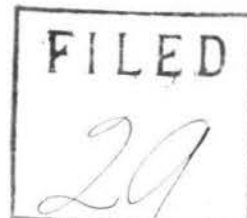


CONSTITUTION OF MO: Sec. 12, Art. IV. Appointment of State representative to Federal position

September 18, 1933.

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Hon. Lester J. Fordyce,
Powersville, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of September 11, 1933, requesting an opinion in regard to the following subject matter:

"I am writing you for information covering the following subject:

I served in the last General Assembly from Putnam County and now have a possibility of appointment as Deputy-Collector in the Internal Revenue Department, Western District for Missouri; I am in doubt as to whether such an appointment can be accepted by me since my term as Representative is not yet completed.

I remember receiving your opinion concerning Members of the General Assembly accepting appointments in the State Department but, since this will come as a Federal appointment I do not believe the same statutes will govern this particular appointment.

May I impose upon your time and good will by asking that you please furnish me with a letter covering the Constitutionality of the above?"

The Constitution of Missouri, Section 12, Article IV, provides as follows:

"No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof (militia officers, justices of the peace

and notaries public excepted) shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

Under the plain wording of the first portion of Sec. 12 of Art. IV, supra, if you were contemplating accepting the appointment to an office within this state or any municipality thereof, you would be precluded from accepting the same by this section of the Constitution. But you now hold the office of Representative of Putnam County and desire to accept a Federal position. We must, therefore, look to the last portion of the section, the pertinent part being as follows:

"and no ****person holding any lucrative office under the United States, or this State **** shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

The question arises as to whether or not you would be accepting an office and thereby becoming a public officer within the definition of a public officer. A definition of "public office" and "public officer" is set out in 22 Ruling Case Law, p. 380, Sec. 12, as follows:

"It is sometimes said that an office is a public charge or employment, but it frequently becomes necessary to distinguish between a public office and a public employment. The term 'Employment' is the more comprehensive, and while an office is an employment, it does not follow that an employment is an office. **** Even where the appointment is in the nature of an employment, the appointee may be a public officer if the necessary elements of an office are present. But on the whole an officer is distinguished from the employee in the greater importance, dignity, and independence of his position, in being required to take an official oath, and perhaps to give an official bond, in the more enduring tenure, and in the fact that the duties of the position are prescribed by law. ****while an employment is an agency, for a temporary purpose, which ceases when that purpose is accomplished."

And again, in *Hastings v. Jasper County*, 314 Mo. 144, 149, the following definition is given:

"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 by him exercised for the benefit of the public.' (*Mechem, Public Officers*, 1; *State ex rel Walker v. Bus*, 135 Mo. 325). **** The authorities all agree, substantially, that if an officer receives his authority from the law and discharges some of the functions of government, he will be a public officer."

In the case of *State ex rel Zevely v. Hackmann*, 300 Mo. 59, "public officer" is defined as follows:

"A public officer is an individual who has been elected or appointed in the manner prescribed by law, who has a designation or title given him by law, and who exercises the functions pertaining to the office assigned to him by law."

You state that you desire to become a Deputy-Collector in the Internal Revenue Department, Western District of Missouri. Under the above definition you would be accepting a public office, with a designated title, and would carry out duties which would be assigned to you by law. You would not be an employee, but you would be holding a public office. If you accept the office of Deputy Internal Revenue Collector, then you can no longer represent your county in the Legislature. You may either resign, or your acceptance of this office will operate ipso facto as a resignation of same. As was said in the case of *State ex rel v. Bus*, 135 Mo. 325, l.c. 330:

"The rule at common law is well settled that one who, while occupying a public office, accepts another which is incompatible with it, the first will, ipso facto, terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first."

Hon. Lester J. Fordyce

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Sept. 18, 1933.

It is therefore the opinion of this department that you may accept the contemplated position of Deputy Internal Revenue Collector, but you will automatically vacate your present office as Representative of Putnam County.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

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