

G. A. R. Records. Records of G. A. R. Custodian of G. A. R. Records.

The person for custodian of the G. A. R. records is the party selected therefor, as provided in Chap. 32, Laws 1913.

November 10th, 1913.

Hon. William Keating,
State Auditor,
Helena, Montana.

Dear Sir:

Some time ago you submitted to this office for solution the following query:

"Who is the legal custodian of the G. A. R. record room in the state capitol building, and therefore entitled to draw the salary of that office provided by law?"

The Journal of the Twenty-ninth Annual Encampment, G. A. R., at page 11, discloses that Mr. John H. Rohrbaugh of Helena was appointed as custodian of the room in question for the period of one year from the 3rd day of March, 1913, this appointment being made by Mr. W. Y. Smith of Bozeman, department commander. Thereupon Mr. Rohrbaugh, under said appointment, entered into the discharge of the duties devolving upon him by virtue of such appointment and has since been in charge of said room as custodian thereof. At the annual G. A. R. encampment held at Great Falls, May 8-10, 1913, the report of Mr. Smith, as department commander, was received and referred to a proper committee; it reported thereon, and made recommendation:

"That we have read and carefully examined the report of the department commander referred to us, and concur therein, and approve of the official acts of said department commander, so far as the same are set forth in his report, and we, your committee, respectfully recommend that the term for which said custodian provided for in Senate Bill No. 30, Chap. 32, Session Laws of the Thirteenth Legislative Assembly, and who has been selected by the department commander of this department, be extended and continued by the incoming administration, because we think that the work that has already been done by the present incumbent is of such a character that it suggests that other work be done that cannot be done by a new appointee successfully, until after considerable experience in such work, and that the said room can be managed and controlled and provided for much better if the selection already mentioned can be extended as herein recommended."

This committee report was concurred in and adopted by the encampment. At the same meeting new officers were elected, and Mr. P. W. Sheehy of Butte succeeded Mr. Smith as department commander for the year commencing May 10, 1913. Thereafter on September 10th Department Commander Sheehy issued the following order of appointment:

"Headquarters Department of Montana,
Grand Army of the Republic.
Butte, Montana.

September 10th, 1913.

"Capt. John A. Schmitt,
Helena.

"Dear Sir and Comrade:

"By virtue of the authority invested in me, I have this day appointed you to take charge of the Hall of Records of the G. A. R. in the State House at Helena, on or before the 15th day of September, 1913.

"You will report to the Secretary of State, and show him this order.

"By Command of

"P. W. SHEEHY,

"Department Commander Montana G. A. R."

This document being filed and recorded in your office, accompanied with a request for the issuance to Mr. Schmitt of future warrants for the salary of the office. It appears that Mr. Rohrbaugh was apprised of this appointment, but refused to recognize the validity of the same, and upon demand by Mr. Schmitt refused to surrender possession of the office room in the capitol, of which he had theretofore had charge, and still persists in such refusal to recognize the validity of the appointment. It appears that Mr. Schmitt has at all times held himself in readiness to take charge of the custodian's office and to perform all the duties of the position under his appointment by Department Commander Sheehy, but is prevented from so doing by the acts of Mr. Rohrbaugh.

On the 8th instant Colonel Nolan, representing Mr. Rohrbaugh, and Mr. E. D. Weed, representing Mr. Schmitt, appeared at this office on behalf of their clients and were accorded a hearing upon the merits of the controversy existing between these contending parties, and the argument and authorities submitted have lightened the labors of this office in reaching a conclusion in the matter.

By reference to the law (Chap. 32, Thirteenth Legislative Assembly) relating to the storage and safe keeping of the records of the Grand Army of the Republic, it will be found that:

"The room set apart in the capitol building in compliance with the provisions of an act approved March 5th, 1903, for the purpose of storage and safe keeping of archives, records, documents, relics and mementoes of the Department of Montana of the Grand Army of the Republic shall be suitably furnished and shall be under the charge of a custodian selected by the department commander of Department of Montana of the Grand Army of the Republic, and their successors in office."

It will be observed that this enactment does not fix any term for the custodian appointed by the department commander, and this being true it evidently was the intent of the legislature that this appointment should be made under and subject to the rules and regulations governing the Grand Army of the Republic. By referring to the Grand Army Blue Book, it will be found that elective officers of each department of the Grand Army of the Republic shall be elected annually, and shall hold office until their successors are duly installed.

Blue Book, 1906, pp. 64-66.

With regard to appointive officers it is provided:

"The department commander shall, immediately after entering upon his office, appoint * * * and may remove these officers at his pleasure."

Id. 66

I am of the opinion that the appointment of a custodian under our legislative enactment providing therefor is subject to the rules and regulations governing other appointments, for it can scarcely be contended that a department commander in making appointments should be governed by one rule in the case of some appointees and by a wholly different rule in the case of others. The mere fact that the department commander is by legislative enactment empowered to appoint a custodian for this room instead of being authorized to do so by a rule or regulation of the department does not, in my opinion, change the principle that all appointments are governable by the same rules and regulations.

Whether or not Department Commander Smith had a right to appoint Mr. Rohrbaugh for one year is a question not necessarily an issue in this controversy, for in any event, no matter what the term of appointment may have been, Mr. Rohrbaugh took the office, in my judgment, subject to being removed therefrom at the pleasure of the department commander. It was urged at the argument, and I believe correctly, that the authority of an appointive officer, under a law which does not prescribe the duration of the office, is terminable at the will of the appointing power, the right of removal being an incident to the right of appointment. Nor is it necessary that an appointee be formally discharged or that he resign, for:

“The mere appointment of a successor would per se be a removal of the prior incumbent.”

Ex parte Hennen, 13 Pet. (U. S.) 230 (261).

At the argument considerable was said pro and con as to whether or not the position of custodian is a public office, or a mere contract of employment. I am inclined to the belief that to settle this controversy it is unnecessary to decide the legal status of the holder of this position, other than to say that the appointee is not, in my judgment, a public officer, though he is an officer of the society from which he derives employment, and as such officer becomes more than a mere employe, for he represents the department commander, who in turn is amenable for his official conduct to the society commissioning him to the post of department commander.

I am of the opinion that the appointment of Mr. Smith was a legal appointment and that the salary incident to the office should in the future be paid to him. However, this office is not clothed with power or authority to eject Mr. Rohrbaugh, nor to require him to surrender his post to Mr. Smith, this being a matter which must be determined by the society having charge thereof.

Attention is called to Sec. 66 of the Blue Book, which provides:

“All members shall have the right of appeal, through the proper channels, from the acts of posts or post commanders and department commanders or encampments to the next highest authority, and to the commander-in-chief, whose decisions shall be final, unless reversed by the national encampment; but all decisions appealed from shall have full force and effect until reversed by competent authority.”

And Note 5 to this section provides:

"A department encampment not being in session, an appeal from the original act of the department commander, or department council of administration, may be made direct to the commander-in-chief."

It would appear from these excerpts that the parties to this controversy have a remedy within the councils of their organization, where it should properly be settled, but thus far neither party to this controversy has availed himself thereof. My conclusion is Mr. Schmitt is entitled to the office and to the salary incident thereto, and that the salary should run from the time that Mr. Schmitt assumes active charge of the hall of records and becomes custodian thereof.

Yours very truly,

D. M. KELLY,
Attorney General.