

ATHLETIC COMMISSION: State commission may employ as inspector person who is already employed by federal, state or county government.

May 5, 1939



Mr. Horace T. Dawson, Secretary
Missouri Athletic Commission
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of April 11, 1939, presenting this question for an opinion:

"Is it a violation of the state law for the Athletic Commission to employ an individual as an inspector for the commission who is already employed by the federal, state or county government?"

The constitutional provisions which may or may not be violated by this action of the commission are as follows:

Section 18, Article IX, Missouri Constitution, which says:

"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. * * * ."

Section 4, Article XIV, Missouri Constitution, which says:

"No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

It will be noted that these provisions limit the disqualification to those holding "offices". The definition of this word, as there used, determines the conclusions to be reached.

In *State ex inf. v. Bode*, 113 S.W. (2d) 805 (Mo. Sup.), is the latest expression we find in this state as to what constitutes an "office". The court said at l.c. 806:

"It is not possible to define the words 'public office or public officer.' The cases are determined from the particular facts, including a consideration of the intention and subject-matter of the enactment of the statute or the adoption of the constitutional provision. In other words, the duties to be performed, the method of performance, end to be attained, depository of the power granted, and the surrounding circumstances must be considered. In determining the question it is not necessary that all criteria be present in all the cases. For instance, tenure, oath, bond, official designation, compensation, and dignity of position may be considered. However, they are not conclusive. It should be noted that the courts and text-writers agree that a delegation of some part of the sovereign power is an important matter to be considered. The question is considered at length in 46 C.J. p. 924."

Further, the court quoted from *State ex rel. v. Bus*, 135 Mo. 325, 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., 1. 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 v. Valle, 41 Mo. (29) 30; People ex rel. v. Langdon, 40 Mich. 673; Rowland v. Mayor (etc., of City of New York), 83 N.Y. (372) 376; State ex rel. v. May, 106 Mo. 488, 17 S.W. 660.

"Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts. They are required to take the oath of office, which is to be indorsed upon the appointment, and filed in the office of the clerk of the circuit court. After appointment and qualification, they 'shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff.' Rev. St. 1889, sections 8181 and 8182. (Mo. St. Ann. sections 11513, 11514, pp. 7433, 7434).

"The right, authority, and duty are thus created by statute; he is invested with some portions of the sovereign functions of the government, to be exercised for the benefit of the public, and

is, consequently, a 'public officer,' within any definition given by the courts or text writers."

From this case, we ascertain that the following is to be considered in ascertaining what is an office - (1) duties to be performed, (2) method of performance, (3) end to be attained, (4) depository of the power granted, (5) tenure, (6) oath, (7) bond, (8) official designation, (9) compensation, (10) dignity of position, (11) the duties exercised must be sovereign functions, (12) they must be for the benefit of the public.

Chapter 92, R.S. Missouri, 1929, creates the Athletic Commission and we look there to see to what extent an inspector will come within the above conditions.

The duties of such inspector are to aid the commission to carry out the law. Method of performance is left to the commission's discretion. End to be attained is to carry out the law. The power is deposited with the commission, not its inspectors. No tenure, oath, bond or official designation other than "other employees and clerical assistants". Dignity of position, of no great moment. Compensation \$5.00 a day while actually engaged in carrying out the law. Since the right to control athletic exhibitions is an exercise of the state police power (Fitzsimmons v. N.Y. Athletic Comm. 146 N.Y.S. 117), a portion of the sovereign functions is exercised. The public who attend such exhibitions are benefited, ostensibly, in that they will see an authentic athletic exhibition.

Thus, we have in reality only the exercise of a sovereign function under orders of the body in which that power is deposited and perhaps some accruing benefit to a portion of the public. The inspectors have no specific duties prescribed other than to aid the commission. The compensation is small and the other conditions above set out are absent. We do not feel that such is sufficient under the above authority to constitute the employment held by these inspectors an office.

Mr. Horace T. Dawson

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CONCLUSION

Therefore, it is our opinion that the position of inspector for the Athletic Commission is not an office. Not being an office, the commission may employ as inspectors persons who may also be employees of the federal, state or county governments.

Respectfully submitted,

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APPROVED By:

J. E. TAYLOR
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