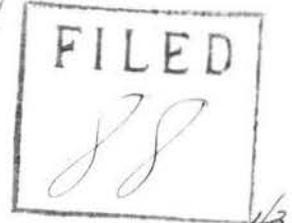


STATE HIGHWAY DEPARTMENT:

Supplemental opinion of
salaries of Legal Department.

September 12, 1933 ✓ 9/12

Honorable Louis V. Stigall
Chief Counsel
Missouri State Highway Department
Jefferson City, Missouri



Dear Mr. Stigall:

This Department acknowledges receipt of your letter of September 7, 1933 requesting a supplemental opinion as to the salaries of the Legal Department of the State Highway Commission. Your letter is herewith quoted:

"With reference to the recent opinion regarding salaries of appointees in the Legal Department for the State Highway Department, I beg leave to ask one additional point.

Mr. John Mather is as a matter of fact not appointed to fill the place of any one who has left the service. He was Chief Counsel and has now been employed as an assistant counsel under the provisions of the statute which gives the Chief Counsel authority to appoint such assistants as he may deem necessary with the approval of the Commission. I could employ eight or ten or twenty-five men if agreeable to the Commission and if they were necessary. It seems to me that in such case no salary limit has been fixed by the Legislature. When I was appointed there were only five assistants. Mr. Collet had left the employment and likewise his office went with it. It could not be said there was a vacancy because we had never definitely set on six assistants in the Department.

There were no definite number of places. When Caskey Collet perished from the Department his place and appointment, or office, or what have you, perished with him. Therefore, when we took up the matter of employing Mr. Mather as an assistant, we merely followed the statute which said we could take such assistants as we might desire. And at that time we happened to desire to increase the number of our assistants from five to six.

Under this statement of facts, I respectfully submit that there is no legal objection to our paying Mr. Mather, if the Commission so desires, a salary which will be in excess of 85% of what may have been paid any assistant during the year 1932. I further would like to submit somewhat outside the scope of this particular inquiry, that no appropriation bill, by tying a condition upon the expenditure of that particular appropriation, can be regarded as having changed the statute governing the appointment and salaries of officials. In other words, although we may not be able to pay our people out of this appropriation the salaries to which they were legally entitled, nevertheless there is considerable question in my mind but that we will owe to them the difference in their such salaries which will some day be paid out of another appropriation, voluntarily or involuntarily. However, this may be disregarded. For the present purpose, I respectfully request that the Attorney-General will give me an opinion upon the John W. Mather matter herein submitted."

The sole authority and power for the appointment of legal assistants is Section 8098 R. S. Mo. 1929, which omitting the parts which are not pertinent, is as follows:

"**The Chief Counsel shall, with the consent of the Commission, appoint such assistant attorneys as the Commission may deem necessary, and their salaries shall be fixed by the Commission."

According to the above section, this Department therefore agrees with you when you state that "I could employ eight or ten or twenty-five men if agreeable to the Commission and if they were necessary." Assuming that you could, and that you did employ that number of legal assistants, what would be their compensation? It is true that the Legislature only fixed the salary limit for the Chief Counsel and is silent as to the compensation of the legal assistants; but are we to assume that because no compensation was fixed by the Legislature for the legal assistants, the Commission has the power and can arbitrarily fix the compensation of an assistant at any amount, and even in excess of the amount of salary paid to the Chief Counsel? We think not.

Under Section 2a, Laws of Missouri 1933, p. 114 (which we are not quoting here, as you are thoroughly familiar with the same) the Legislature undertook, and did place a blanket reduction on all salaries from \$2,000 and more than \$7500 per annum, the percentage of reduction in each instance being according to the range of the salaries.

In an opinion heretofore rendered you we held that the reduction applied to the salary of the position that the employee was holding in 1932 and not to the employee personally. Therefore, we cannot agree with you when you say in essence that when Mr. Collet left the Department his office was banished and that he carried away with him all title to the office. It is our opinion that when Mr. Collet resigned and left the office, there was thereby created a vacancy and that the same was subject to being filled by yourself by and with the consent of the Commission. In other words, Mr. Collet's position is subject to being filled, and if the same has been filled, the person placed in the position must accept the same salary Mr. Collet was receiving, less the percentage of reduction as set out in Section 2a.

The same applies to all other vacancies or changes in the Legal Department. As to Mr. Mather, if he is not Chief Counsel he must therefore take one of the subordinate positions, it being optional with you as to which position you desire him to fill.

September 12, 1933

You have stated heretofore that there is no such official designation as first, second and third assistants, but the assistants are receiving different salaries, and therefore each is holding a distinct position; but you state you now have six assistants, whereas in 1932 there were only five, and indicate that Mr. Mather is going to be the sixth one. If such be the case, then you have the right to place Mr. Mather in a new position or in a position "formerly held by no one in 1932", but the spirit of the law or intention of the Legislature should not be violated in fixing his salary.

It is the opinion of this Department that the Commission could fix his salary at a figure ranging between the lowest paid assistant and the highest paid assistant. The salaries of the legal assistants of 1932 should at least be a guide for the Commission in fixing the salary of additional assistants irrespective of how many, as it was clearly the intention of the Legislature to reduce the salaries of the assistants, and the Commission should at least be morally bound and guided in arriving at the salary of the new or additional assistants by the amount of salary that is being paid to present assistants doing similar work.

In rendering you this opinion we are not undertaking to pass on the constitutionality or unconstitutionality of Section 2a, but we are assuming and will continue to assume that said section is constitutional until declared by a court of competent jurisdiction to be otherwise.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

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