

OFFICERS - A person holding a civil office may also at the same time hold a military office within this State, and receive compensation from the State from both offices.

September 25, 1936

9-26

Judge Ray E. Watson
Division No. 1
Circuit Court, Jasper County
Webb City, Missouri



Dear Sir:

This will acknowledge receipt of your letter of recent date wherein you have questioned our ruling under date of August 15, 1933 relating to whether a State officer can receive a salary from a State Department and at the same time receive compensation from the State Fair Board.

The question as presented in our ruling above mentioned is different from the question you have presented in that our previous ruling turns upon persons holding two civil offices, contradistinguished from those holding military offices, and in this opinion we in nowise overrule our opinion under date of August 15, 1933.

Briefly, the question you have propounded is, whether a civil officer can at the same time hold an office in the state militia and be entitled to compensation for his service in the latter office even though such compensation accrues at the time of that of the civil office.

In the course of this opinion we have not deemed it proper to discuss the questions which might arise under certain contingencies, nor have we deemed it necessary in support of the conclusion reached to discuss the incompatibility of offices, as it appears from the number of cases read that the courts have invariably contented themselves regarding the inconsistencies or incompatibility of offices with the specific facts as presented in those cases.

Under the provisions of Article IX, Section 18 of the Constitution of Missouri, relating to when no person may hold two offices, it reads as follows:

"In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

You will note that the above constitutional provision prohibits a state officer (meaning a civil officer) in cities and counties having more than two hundred thousand inhabitants from holding any office in any county, city or municipality. It prohibits any person from holding two offices at the same time in the same municipality. It further restricts a person from holding an office in one municipality and at the same time holding an office in another municipality. This constitutional provision specifically exempts notaries public, justices of the peace, and officers of the militia.

Under the provisions of Article IV, Section 12 of the Constitution of the State of Missouri it provides:

"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."

The above constitutional provision also exempts militia officers, justices of the peace and notaries public from being appointed to any other office in this State.

In the case of *Gracie vs. St. Louis*, 213 Mo., l.c. 394, the court, in discussing who is a public officer, said:

"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 a 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. (6 *Words and Phrases*, p. 4923.) 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.')

In the case of *the United States vs. American Brewing Company*, 296 Fed. Rep., l.c. 776, the court in discussing the word "officer", said:

"The word 'officer' is a term applied indiscriminately to constables and patrolmen, as well as to those who fill offices of the highest dignity and importance. The word 'civil' is commonly used to distinguish those who are in the public service but not of the 'military'."

Under the Constitution of Missouri, Article XIV, Section 6, relating to the oath of officers, whether civil

or military, it provides:

"All officers, both civil and military, under the authority of this State, shall, before entering on the duties of their respective offices, take and subscribe an oath, or affirmation, to support the Constitution of the United States and of this State, and to demean themselves faithfully in office."

The above provision requires that all officers, whether civil or military, shall take and subscribe to an oath before entering upon the duties of their respective offices.

In the case of *Ex parte Dailey*, 246 S. W. 91, the relator made application to the 66th judicial district court of the State of Texas for a writ of habeas corpus to release him from an order made by said court committing the relator for contempt in refusing to testify as a witness before the grand jury. It was claimed by the relator that the district judge had vacated his office by having accepted a commission as captain in the national guard of the State of Texas and was therefore without any authority to enter an order adjudging relator guilty of contempt.

The facts reveal that the Honorable Horton B. Porter was the duly elected and qualified judge of the 66th judicial district on December 1, 1918, and that on or about the 30th day of December, 1921, while serving as such district judge, he accepted an appointment in the national guard of the State of Texas and was commissioned by the Governor as captain in the national guard. As district judge, he received the sum of \$4,000.00 per year, and as captain in the national guard was entitled to receive as compensation for his services the sum of \$6.60 for each drill night that not less than sixty per cent of the enlistment of the company of which he was captain, shall assemble for drill. He was also entitled to compensation in the amount of \$240.00 per annum as custodian and caretaker of all property that was issued to him as captain of his company by the State of Texas.

The court, in discussing the difference between a civil officer and a military officer, said:

"No civil office within this state is provided for a term corresponding with that as fixed

for officers of the National Guard as contained in the foregoing article. Article 4, Section 7, of our Constitution, provides: 'He (the governor) shall be commander in chief of the military forces of the state, except when they are called into actual service of the United States. He shall have power to call forth the Militia to execute the laws of the state, ' etc.

"The military forces referred to in the above-quoted article are the National Guard and the reserve Militia. Rev. Stat. title 91, chap. 1. The state has no other military forces, and these are the only military forces in the state that are liable to be called into the service of the United States. The statute further classifies these military forces into the active and reserve Militia. Rev. Stat. 1911, art. 5764, chap. 3, title 91, defines the status and regulates the authority and duties of the members of the Texas National Guard. Throughout the chapter and the entire title, membership in the organization is referred to as 'military service;' the members are classified as 'officers' and 'enlisted men;' the company, regiment, etc., are called 'military organizations.' The organization is required to conform as nearly as possible with that of the Army of the United States, and the discipline conforms generally to that of the Army of the United States. Article 5860, Rev. Stat., declares articles of war by which the 'military forces of this state shall be governed,' and to which all officers and privates are made amenable and under which they are to be tried by court-martial. Articles of War, 35. All through the title relating to the National Guard appears a constant recognition that a 'civil officer' is different and distinct from an 'officer' of the National Guard."

The court held that the district judge did not vacate the office by the acceptance of a commission in the national guard, for the reason that he had not been called into active duty or service of the United States.

Section 13873, R. S. Mo. 1929, provides as follows:

"The military council shall have power to fix the pay and allowance of officers and enlisted men placed on duty under the provisions of this chapter; Provided, however, that such pay and allowances shall not exceed that of officers and enlisted men of the regular army of like grade; and provided further, that this section shall not be construed to authorize any expenditure by the state beyond the sum appropriated for military purposes."

CONCLUSION.

In light of the above, it is the opinion of this department that a person holding a civil office may also at the same time hold a military office within this state, and receive compensation from the state from both offices.

Respectfully submitted,

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APPROVED:

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