promotion and to certify lists of eligibles to the mayor or other appointing authority;

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(3) The mayor or other appointing authority shall be required to appoint or promote from a list of eligibles so certified;

(4) All persons so appointed or promoted shall be entitled to hold office during good behavior and efficient service;

(5) Any person suspended, demoted or discharged for misbehavior or inefficiency shall, upon his application, be granted a public hearing before the personnel board."

Notice that paragraph 4, subsection 2 of the section provides that "all persons so appointed or promoted shall be entitled to hold office during good behavior and efficient service." And then notice that a public hearing is provided for in the next and last paragraph. The courts, in determining the term of office under similar provisions, have almost universally grounded their decision upon whether the officer held his office subject to his own misconduct or whether he held office at the pleasure of the appointing party. If under the former conditions the prevailing view is that the party holds office for a fixed term; if he holds office under the latter conditions, it is for an indefinite term.

In the case of Shira vs. State, 119 N.E. 833, 187 Ind. 441, a statute provided that police officers "shall serve during good behavior." The police officers (relators) were dismissed upon the asserted ground that the board of police commissioners had decided to reduce the size and number of the police force in the interest of economy and efficiency. Such was found to be untrue-- that the real reason for the order was to make room for friends of the commissioners. The court, in setting aside the order of the board and reinstating the relators, said at l.c. 834 of the N.E. Reporter:

"Appellants' next assertion is that the complaint, considered on its merits, does not state a cause of action, but we are unable to agree with this contention. The police department of the city of Marion, as the complaint shows, is governed by the provisions of section 9034a, Burns 1914,

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and its members, when appointed, 'shall serve during good behavior.' Their term of office is thus a fixed tenure within the meaning of the law (Roth v. State ex rel., 158 Ind. 242, 264, 63 N.E. 460), and as a general proposition they are not subject to be dismissed from the service except for cause and then after a hearing on proper notice. \* \* \*"

(Emphasis supplied.)

See also the case of State ex rel. Anderson vs. Fousek, 8 P. 2d 791, 91 Mont. 448, where the Supreme Court of Montana in a case involving the discharge of a policeman, stated at l.c. 793 of the P. Reporter:

"The term of office of a policeman is 'during good behavior, unless suspended or discharged as provided by law'. Section 2, C. 119, Laws of 1923. Tenure of office 'during good behavior' is for a fixed term \* \* \*."

It appears from the case of McCartney vs. Poetting et al., 261 S.W. 2d 489, that Missouri will follow the prevailing view as the courts did in the above cited cases. In the McCartney case the St. Louis Court of Appeals, at l.c. 491, cited with approval the following general rule:

"Where the duration of the appointment of policeman is not fixed, they hold their office at the pleasure of the appointing power; and the appointment of a policeman is subject to the pleasure of the appointing power where such tenure is fixed by the express terms of the constitution, statute, or charter provisions. Under such provisions the term of the appointee is an indefinite one and is terminated by the appointment and qualification of his successor."

The inference from the language used by the court is that if the office is not terminable at the pleasure of the appointing power, then it is a definite term.

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That the prospective police chief will hold office subject to his own misconduct and inefficiency and not at the pleasure of the appointing power, is clear from a reading of paragraphs 4 and 5, subsection 2, Section 85.541, supra. This fact, of course, would bring him within the scope of the above cited cases unless the term, "definite term", as used in Section 77.400, supra, means something different than a "fixed term" as used by the courts in the cases cited. It appears to this writer that although the terms are not synonymous, the paragraph in question (paragraph 4, subsection 2, Section 84.541, supra) sets forth a definite term-- that the courts have said "fixed term" in a sense which includes the meaning of "definite term." The word "definite" is defined in Webster's New International Dictionary, Second Edition, page 688, as "a thing defined or determined; a definite thing." It appears that the term of office has been defined in paragraph 4, subsection 2, Section 85.541, supra, and that the prospective police chief will be appointed for a definite term.

Another factor lending some support to the conclusion that a police chief under the merit system is an officer within the meaning of Section 77.400, supra, is Section 77.440, Cum. Supp. 1955, which reads in part as follows:

"\* \* \* except as to personnel of a merit system police department whose salary schedules may be revised by the council upon recommendation of the personnel board, the salary of an officer shall not be changed during the time for which he was elected or appointed."

There would seem to be no reason for the exception by the Legislature unless as it manifestly appears from the section, it considered the personnel of a merit system police department as being officers.

#### CONCLUSION

It is therefore the opinion of this office that a chief of police under the merit system police department is an officer under Section 77.400, RSMo 1949, and, consequently, would have to comply with the provisions of Section 77.380, RSMo 1949.

Yours very truly,

JOHN M. DALTON  
Attorney General

HLH/bf