

STATE OFFICERS--State Officer cannot receive salary from State Department and also from State Fair Board.

August 15, 1933



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This Department is in receipt of your letter of August 11, in which you request an opinion from this Department on the following state of facts:

"Will you please advise me if a person receiving a salary from any state department can receive additional salary from the State Fair Board for services rendered while the Fair is in session.

Can an individual who is now working for the state be paid expenses from the Fair Board for attending the Fair and working for the Fair Board?

Or in other words, can an individual receive salary from two different sources of the state for the same period."

Section 12479, Revised Statutes of Missouri, 1929 provides as follows:

"No money shall be paid out by the treasurer of the association except upon warrant issued by order of the board of directors, signed by the president and the secretary. And no warrant shall be drawn unless there is money in the treasurer's hands to pay it."

Section 12480, Revised Statutes of Missouri, 1929, insofar as it is pertinent provides as follows:

"The board of directors shall have power to make all rules, regulations and by-laws necessary and suitable for the conduct and

government of the exhibitions, the sale of privileges, and for the proper control, operation and conduct of the fair not inconsistent with the purposes of this article, nor with the Constitution and laws of this state. It shall have the power to employ marshals, superintendents and assistants, needful for the proper management of the fair, * * * ."

At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of the two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment. 46 Corpus Juris, 941.

There being no constitutional or statutory provision relating to the subject or under discussion, the common law remains the law of Missouri.

In the case, State ex rel, McAllister v. Dunn, 277 Mo., 38, 209 S. W. 110, the Court held, "It is a well settled rule that the Legislature is not to be held to have done a vain and useless thing. It is elementary law that one may not hold two offices, the duties of which are incompatible.

In the case of State ex rel. v. Bus, 135, Mo., 1. c. 338, the Court said:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school directors are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time.

At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

It was said by Judge Folger in *People ex rel v. Green*, 58 N. Y. l. c. 304; 'Where one office is not subordinate, to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law' ".

As has been indicated above, the question of incompatibility does not arise when one position is an office and the other is merely an employment; the rule is laid down in the case cited, supra, referring only to public offices. As to what is a public office, the Court in the case of *Gracey v. St. Louis*, 213 Mo. l. c. 394, lays down the following definition:

"If, however, the question be referred to the more general definition of public office, the result would be the same. For instance, McFarlane, J., in *State ex rel v. Bus*, 135 Mo. L. C. 332, declares the sum of the matter to be 'that if an officer receives his authority from the law and discharges some of the functions of government he will be public officer.' An office has been defined as 'a special trust or charge created by competent authority'—more tersely still, 'a public office is a public trust.' His oath, his bond, his liability to be called to account as a public offender for misfeasance or non-feasance, the tenure of his position, etc., have been said to be indicia of a public officer. (*State ex rel v. May*, supra; *Throop v. Langdon*, 40 Mich. 682.) And the general doctrine is that the idea of office clearly embraces the ideas of tenure, duration, fees or emoluments, rights and powers as well as that of duty. (8 *Words and Phrases*, p.4933.) It has been aptly said that the true test of public office is 'that it is a parcel of the administration of government'. (2 *Bouv. L. Dict.*, Tit. 'Officer'.)"

Section 18, Article 3, of the Constitution of Missouri provides as follows:

"That no person elected or appointed to any office or employment of trust or profit under the laws of this state, or any ordinance of any municipality of this state, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

Honorable Forrest Smith

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Therefore, it is the opinion of this Department that it is unlawful for any person receiving a salary from any State Department to receive additional salary from the State Fair Board for services rendered while the fair is in session, for the reason that the functions of the two offices are inconsistent and incompatible.

Respectfully Submitted

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APPROVED:

ROY McKITTRICK
Attorney General.