

**CITIES OF FOURTH CLASS:
OFFICERS:**

Marshal elected in April, 1963, in Fourth Class City of Grandview, Missouri, may not serve or be paid an additional salary as a patrolman member of the police department of such city. Such offices incompatible due to fact that office of patrolman is subordinate and accountable to office of marshal. Such marshal may not be paid an additional salary as chief of police.

May 24, 1963

OPINION NO. 172

Honorable John L. Fitzgerald
Member, Missouri House of Representatives
State Capitol Building
Jefferson City, Missouri



Dear Mr. Fitzgerald:

This opinion is rendered in reply to two inquiries directed to you on April 8th and 10th by the City Attorney of Grandview, Missouri, the latter letter stating the questions in the following language:

"My question at this time is whether the City of Grandview, a fourth class city, can pay an elected Marshall a fixed salary, and subsequent to election, pay an additional salary as a Patrolman, or whether this is a subordinate position and therefore he would be prohibited as serving as a Patrolman. My further question is whether he can receive a salary as Chief of Police, since the State Statutes state that the Marshall shall also be a Chief of Police."

Statutes generally applicable to cities of the Fourth Class are found at Chapter 79, RSMo 1959. Section 79.050, RSMo Cum. Supp. 1961, provides:

"The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to wit: Mayor and board of aldermen. The board of aldermen may provide by ordinance, after the approval of a majority of the voters voting at an

election at which the issue is submitted, for the appointment of a collector and for the appointment of a chief of police, who shall perform all duties required of the marshal by law, and any other police officers found by the board of aldermen to be necessary for the good government of the city. If the board of aldermen does not provide for the appointment of a chief of police and collector as provided by this section, a city marshal and collector shall be elected, and the board of aldermen may provide by ordinance that the same person may be elected marshal and collector, at the same election, and hold both offices and the board of aldermen may provide by ordinance for the election of city assessor, city attorney, city clerk and street commissioner, who shall hold their respective offices for a term of two years and until their successors shall be elected or appointed and qualified."

It has been established that the present marshal of Grandview was elected in April, 1963, pursuant to authority found in Section 79.050, RSMo Cum. Supp. 1961, effective October 13, 1961; that no issue has been submitted to the electorate under that statute; and no ordinance has been passed providing that the same person may be elected marshal and collector. In the April, 1963 election different persons were elected to the offices of marshal and collector.

Since the board of aldermen of Grandview has not employed the statutory procedures outlined in Section 79.050, RSMo Cum. Supp. 1961, by which a chief of police would be appointed to "perform all duties required of the marshal by law," and by which "the same person may be elected marshal and collector," we must conclude that the only mandatory directive found in this statute which has been complied with is that "a city marshal and collector shall be elected."

Two statutes bearing significantly on this question are found at Sections 85.610 and 85.620, RSMo 1959, and we here quote them in full:

"85.610. Marshal--powers (fourth class cities).--The marshal in cities of the fourth class 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 or of the state, and to 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 offenses against the laws of the city or of the state shall be committed in his presence."

"85.620. Size of police force (fourth class cities).--The police of the city may be appointed in such numbers, for such times and in such manner as may be prescribed by ordinance. They shall have power to serve and execute all warrants, subpoenas, writs or other process, and to make arrests in the same manner as the marshal. The marshal and policemen shall be conservators of the peace, and shall be active and vigilant in the preservation of good order within the city."

In the 1949 revision of Missouri's statutes, Sections 85.610 and 85.620, RSMo 1959, quoted above, were removed from the group of statutes now found at Chapter 79, RSMo 1959, pertaining to "cities of fourth class" and placed in what is now Chapter 85, RSMo 1959, pertaining to "city police and fire departments generally," but they remain particularly applicable to cities of the fourth class.

When we notice the requirement of Section 85.610, RSMo 1959, that "the marshal in cities of the fourth class shall be chief of police," and read the same with the requirement found in Section 79.050, RSMo Cum. Supp. 1961,

that the chief of police "shall perform all duties required of the marshal by law," we find two statutes which are wholly compatible and one complements the other in this regard.

When Section 79.050, RSMo Cum. Supp. 1961, and Section 85.610 RSMo 1959, are read together we must conclude that the elected marshal of a Fourth Class city is chief of police by virtue of his election in those instances where the board of aldermen does not provide for appointment of a chief of police. Where appointment of a chief of police is made as provided for in Section 79.050, RSMo Cum. Supp. 1961, the chief of police takes on "all duties required of the marshal by law," and only in such instance is the election of a marshal dispensed with.

The analysis made, supra, of Section 85.610 RSMo 1959, and Section 79.050, RSMo Cum. Supp. 1961, demonstrates that one and only one person is authorized by law to be the chief of police and marshal of a Fourth Class city. We now turn to the first question posed as to the right of Grandview, a Fourth Class city, to pay its marshal an additional salary as a patrolman.

Under Section 79.050, RSMo Cum. Supp. 1961, the marshal elected in the City of Grandview in April, 1963, was elected for a definite term of two years. Section 79.270 RSMo 1959, provides:

"The board of aldermen shall have power to fix the compensation of all the officers and employees of the city, by ordinance. But the salary of an officer shall not be changed during the time for which he was elected or appointed."

Section 79.290 RSMo 1959, provides:

"The duties, powers and privileges of officers of every character in any way connected with the city government, not herein defined, shall be prescribed by ordinance. And bonds may be required of any such officers for faithfulness in office in all respects."

We have heretofore set forth Section 85.620 RSMo 1959, applicable to cities of the Fourth Class, which provides that "the police of the city may be appointed in such numbers, for such times and in such manner as may be prescribed by ordinance." Such statute also provides that "the marshal and policemen shall be conservators of the peace. * * *" No ordinances are before us outlining the duties of marshal as they may be related to the duties and responsibilities of patrolmen or policemen. However, common experience demonstrates that a chief of police occupies a position distinct and different from that held by patrolmen or policemen under his jurisdiction. Whatever rules may be laid down by ordinance affecting the police department, the position of chief of police connotes a position or office having supervisory jurisdiction over the positions or offices of patrolmen or policemen. In consideration of such established fact, we must conclude that the office of marshal of a city of the Fourth Class in Missouri is incompatible with the positions of patrolmen or policemen of such city due to the fact that patrolmen and policemen hold positions subordinate to the marshal as chief of police and are accountable to such superior officer. Such conclusion is well within the rule stated as follows from *State v. Grayston*, 349 Mo. 700, 1.c. 708, 163 SW2d 335:

"The settled rule of the common law prohibiting a public officer from holding two incompatible offices at the same time has never been questioned. The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other."

Turning now to your second question. May the marshal elected in April, 1963, receive an additional salary as chief of police? Section 79.270 RSMo 1959, applicable to Fourth Class cities provides:

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"The board of aldermen shall have power to fix the compensation of all the officers and employees of the city, by ordinance. But the salary of an officer shall not be changed during the time for which he was elected or appointed."

Section 79.270 RSMo 1959, quoted above, may be said to implement Article VII, Section 13 of Missouri's constitution reading as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

It has been previously disclosed, by quoting Section 79.050 RSMo Cum. Supp. 1961, that the elected marshal of a Fourth Class city is elected for a definite term of two years. Since we are dealing with the single office of marshal, who is chief of police, any ordinance enacted after the election of such officer to grant him additional salary as chief of police would be in violation of Article VII, Section 13 of Missouri's constitution and contravene Section 79.270 RSMo 1959.

CONCLUSION

It is the opinion of this office that the marshal elected in April, 1963, in the Fourth Class city of Grandview, Missouri, may not be paid an additional salary to serve as a patrolman member of the police force of such city since the two offices are incompatible by reason of the office of patrolman being subordinate and accountable to the office of marshal and chief of police. Such marshal may not be paid an additional salary as chief of police.

The foregoing opinion which I hereby approve was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General