OFFICER: Marshal of city of third class may be removed under Section 77.340, RSMo 1949, even in absence of ordinance.

MUNICIPALITIES:

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Honorable Edward V. Long
Senator, 66th General Assembly
State Capitol Building
Jefferson City, Missouri

Dear Sir:

We are in receipt of your recent letter requesting an official opinion of this department which letter reads in part as follows:

> "Does a city of the Third Class have the authority to remove the City Marshall, who is an elective officer, from his office for misconduct. Section 77.340, Revised Statutes of Missouri, 1949, and Section 85.600, Revised Statutes of Missouri, 1949, seem to touch on the matter, although the Ordinances of the city in question are silent about the removal from office of any official.
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> "I will appreciate it if you will advise me whether or not such city has the authority to remove such officer under such Sections, even though not set out by City Ordinance."

We assume that the marshal in question is an officer of a city incorporated under Chapter 77, RSMo 1949, which contains the general statutory provisions relating to cities of the third class. In such cities, the marshal is an elective officer as is provided by Section 77.370, RSMo 1949.

Honorable Edward V. Long

Section 77.340, RSMo 1949, provides for the removal of elective officers of cities of the third class. Section 77.340 reads:

> "The mayor may, with the consent of a majority of all the members elected to the city council, remove from office, for cause shown, any elective officer of the city, such officer being first given opportunity, together with his witnesses, to be heard before the council, sitting as a court of impeachment. Any elective officer may, in like manner, for cause shown, be removed from office by a two-thirds vote of all the members elected to the city council, independently of the mayor's approval or recommendation. The mayor may, with the consent of a majority of all the members elected to the council, remove from office any appointive officer of the city at will; and any such appointive officer may be so removed by a two-thirds vote of all the members elected to the council, independently of the mayor's approval or recommendation. The council may pass ordinances regulating the manner of impeachment and removals."

As you have stated in your letter above, no ordinance has been passed in the instant case providing for the removal of city officials. The first question presented is whether the marshal may be removed in the absence of any ordinance providing for such removal.

In the case of State ex rel. v. Walker, 68 Mo. App. 110, the mayor of a third class city was removed under the provisions of Section 11, Sess. Acts, 1893, p. 65, which Section is now Section 77.340, supra. Here too, there had been no ordinance providing for removals passed. The court stated at l.c. 117 that:

> "It is contended by the relator that since the council had not passed an ordinance regulating the manner of impeachment and removals, as authorized by said section 11,

> it could not resolve itself into a court of impeachment. It is a sufficient answer to this to say that by the provisions of said section 11 is conferred the power to remove all elective officers for cause, and yet, while there are no means or measures whereby removals may be accomplished as therein provided, or by any ordinance passed in pursuance thereof, yet the grant of power by the section carried with it all necessary incidental powers, without which the grant would be ineffectual. The general rule is that where a grant of power is given, all the means necessary to effectuate the power pass as incidents to the grant. State v. Walbridge, 119 Mo. 383; Ex parte Marmaduke, 91 Mo. loc. cit. 262; Sutherland on Stat. Const., sec. 391; Beach on Public Corporations, sec. 1314.
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> "Here where the power of removal for cause is conferred and no notice is required to be given to the officer proceeded against, the law will imply that such notice be given. Laughlin v. Fairbanks, 8 Mo. 370; Wickham v. Page, 49 Mo. 526; Brown v. Weatherby, 71 Mo. 152. And what the law will imply is as much a part and parcel of a legislative enactment as though set forth in terms. State v. Board, 108 Mo. 235; Sutherland on Stat. Const., sec. 334. Therefore the section of the statute conferring the power of removal for cause needs no ordinance to render it operative--the means to effectuate the power conferred passed as a necessary incident. It is a self-executing statute in this respect."

Therefore, in view of the above, the instant city marshal may be removed under the provisions of Section 77,340, supra, as the provisions of this Section are self-executing and no ordinance is necessary to permit their operation.

There remains, however, Section 85.600, RSMo 1949, to be considered and its operation with regard to Section 77.340

determined. Section 85.600 is included among those city police provisions applicable to cities of the third class and reads as follows:

> "The council shall, by ordinance, provide for the removal of any marshal, assistant marshal or policeman guilty of misbehavior in office."

It might be urged that this section is mandatory and that the instant marshal may not be removed under Section 77.340, supra. A somewhat similar situation arose with regard to the city charter of the City of Grand Rapids in the case of Hawkins v. Common Council of City of Grand Rapids, 158 N.W. 953, 192 Mich. 276, wherein section 11, tit. 2, of the charter provided for removal of elective or appointive officers by the common council upon giving of notice, setting of a hearing and an affirmative vote of two-thirds of all aldermen elected. The court stated at l.c. 957:

> "Under title 3 of the Grand Rapids Charter, entitled 'Powers and Duties of the Common Council,' power is given to legislate for various purposes, amongst which is:
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> 'Sec. 11. To provide for and regulate the election and appointment of all officers and for their removal from office, and the filling of vacancies.'
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> "It is urged this was a mandatory prerequisite to exercising the power, and, because the council had not passed a guiding ordinance or otherwise provided by legislation any regulations or course of procedure for removal from office, this hearing was a nullity. Having been given in general terms, under title 2 of the charter, a limited power of removal for cause, the language used in title 3 seems to suggest a legislative intent that before exercising such power the council would prescribe rules, or regulate by some preadopted method the manner in which it would be administered. Considerations of

> fairness, certainty, and convenience suggest the wisdom of such a course before assuming to exercise the power. The language of the charter appears to be in its nature permissive and directory rather than imperative.
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> "It was said in State v. Walbridge, 119 Mo. 383, 24 S.W. 457, 41 Am. St. Rep. 663:
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> 'It is true that neither charter nor ordinance make any provision for the means whereby the motion of an appointive officer is to be effected; but, where a grant of power is given, all the means necessary to effectuate the power pass as incidents of the grant.'
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> "While this omission may be an element entering into consideration of what was done, we cannot say that it ipso facto nullified the action of the council because in direct violation of a mandatory provision.* * *"

With regard to the marshal in the instant case, we feel that the provision of Section 85.600, supra, is not mandatory and failure to enact an ordinance as there provided will not prevent the removal of said officer under the provisions of Section 77.340, supra.

Furthermore, we feel that even had there been enacted proper ordinances pursuant to the authority of Section 85.600, with regard to the marshal such mode of removal would be considered merely cumulative. In the case of State ex rel. v. Walbridge, 119 Mo. 383, 24 S.W. 457, it was urged that Section 7127 et seq., Revised Statutes, 1889, which provided for forfeiture and removal from office upon filing of complaint by prosecuting attorney of all elective and appointive officers, except those subject to impeachment, for failure to personally devote their time to the performance of their duties, provided an exclusive remedy. The court however stated at l.c. 388 that:

> "In Manker v. Faulhaber, 94 Mo. 430, action was brought against the mayor and others for damage for maliciously removing the

plaintiff from the office of city collector, in November, 1878. The defendants justified under the amended charter of that city, approved March, 1875, which contained this provision: 'The mayor * * * shall have power, with the consent of the board of aldermen, to remove from office any person holding office created by charter or ordinance, for cause, and on application of three-fourths of the board of aldermen he shall be compelled to remove any officer created by ordinance.' The trial court refused to permit that section of the charter to be read in evidence, and instructed the jury that, under the constitution and laws of Missouri, as they existed in November, 1878, the mayor and board of aldermen of the city of Sedalia had no legal right or authority to remove the plaintiff from the office of city collector. This action of the trial court was held erroneous; that the charter of Sedalia was unaffected by the act of 1877; that the charter not conferring on the mayor and aldermen the power to remove a municipal officer, was special and particular, while the act of 1877 was general and affirmative, without repealing words; that the two acts were not irreconcilably inconsistent, and, therefore, there was no repeal by implication.

"That ruling can not be otherwise regarded than as decisive of this case; since the charter of St. Louis of 1876 is no more inconsistent with the general law of 1877 than was the charter of Sedalia on the point already quoted. Manker v. Faulhaber, has been approvingly cited as to repeals by implication in State v. Noland, 111 Mo. loc. cit. 484, and directly followed in State ex rel. v. Slover, 113 Mo. 202, where it was distinctly ruled that section 8233, Revised Statutes, 1889, providing that an official stenographer might be removed without the intervention of a jury, for 'incompetency or any misconduct in office,' by the judge of the circuit court, on charges entered of record, and notice given, could stand as consistent with section 7127, aforesaid, and

> that the provisions of section 8233 might well be regarded as simply furnishing a cumulative remedy to that ordained in the former section, in relation to removals for failure to give personal attention to official duties."

We therefore feel that the presence of Section 85.600, supra, does not prevent the removal of the marshal in this case under the provisions of Section 77.340, as any proper mode of removal which would be provided by ordinance under authority of Section 85.600 would simply furnish a cumulative remedy.

CONCLUSION

It is therefore the opinion of this department that the marshal, an elective official, of a city of the third class may be removed from office under the provisions of Section 77.340, RSMo 1949, even though no ordinance providing for such removal has been passed by said city.

Respectfully submitted,

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Assistant Attorney General

Approved:

J. E. TAYLOR
Attorney General

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