

MILITIA - Same individual can be Adjutant General and Commander of the National Guard, but there is no salary provided for commanding the National Guard.

February 23, 1938

Honorable Forrest Smith
State Auditor
Jefferson City, Mo.



Dear Sir:

This is to acknowledge your request for an opinion dated February 12, 1938, which reads as follows:

"I would like an opinion from your office as to whether the same individual can serve in the two capacities of Adjutant General of Missouri and Commanding General of Missouri National Guard and if so, is he entitled to draw the salary of both Adjutant General of Missouri and Commanding General of the Missouri National Guard."

Article V, Section 7, of the Missouri Constitution provides:

"The Governor shall be commander-in-chief of the militia of this State, except when they shall be called into the service of the United States, and may call out the same to execute the laws, suppress insurrection and repel invasion; but he need not command in person unless directed so to do by a resolution of the General Assembly."

Pursuant to the above constitutional provision, the Governor of Missouri is commander-in-chief of the Missouri National Guard, but need not command in person unless directed to do so by resolution of the General Assembly.

Article XIII, Section 6, Missouri Constitution provides:

"The Governor shall appoint the Adjutant-General, Quartermaster-General and his other staff officers. He shall also, with the advice and consent of the Senate, appoint all Major Generals and Brigadier Generals."

Laws of Mo., 1935, page 293, Section 13834, provides in part:

"Officers, how appointed, who elected -- election, where held, how conducted. A Major General, to be Commanding General of the Thirty-Fifth Division, National Guard of the United States, when occasion for such appointment arises, the commanding general of the national guard and all general officers shall be appointed by the governor, by and with the advice and consent of the senate, and such officers shall, at the time of their appointment, be either active general or field officers in the national guard or shall have served for at least two years as a general officer or a field officer of the line in the national guard of Missouri immediately prior to August 5, 1917. ** "

Section 13844, R. S. Mo. 1929, provides as follows:

"There shall be a commanding general of the national guard with the rank of brigadier-general who shall command the same and who shall be responsible only to the governor for its drill, equipment, instruction, inspection, service, movements, operations and general efficiency. His office shall be the office of administration and

his headquarters the headquarters of the national guard. The governor shall exercise command through such officer, who may cause those under his command to perform any lawful military duty he may require and shall have full authority to issue all orders necessary in the premises. All other commanding officers shall be responsible to the commanding general for the equipment, drill, instruction and efficiency of their respective commands. Every commissioned officer and enlisted man shall be responsible to the officer under whose immediate command he serves for prompt and unhesitating obedience, and the preservation, care and proper use of public property in his care. When the commanding general is absent from the state, the governor may designate the senior line officer on duty with the military forces of the state to perform his duties, and when so designated such officer shall have all the power and authority vested by law in the commanding general."

Thus we see that the Governor of Missouri, as commander-in-chief of the National Guard, has the constitutional and statutory power to appoint an Adjutant General for Missouri, and with the advice and consent of the Senate, he has also the power to appoint a Brigadier General and delegate to him the ex-officio command of the Missouri National Guard as commanding General thereof.

Since the Missouri Governor has appointed the Honorable Lewis M. Means as Adjutant General for Missouri, and also has delegated to him, he being Brigadier General, the command of the Missouri National Guard, as its commanding General, you ask first if it be legal for him to serve in these two capacities. There are no specific

limitations in the Constitution or statutes prohibiting the same individual from serving in these two official capacities.

Article IX, Section 18, Missouri Constitution, expressly excepts officers of the Missouri National Guard from its limitations and reads:

"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."

The exception found in the above constitutional provision shows that two militia offices in one person can rather be expected in Missouri. We look to the common law to find the rule applicable where one individual be appointed to serve in two offices.

46 C. J., page 941, Section 46, reads as follows:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible.** "

Any Brigadier General appointed to act as commanding General of the National Guard in Missouri also performs duties in the "military council" as provided in Section 13824, R. S. Mo. 1929, which reads:

"There shall be a military council, to consist of the commanding general of the national guard, the adjutant-general of the state, the colonels commanding regiments of the national guard and the colonels of organized regiments of the reserve military forces of the state. The commanding general shall be the president of the council, which council, except as herein otherwise provided, shall sustain the same relation to the military forces of the state and the governor as the general staff of the army sustains to the United States army and the president. The military council shall formulate plans for the organization, instruction, equipment and maintenance of the military forces of the state, provide for encampment and all other field and armory instruction and make allotments of funds and supplies appropriated or furnished for the support, equipment and maintenance of the military forces of the state. All appropriations made for military purposes shall be apportioned and expended by the council. Vouchers and accounts covering the expenditure of funds and appropriations for the support of such forces shall be audited and paid only when fully itemized, certified and approved by the executive officer of the council. Such council shall meet quarterly at such time and place as the members shall designate. Special meetings may be called by the governor or the president of the council. A majority of the members of the council on duty within the state shall constitute a quorum for the transaction of its business. The council shall elect an executive of-

ficer, who shall keep full and detailed records of its proceedings, allotments and expenditures, and a statement of vouchers and accounts audited and approved shall be furnished each member quarterly. The salary of the executive officer shall be fixed by the council, to be paid from funds appropriated for the support of the military forces of the state, and such salary shall be in addition to any other compensation received by such officer from either the state or federal government."

The Adjutant General for the State of Missouri has no constitutional duties prescribed, but his statutory duties are set out in Section 13823, R. S. Mo. 1929, which provides:

"There shall be an adjutant-general of the state, to be appointed by the governor by and with the advice and consent of the senate, who shall, at the time of his appointment, be either an active officer in the national guard of Missouri or otherwise qualified for his duties by two years' continuous service as a commissioned officer in the national guard of Missouri immediately prior to August 5, 1917. His appointment as adjutant-general shall not vacate his commission in the national guard. He shall sustain the relation to the governor of military secretary. Before entering upon the duties of his office, the adjutant-general shall file in the office of the state auditor, to be approved by him, a bond for twenty thousand dollars, conditioned for the faithful performance of his duties.

He shall receive as compensation for his services as adjutant-general the sum of three thousand five hundred dollars per annum, payable monthly out of the state treasury. The adjutant-general shall keep on file in his office a complete record of the enlistment, commission and service of all officers and enlisted men in the military service of the state, of all property issued and in the hands of the same, and generally be the custodian of all books, records and documents required to be kept by such department. He shall have a chief clerk to be appointed by him from the officers of the national guard. The adjutant-general shall, if required by the governor, be the custodian of all property purchased for, allotted or issued to the military forces of this state and keep a correct account of the same. He shall have a property officer to be appointed by him from the officers of the national guard. The salary of such property officer shall be fixed by the adjutant-general at such sum as he may deem proper, not to exceed eighteen hundred dollars per annum, to be paid monthly out of the state treasury. There shall be a division of pensions and war records in the office of the adjutant-general, and in such division shall be kept the records of all members of the national guard called into service of the United States, the volunteer troops of the state who served in the war of 1812, the Mexican war, the Seminole war, the Civil war, the Spanish-American war, the war with Germany and all other Missouri war records. In such division shall likewise be kept the colors, standards, and battle flags of such troops. There shall be a commissioner of

pensions, war claims and records to be appointed by the adjutant-general, and such commissioner shall receive an annual salary of eighteen hundred dollars payable monthly out of the state treasury. The duty of such commissioner shall be to keep such records, to furnish certified copies of the same when required and to furnish all data and information required by any soldier who volunteered, enlisted or was drafted from this state in prosecuting any claim for pension, bounty or other allowance to which he may be entitled or for any other purpose: Provided, that no such person shall be appointed such commissioner of pensions, war claims and records unless he shall have served as a soldier from this state as a member of the national guard or as a volunteer or drafted man in one of the wars above mentioned."

The duties of one individual serving as both Adjutant General for Missouri and as commanding General of the Missouri National Guard, are in their essence similar, identical and overlapping, yet neither office carries with it statutory power to exercise supervisory control over the other.

As provided in Section 13823, supra, the Adjutant General sustains "the relation to the governor of military secretary." As provided in Section 13844, supra, the commanding General is the office of administration and his headquarters the headquarters of the National Guard.

46 C. J., page 937, Section 32, reads in part:

"There is a presumption in favor of eligibility of one who has been elected or appointed to public office."

Answering your first question, we are of the opinion that in Missouri the same individual can serve in the two capacities of Adjutant General of Missouri and commanding General of the Missouri National Guard.

We now proceed to answer your second question, -- is the Honorable Lewis M. Means now entitled to draw the salary as Adjutant General of Missouri and commanding General of the Missouri National Guard?

In State ex rel. Bybee vs. Hackmann, 276 Mo. 110, 1.c. 116; 207 S. W. 64, the court laid down the rule to be followed by the State Auditor when they said:

"For it is fundamental that no officer in this State can pay out the money of the State except pursuant to statutory authority authorizing and warranting such payment."

40 C. J., page 677, Section 40 has this to say about the pay and allowance of militia officers:

"An officer is not entitled to pay and allowance where no provision therefor is made by law. Some statutes provide for the payment of officers in certain cases, as where they are in active or actual service, in aid of the civil authorities, or during encampments, maneuvers, or other exercises. *** "

46 C. J. page 1014, Section 233 reads in part:

"Public officers have no claim for official services rendered, except where and to the extent that compensation is provided by law, and, when no compensation is so provided, the rendition of such service is deemed to be gratuitous .

As to your second question, although we have cited you the Constitution and statutes showing the creation of the office of commanding General of the Missouri National Guard, we have not been able to discover any statutory salary connected with said office, as such, and consequently we are of the opinion that the commanding General is entitled to no salary for serving as commanding General of the National Guard.

We respectfully call your attention to the provisions of Section 13824, supra, which places the commanding General on the "military council", and contains provisions authorizing that body to elect an "executive officer" and fixes the salary of said executive officer "to be paid from funds appropriated for the support of the military forces of the state". Said section further provides, "such salary shall be in addition to any other compensation received by such officer from either the State or Federal government". We are informed that all commanding Generals since this enactment have held the office of "executive officer" and have received a salary as "executive officer" under the provisions of this statute, and that they made no claims for salaries as Commanding Generals.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

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