

HIGHWAY ENGINEER: Power and authority of County Court to remove Highway Engineer, where he is not ex officio Highway Engineer.

June 2, 1933 67



Honorable Owen C. Rawlings
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

We are in receipt of your letter of April 4th, 1933, in which you request an opinion on the power and authority of the county court to dismiss the county highway engineer of your county and appoint another in his place. Your letter is as follows:

"The County Court of Saline County, Missouri, has requested that I advise it as to whether or not it has the authority and power to dismiss the County Highway Engineer, who at present is the County Surveyor, appointed by the Court for an indefinite term to fill the position of Highway Engineer and to appoint another Engineer for the office of Highway Engineer.

I will advise further that Saline County is a County which comes under the class of 50,000 or less, and that the question of retaining or doing away with the office of County Highway Engineer has never as yet been submitted to the vote of the people of this county.

I should appreciate the advice of your office in this matter."

As will be seen by the statements in your letter, Saline County has a population of less than 50,000 and the question of the suspension of the county highway engineer law has never been submitted to a vote of the people of your county.

For an answer to your inquiry we must first look to the statutes Article 8, Chapter 42, Sections 8006 to 8023, R. S. No. 1929, under the county highway engineer law.

Section 8006 R. S. No. 1929 provides:

"There is hereby created in the several counties of the state of Missouri the office of county highway engineer, and the county courts of each county in this state are hereby authorized and empowered to appoint, and may appoint a highway engineer within and for their respective counties at any regular meeting for such length of time as may be deemed advisable in the judgment of the court, at a compensation to be fixed by the court."

Section 8007 R. S. No. 1929, provides for a bond for the highway engineer and his assistants.

Section 8008 R. S. No. 1929, provides the compensation for the highway engineer.

Since your county has not voted on the question of suspension of the highway engineer law and not suspended same as provided in Sections 8019 R. S. No. 1929, and 8020 R. S. No. 1929, wherein it is provided that:

"In all counties wherein the services of a county highway engineer are dispensed with, as provided by section 8019 of this article, the county surveyor shall be ex officio county highway engineer, and, as such, shall perform such services pertaining to the working, improvement, repairing and maintenance of the roads and highways, and the building of bridges and culverts as provided by this article to be done and performed by the county highway engineer, or as may be ordered by the county court." * * *

your county does not come within the classification by population and taxable wealth qualification as provided in the second provision of section 8011 R. S. No. 1929, which is as follows:

"* * * 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, and his salary as surveyor and ex officio county highway engineer shall be not less than three thousand dollars and not more than five thousand dollars, as may be fixed by the county court, and all fees collected in such counties by the surveyor, for his services as surveyor, shall be paid into the county treasury, to be placed to the credit of the county revenue fund:" * * *

Therefore, in your county, the highway engineer is not by reason of being county surveyor ex officio county highway engineer. Your county highway engineer receives his appointment by the county court under the provisions of section 8006, R. S. Mo. 1929 supra, and the first twelve lines of section 8011 R. S. Mo. 1929, which are as follows:

"The county court of the several counties of this state may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, as provided in section 8006, in lieu of all fees, except such fees as are allowed by law for his services as county surveyor;"

And your county court has exercised their discretion as provided in section 8011 and appointed your county surveyor (an elective office) section 11571 R. S. Mo. 1929) as county highway engineer.

The county highway engineer law was enacted in 1907, p. 401, et seq. Laws 1907, and the original section on removal was as follows: Section 4, p. 401, Laws 1907.

"The county highway engineer shall be a resident of the State of Missouri, and he shall be skilled in the laying of drains in bridge, culvert and road building and general road work, and he shall have practical knowledge of civil engineering. He may be removed from office by the county court upon the grounds of incompetency, neglect of duty, or for any other good and sufficient cause."

And the reading of the original section on removal, Laws 1907 above, and comparing same with the present section on qualifications and removal, Section 8009 R. S. Mo. 1929, we find that the statute has been enlarged and amplified as to the causes and reasons for the removal of the highway engineer by the county court.

Section 8009, R. S. Mo. 1929, provides the qualifications and how he may be removed and said section reads as follows:

"The county highway engineer shall be a resident of the state of Missouri, and shall be skilled in the laying of drains, in bridge, culvert and road building and general road work, and he shall have a practical knowledge of civil engineering, and shall be active and diligent in the discharge of his duties. If any county highway engineer shall fail, refuse or neglect to visit and inspect in person or by his deputy, the roads, bridges and culverts in each road district in the county, at frequent and regular intervals, or shall fail, refuse or neglect to advise with, assist and direct the road overseers of his county in the performance of their duties, or if he shall fail, refuse or neglect to perform any of the duties imposed upon him by law, or if he be found incompetent or in any manner unfitted for such office, he may be removed from office by

the county court, and it shall be the duty of the county court to remove such county highway engineer forthwith and to appoint a successor in his stead."

When we read Section 8008, R. S. No. 1929, in connection with 8008 R. S. No. 1929, and the general law regarding the removal of an appointive officer, it is our opinion that under the statements set forth in your letter the county court of Sa ine County has the power to remove the highway engineer for causes set out in Section 8009, R. S. No. 1929.

We further base our opinion on the statutes aforesaid and what the courts have said on similar propositions.

In 46 C. J. p. 964 it is said:

"Where the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power, even though the appointing power attempts to fix a definite term;" " " "

In R. C. L. Section 266 p. 562, it is said:

"When the term or tenure of a public officer is not fixed by law, the general rule is that the power of removal is incident to the power to appoint. The tenure not having been declared by law the office is held during the pleasure of the authority making the appointment." " " "

In 29 Cyc. 1371, it is said:

"It is the universal rule that where the duration of an office is not prescribed by law, the power to remove is an incident of the power to appoint."

The annotated note set out in 35 L. R. A. (N.S.) 866, the general rule is stated:

"A person holding an appointive office, or even an elective office, created by statute, wherein is reserved to the creat-

ing power or to some other official or body the authority to remove at pleasure, holding the office subject to the exercise of this power at any time. He can claim no property or contract rights in the office, and his summary removal if in accordance with the statute authority is a breach of no obligation or duty to him. The exercise of a power of removal may be impliedly as well as expressly conferred."

In annotated cases 1912 C. note on p. 374, note said citing many cases:

"With respect to the tenure or duration of a public employment, it has been ruled uniformly that where the power of appointment is conferred in general terms and without restrictions, the power of removal at the will of the appointing power without cause or notice, is applied and always exists."

In Horstman v. Adamson, 101 Mo. A. 119, l.c. 124, the court said:

"But where the law conferring the authority, under which the appointment is made, is silent as to any limitation of the right of removal, and the official term is unlimited, the absolute power of removal is an incident to the power of appointment to be invoked and applied at pleasure, without notice, and without legal liability for the results. These principles have been frequently recognized in numerous decisions, alike by the Federal courts as well as by the courts of many States, including our own." * * *

In the case of State ex rel. v. Hedrick, 294 Mo. p. 31 l.c. 64, 241 S. W. 416, the court said:

"* * * If the simple power to appoint is conferred and no term is fixed by law and nothing else appears, then the appointee may be removed at pleasure, by the appointing authority, without notice, the preferment of charges or

the assignment of reasons. Throop on Public Officers, Chap. 354; Mechem's Public Officers, Chap. 445. The reason of the rule is found in the unreason of its alternative, which, as Mr. Mechem says, would be that the tenure of such appointee then would be 'subject to no will but his own'; i.e. he would, in such case, hold at his own pleasure, a predicament in which courts have refused to place the public. This is the law in this state. In State ex rel. Campbell v. Police Commissioners, 14 Mo. App. loc.cit. 302, it is said:

'It is not disputed that the power of removal at pleasure is incidental to the power of appointing, in the absence of any inconsistent limitation in the law which creates the authority to appoint.' * * *

It is the opinion of this office that the county court of your county where the county surveyor has been appointed highway engineer under Section 8006 R. S. Mo. 1 29, and 8011 R. S. Mo. 1929, that the county court has the power under section 8009, R. S. Mo. 1929, herein set out, to remove the highway engineer for the causes set forth in said section, and upon the removal of the highway engineer the authority to appoint another engineer, of course, follows:

If there remains some question which in your judgment is not covered by this opinion we shall be glad to go into the matter further.

Yours very truly,

COVELL R. HEWITT,
Assistant Attorney General.

APPROVED

ROY McKITTRICK
Attorney General.

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