

ELEEMOSYNARY BOARD: )  
                                  )  
SUPERINTENDENT,        )  
STATE HOSPITAL         :)

Power of said board to appoint acting  
superintendent, one who does not  
possess the statutory qualifications  
of superintendent.

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March 28, 1935.

FILED  
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Hon. W. Ed. Jameson  
President, Board of Managers  
State Eleemosynary Institutions  
Jefferson City, Missouri

Dear Mr. Jameson:

This is to acknowledge receipt of your letter of  
March 22, 1935, in which you request the opinion of this  
Department. Your letter is as follows:

"Please refer to Section 8578, revised  
statutes of Missouri 1929, reading  
as follows:

\* \* \* \* \*

I would like to ask you the following  
questions. Would the President of the  
Board of Managers of the State Eleemosy-  
nary Institutions be permitted under this  
section to appoint a physician who has  
not quite had five years of experience  
as acting superintendent until the time  
that he shall be eligible to election  
as permanent superintendent under this  
section?

Would the Board of Managers itself, be  
permitted under this section to appoint  
a physician who has not quite served  
five years as acting superintendent  
until such time as he is qualified under  
this bill to be elected as permanent  
superintendent in one of these insti-  
tutions?

Would the Governor of the State of Missouri be permitted under this section to appoint a physician who has not quite had five years experience as acting superintendent until the time that he shall be eligible to election as permanent superintendent under this section?"

We shall answer the three questions set forth in your letter in the order submitted therein, that is, (1) Would the President of the Board of Managers of the State Eleemosynary Institutions; (2) or the Board of Managers itself, or (3) the Governor of the State of Missouri, have the power to appoint one as acting superintendent of a state hospital, who does not possess part of the statutory qualifications, that is, five years' experience as physician, or assistant physician, in a hospital for the treatment of the insane or feeble-minded?

We do not find that the (1) President of the Board of Managers, the (2) Board of Managers itself, or the (3) Governor of the State of Missouri, has the power to appoint an acting superintendent of one of these institutions.

The qualifications of the superintendents of the several hospitals for the insane and for the Missouri State School are found in Sections 8577 and 8578, R. S. Mo. 1929, which are as follows:

(8577)

"The board of managers shall appoint some suitable person as superintendent for each of the several eleemosynary institutions herein named."

(8578)

"The persons appointed as superintendents of the several hospitals for the insane and for the Missouri state school shall be skilled in the practice of medicine and in the treatment of mental diseases, and shall have had at least five years'

experience as physician, or assistant physician in a hospital for the treatment of the insane or feeble-minded."

That part of Section 8578, R. S. No. 1929, which provides that the "superintendents of the several hospitals for the insane \* \* \* shall have had at least five years' experience as physician, or assistant physician in a hospital for the treatment of the insane or feeble-minded," was enacted by the Legislature at the 1929 session and found in Laws of Missouri, 1929, page 197.

The duties of the superintendent are set forth in Section 8580, R. S. No. 1929, the pertinent part of which is as follows:

"The person appointed as superintendent of each of the several eleemosynary institutions herein named shall have complete charge, control and management of the entire institution with special attention to health and sanitation of the respective institution over which he has been appointed as manager, and shall devote his entire time thereto \* \* \* \* \*"

It will be seen that the duties of the superintendents of the eleemosynary institutions of the state are wide and varied and special attention by them shall be given to the health and sanitation of the institutions. No doubt it was the intention of the Legislature to raise the qualifications of the superintendent by providing that, in addition to certain qualifications, he must have had at least five years' experience as a physician, or assistant physician in an institution of that character. One who has the responsibility of an institution of this kind, pertaining to the care and welfare of the unfortunate inmates, should be one who not only possesses the medical qualifications but one who has had special training and experience in carrying for the mentally infirm and feeble-minded.

The superintendent of a state hospital was held by the Supreme Court in the case of *In Re Moynihan*, 62 S. W. 410, l. c. 419, to be a public officer.

The Supreme Court in the recently decided case of *State ex inf. McKittrick, Attorney-General, v. Whittle*, 63 S. W. 100, l. c. 102, in ruling on the question of who was a public officer, said the following:

"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 exercised by him for the benefit of the public." *Mechem, Pub. Off. l.* The individual who is invested with the authority, and is required to perform the duties, is a public officer.

'The courts have undertaken to give definitions in many cases; and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still 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.' *State ex rel. v. Bus*, 135 Mo. 325, loc. cit. 331, 332, 36 S. W. 636, 637, 33 L. R. A. 616. To the same effect, *State ex rel. Zevely v. Hackmann*, 300 Mo. 59, loc. cit. 66, 67, 254 S. W. 53; *Hasting v. Jasper County*, 314 Mo. 144, loc. cit. 149, 150, 282 S. W. 700."

The Legislature has the right to fix the qualifications of the officers of the state in the absence of qualifications

fixed by the Constitution, as was said by the Supreme Court in the case of State ex rel. Wingate v. Woodson, 41 Mo. 153, l. c. 154:

"The power of the State to declare in its fundamental law, or, when that is silent upon the subject, by legislative enactment, what shall constitute the test of eligibility to office, is as clear and unquestionable as is the power to fix the qualifications of voters;"

And it was said by the Supreme Court in the case of State ex rel. Attorney-General v. Seay, 64 Mo. 89, l. c. 101:

"qualification for office, as defined by the most approved lexicographer, is 'endowment, or accomplishment that fits for an office; having the legal requisites, endowed with qualities fit or suitable for the purpose.'"

22 R. C. L. 400, Section 40.

Under Section 8577, supra, the power to appoint the superintendents of the several eleemosynary institutions is lodged in the Board of Managers who are appointed by the Governor, by and with the consent of the Senate, under Section 8561, R. S. Mo. 1929.

We find no statutory basis for appointing an acting superintendent.

"Acting" has been defined in 1 C. J. 913, as,

"officiating; doing duty for another; a term employed to designate one performing the duties of an office to which he does not himself claim title."

In Fraser v. United States, 16 Ct. of Claims, 507, l. c. 514, it is said "acting" attached to an officer's title is,

"A form of expression in constant use and well understood in all the executive departments of the government as designating, not an appointed incumbent, but merely a locum-tenens who is performing the duties of an office to which he does not himself claim title."

To the same effect the term is defined in State Bank of Williams v. Gish, 149 N. W. (Ia.) 600, l. c. 601:

"The phrase 'acting officer' is used to designate, not an appointed incumbent, but merely a locum tenens who is performing the duties of an office to which he himself does not claim title. I Am. & Eng. Enc. of Law, 577 (2d Ed.); 1 Cyc. 632. Both these authorities cite the same case (Fraser v. U. S., 16 Ct. Cl. 514)."

"Locum tenens" means, "holding the place; a deputy, a lieutenant, or representative."

We do not think that the fact that one has almost the requisite qualifications makes any difference. The statute requires that the superintendent must possess certain qualifications. He is either qualified or not qualified and there is no middle ground whereby one could be appointed who has not quite the qualifications as required by statute. The qualifications are definite and certain. He "shall be skilled in the practice of medicine and in the treatment of mental diseases, and shall have had at least five years experience as physician, or assistant physician in a hospital for the treatment of the insane or feeble-minded." If it were possible to appoint a person, who does not possess the necessary statutory qualifications, for a short time, one might be appointed for the whole time and thereby defeat the purpose of the statute.

#### CONCLUSION.

It is, therefore, our opinion that the power to appoint an acting superintendent who does not possess the qualifications

Hon. W. Ed. Jameson

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as set forth in Sections 8577 and 8578, supra, is not lodged in the President of the Board of Managers, the Board of Managers itself or the Governor of the State of Missouri. The power is lodged in the Board of Managers to appoint as superintendent only such person who possesses all of the statutory qualifications, and one who does not possess such qualifications is ineligible to be appointed either as acting superintendent or superintendent.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General

APPROVED:

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ROY McKITTRICK  
Attorney-General

CRH:EG