

C. Treasurer

HEADING. : Officers: Field Representatives of State
: Service Officer not public officers. Nor
: do statutes preclude holding office
: of field representative and County
: Treasurer at same time. Offices are not
: incompatible.

June 28, 1944

Honorable R. Leroy Miller
Prosecuting Attorney,
Grundy County
Trenton, Missouri

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Dear Mr. Miller:

This will acknowledge the receipt of your letter, dated May 29, 1944, requesting an opinion of this office, which is as follows:

"Mr. Ben W. Gallup, County Treasurer of Grundy County, is desirous of obtaining an appointment as Field Representative of the State Service Officer's Department providing he could receive this appointment and retain his office as County Treasurer.

"Mr. Gallup has been Service Officer for the local American Legion Post for the past eight years and has taken care of the servicemen's claims for the Red Cross since the beginning of the war. He stated he would have ample time to attend to the duties of the Service Officer's Field Representative as he has a deputy in the Treasurers office qualified to carry on in his absence.

"I have found no law to prevent Mr. Gallup from being appointed as Field Representative of the State Service Officer's Department and at the same time retain his office as County Treasurer. The only law I was able to find relative to the same was Section 12, Article IV of the Constitution which refers to members of the general assembly; Section 18, Article IX which refers to counties of over 200,000 (the population of our county being about 15,000); and Section 4, Article XIV which refers to federal and state officers.

"Could I have your opinion on this matter."

These rules against holding of two offices apply only where the holding of two public offices is involved. There is no question but that the County Treasurer is a public officer, but a question arises as to whether a field representative for the state service officer could be considered as a public officer. As is stated in 42 Am. Jur. Sec. 61:

"The prohibition against one person holding more than one office at the same time has reference to offices, as distinguished from positions in the public service that do not arise to the dignity of offices."

A definition of "public officer" was given in the case of State ex rel vs. Bus, 138 Mo.325 at page 331. There the court said:

"A public office is defined to be 'the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' ***. It can make no difference that the appointment is made by the sheriff, or that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the state, the authority is derived from the law and the duties are exercised for the benefit of the public." (The court in the last sentence quoted was speaking of the office of deputy sheriff.)

In Hudson v. Annear (Colorado) 75 Pac.2d 587, the court said:

"Although an office is an employment it does not follow that every employment is an office; a position, the duties of which are undefined and which can be changed at the will of the superior, is not an office but a mere 'employment' and the incumbent is not an 'officer' but a mere 'employee'."

There is no specific title of "field representative" of the State Service Officer in the law but he would probably come within the word "assistants" as used in Sec. 15086 of S. B. 28 (62nd General Assembly in Extra

Session.) Section 15086 provides:

"The said State Service Officer shall employ such assistants as may be necessary, and within the limits of funds appropriated for such purpose. All of such assistants shall have served in the Military Forces of the United States and shall have been honorably discharged therefrom. The State Service Officer shall employ such attorneys, consultants, clerks, stenographers and employees as may be necessary to properly carry out the provisions of this act, and within the limits of the funds appropriated therefor."

Section 15086-A provides:

"The salary of the State Service Officer shall not exceed the sum of \$3,600 per year, and the salaries of the assistants, attorneys, consultants, clerks, stenographers and employees shall be determined and fixed by the State Service Officer, subject to the approval of the Governor."

Section 15086-D provides:

"The State Service Officer is, by himself, or through his duly appointed assistants, authorized to administer oaths, and acknowledge powers of attorney in favor of the State Service Officer, and such other instruments as shall be used in connection with applications and matter pertaining to claims of any nature against the United States of America or any State under any law or laws pertaining to the rights of veterans, their legal representatives and dependents, living within the State of Missouri."

Section 15086-E provides:

"The State Service Officer, his assistants, and all attorneys, consultants, employees and persons commissioned by the Governor shall not for themselves accept, receive or charge any money, article or thing, of value for the performance of any such service rendered to any veteran,

his or her legal representatives or dependents, at any time or in any manner, and any person who shall violate the provisions of this Section shall be deemed guilty of a misdemeanor."

Section 10384 provides:

"The State Service Officer and all subordinates and employees of said State Service Officer shall familiarize themselves with all laws, both federal and state, relating to the rights of ex-service men and women, their legal representatives and dependents* * *. It shall be the duty of the State Service Officer and his assistants to cooperate with the several offices of the United States Employment Service, the United Veteran's Administration and all other federal and state offices legally concerned with and interested in the welfare of veterans and their dependents * * *"

These are the sections in the law which relate to the assistants and other employees of the State Service Officer. The number, tenure, salary or specific duties of these assistants are not provided for in the law.

By Section 15086-D the State Service Officer can empower his assistants to administer oaths and acknowledge powers of attorney in favor of the State Service Officer. They do not have the right to take powers of attorney in their own name. All the powers and duties under the act are vested in the State Service Officer and he has complete charge over and direction of his assistants, their office does not have any power or authority in itself but is under the minute direction of the State Service Officer. It does not seem that under these considerations these assistants exercise or have vested in them any of the sovereign power of the state and hence they cannot be considered public officers.

There is no specific requirement that the county treasurer devote all of his time to the duties of his office. Indeed, Section 13799 would infer that the county treasurer could hold another office, inasmuch, as it specifically excluded sheriffs, marshalls, clerks,

collectors, or deputies of such officers from being county treasurer, thereby inferring that other office holders not within these groups could also hold the office of county treasurer; nor is there anything apparent in the laws showing the scope of the activities of these two offices that would make them incompatible. As is stated in 42 Am. Jur. Sec. 70, "Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the one interferes with the performance of the duties of the other." This would certainly not seem to be the case here, the performance of the duties of one of these offices would in no way concern or conflict with the other.

Of course, it must be pointed out that your county treasurer must still faithfully and personally carry on the duties of the office of county treasurer should he accept the position of field representative. The fact that he may accept another position to occupy part of his time would not be an excuse for neglecting his duties as county treasurer. See Sec. 12828 R. S. Mo., 1939, and Art. 11, Sec. 18 Mo. Constitution, which requires an officer to personally devote his time to the performance of the duties of such office. See *State v. Yager*, 250 Mo. 388, 157 S. W. 557 and *State v. Stoner*, 113 Mo. 202, where the Court said at page 206,

"The wholesome doctrine that 'public office is a public trust' was fortified by its provision declaring it also a personal trust and that no person should thereafter hold office in this state who did not personally devote his time to the performance of his official duties. That he may have deputies who under his supervision and control, may assist him in the performance of his official functions, does not dispense with, nor in any way lessen his obligation to personally devote his time to their performance.* * *"

Hon. R. Leroy Miller

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CONCLUSION.

It is therefore the opinion of this office that a field representative for the State Service Officer is not a public officer within constitutional inhibitions against officers holding two offices at the same time; nor do the statutes of this state preclude the holding of the offices of field representative and county treasurer at the same time, and that these offices are not incompatible.

Respectfully submitted

ROBERT J. PLANAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RJF:LeC