

COUNTY HIGHWAY ENGINEER - Authority under Sec. 8011 Revised Statutes of Missouri, 1929 to appoint assistants - definition of assistant.

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January 25,
1933.

Hon. C. Arthur Anderson,
Prosecuting Attorney,
St. Louis County,
Clayton, Missouri.



My dear Mr. Anderson:

I acknowledge receipt of your request addressed to this office of January 12, 1933 endorsed upon the letter of Mr. John M. Crutsinger wherein you request the opinion of this office as to the authority of the County Highway Engineer of St. Louis County to employ truck drivers, mechanics, operators and superintendents.

We have received a request from William H. Bray, County Counselor, which request is as follows:

"I am asking for your opinion as to whether or not the county court in counties of a class of St. Louis, has the power of appointing the various offices in the Highway Engineer Department."

As both of these requests cover the same situation and undoubtedly the same set of facts, we are answering you both with this one opinion.

The first proposition to be considered is the status of the County Surveyor, to-wit: Is he, or is he not Ex-officio Highway Engineer of St. Louis County by virtue of his office as County Surveyor? It is the opinion of this office that without any doubt Mr. Crutsinger is the Ex-officio County Highway Engineer by virtue of the provisions of Section 8011, Revised Statutes of Missouri, 1929:

"***Provided, however, that in all counties in this state which contain or which may hereafter contain more than fifty thousand inhabitants, and whose taxable wealth exceeds or may hereafter exceed the sum of forty-five million dollars, and which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than 100,000 inhabitants by the last decennial census, the county surveyor shall be ex-officio county highway engineer***."

The portion of Section 8011 above quoted is the portion that applies to the County of St. Louis, which has a population

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in excess of 50,000, a taxable valuation in excess of forty-five million dollars, and is adjoining a city in excess of 100,000 in population. Your county falling under such classification, the wording of the statute is mandatory and the county court has no discretion or choice in the matter of the appointment of the Ex-officio Highway Engineer.

The question as to the constitutionality of the proviso above referred to has been heretofore passed upon by the Supreme Court and has been held valid. This was determined in the case of

STATE ex inf. BARKER vs. SOUTHERN, 177 S.W. 640, l.c. 643

where it is said:

****The purpose in each clause of the sentence was to create a distinction based upon differences in population and in wealth; for if, as the Legislature rightfully assumed, counties of 50,000 inhabitants would acquire coincidentally a taxable wealth of \$45,000,000, it might be well assumed that such counties would not have less wealth when they should embrace or adjoin cities containing 100,000 inhabitants. *** Our conclusion is that this proviso of the statute is not obnoxious to the provisions of the Constitution forbidding the enactment of certain special laws. *** "

While it is true that in the above case the Supreme Court held the last proviso of Section 8011 to be unconstitutional, it also held that such unconstitutionality of that portion did not affect the constitutionality of the portion of the statute herein quoted.

The second proposition to be considered is the power of the County Surveyor and Ex-officio Highway Engineer to make the appointments referred to in your request for this opinion. The authority, if any, of the County Surveyor and Ex-officio Highway Engineer to make these appointments is founded upon Section 8011, Revised Statutes of Missouri, 1929. This section provides, among other things, that:

****the county surveyor, as surveyor and ex-officio county highway engineer, may appoint, subject to the approval of the county court, such assistants as may be necessary, and no assistant shall receive more than twenty-one hundred dollars per annum.*** "

Before directing your attention to the purport of the above proviso, we will first consider the contention made by the County Counselor of the County of St. Louis, to-wit: That this legislative grant is violative of Section 36, Article VI of the Constitution. That

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section of the Missouri Constitution is as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law."

The above provision of the Constitution is interpreted by the Legislature in Section 2078, Revised Statutes of Missouri, 1929, which is as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

While it is true that the County Court cannot be deprived of powers granted by the Constitution, it is the creature of the statutes and has only such power and jurisdiction as is plainly and clearly given by the statutes. See:

KING vs. MARION COUNTY, 249 S.W. 418, L.C. 420

Even then it has been held that there are acts of a certain nature which may be delegated to others. Corpus Juris, Volume 15 at page 465, states as follows:

"Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee or to an agent, an employee, or a servant."

In many statutes the Legislature has placed on county officers the duties and responsibilities of certain ministerial and executive acts. It has done so in Sections 8010, 8012, 8013, et seq., which sections provide for the powers and duties of the County Surveyor and Ex-officio County Highway Engineer. It is accordingly the opinion of this department that the foregoing proviso of Section 8011 is constitutional and that under said proviso the County Surveyor and Ex-officio Highway Engineer has the power and authority to appoint his assistants subject to the approval of the County Court, and that he alone possesses that power. This opinion is confirmed by the decision of the Supreme Court of this state in the case of

EUTLER vs. SULLIVAN COUNTY, 106 No., page 630.

The plaintiff in this case, an attorney, was attempting to collect from the defendant county for professional services rendered on behalf of the county under an employment by the county court to prosecute suits for delinquent taxes. In this case the Supreme Court stated at page 636 the following:

"The only power conferred upon county courts *** is contained in Section 6363, Revised Statutes, 1879, which provides that it shall be the duty of the prosecuting attorney of each county to prosecute all suits for taxes under this article. County collectors shall have power, with the approval of the county court, *** to employ such attorneys as may be deemed necessary *** and the court in which suit is brought shall, if plaintiff obtains judgment, allow such attorneys a reasonable fee ***"

The statute neither authorized the county court to employ to employ counsel nor to charge the county with liability for his compensation. The power to employ an attorney is granted solely to the collector; his compensation and the liability therefor is provided for by the law. The only power granted to the county court is to approve or disapprove of such employment ****

The third proposition to be considered is the meaning and significance of the word "assistants" as used in Section 8011. This section as heretofore stated, provided in the following language that the Highway Engineer may appoint his assistants:

***"The County Surveyor as Surveyor and Ex-officio County Highway Engineer, may appoint, subject to the approval of the County Court, such assistants as may be necessary ***"

Although there has been no decision in this state defining or interpreting the word "assistants", as used in the above statute, we find the following definition in Corpus Juris, Volume V at page 1327:

"Assistant - One who helps, aids or assists; one who stands by and helps or aids another. The word is susceptible of considerable variety of meaning, to be made definite in each case by the aid of the context, the circumstances, and other materials of interpretation. It has been held to include an agent, or servant, and a deputy."

The above definition was adopted practically verbatim from the Missouri case of

STATE ex rel BARTRAM vs. LONGFELLOW, 95 Mo. App. 600

in which case a building inspector of the City of St. Louis was held to be an assistant to the Commissioner of Public Buildings.

Upon this authority it is the opinion of this office that the County Highway Engineer is empowered to appoint, with the approval of the County Court, such assistants as are necessary to enable him to perform all the duties that are required of him by the statutes. In other words, such employees of the Highway Engineer as directly assist and help him in fulfilling his duties under the statutes are the ones contemplated by the statute as his appointive assistants.

In applying the foregoing to Section 8013, it is our opinion that this section requires the Highway Engineer to supervise the construction and maintenance of the roads of the county. By the very words of the statute his duties are to supervise and not to perform the details of construction or maintenance.

Webster defines "Supervise" - "To oversee for the purpose of direction; to superintend", and this definition has been adopted by various others, including our own. See

WOLFE vs. BRONSON, 21 S.W. 1125; 115 Mo. 271

In applying our conclusion to Section 8012 it is our opinion that this section requires the Highway Engineer to be the custodian of the tools, materials and machinery belonging to the road district and the county. He has the care and responsibility and the safe-keeping of the county property therein enumerated and may, under certain conditions deliver the same to others, but the statute gives him no further right or duty than that of a custodian. He is not required to maintain or repair the tools or equipment, nor to do other than to keep them safely in a proper place. None of the approved definitions of custodian of property, or custodian, require more than a safe-keeping. The New York courts in

PEOPLE vs. HARR, 41 How. Prac. 293

have defined custodian of property as follows:

"The term 'custodian of property' as contradistinguished from legal possession, means the charge to keep and care for the owner, subject to his order and direction without any interest or right therein adverse to him***"

Corpus Juris in Volume 17 at page 439 defines a custodian as

*** One whose duty it is to watch, guard and account for that which is committed to his custody"

and approves the definition of "custodian" as set out in

TURNER vs. COFFIN, 74 Pacific 962

which is as follows:

"Custodian. The term means the keeping, guarding, care, watch, inspection, preservation or security of a thing"

and further defines "custodian of property" to be

"The keeping of property by one who is charged with or assumes responsibility for its safety" ✓

In applying our conclusion to Section 6014, we find the duty placed on the Highway Engineer by this section to be that of inspecting the condition of the roads, etc. of the county. There can be little doubt in reasonable minds as to what duties are here required of the Highway Engineer. He shall visit the various parts of the road system for the purpose of determining their condition and cause any bad or damaged condition to be remedied. This places a duty on him of investigation and correction, but not necessarily to do the actual manual labor in correcting the bad or damaged conditions found.

In considering Section 6011 the duty this statute places on the Highway Engineer is to maintain an office and to keep and preserve various records. These duties may be many and varied and it does not take any stretch of the imagination to perceive that in a large county with considerable activity in this department the duties required by this section might by themselves become more than any one or two persons could efficiently perform.

The foregoing consideration of these statutes has been made for the purpose of determining the duties of the Highway Engineer under these sections. This was necessary in order to ascertain the type and kind of assistants the Highway Engineer is empowered to appoint subject to the approval of the County Court. In other words, the Highway Engineer is without authority under Section 6011 to appoint assistants to perform duties which the statutes do not directly and approximately place upon the shoulders of the Highway Engineer.

We have not in the foregoing paragraphs considered all of the statutes placing a duty upon the Highway Engineer and do not by this opinion limit his power to appoint to the duties as set out in the four sections herein considered. In other words, in determining whom he may appoint as assistants, all the statutes placing a duty on him must be considered, and such employees as properly fall in the class of "those who stand by and assist" may properly be appointed by the Highway Engineer with the approval of the County Court.

Very truly yours,

APPROVED: _____
Attorney General

H. C. SALTER, Jr.,
Assistant Attorney General