

ELECTION CONTEST: LEGISLATURE: Representative entitled to receive emoluments of office from State Treasury upon determination of election contest.

June 29, 1939

7-11

Mr. W. A. Holloway
Chief Clerk
Auditor's Office
Jefferson City, Missouri



Dear Mr. Holloway:

We wish to acknowledge your request for an opinion under date of June 26, 1939, as follows:

"During the 60th General Assembly there was a contest filed by Mr. W. N. Mosier of Clark County contesting the election of Mr. Orvey C. Buck, who had been certified by the County Clerk as the Representative-elect of Clark County.

Mr. Buck was regularly certified to this office for all the compensation due a Representative throughout the entire Session, however, the Committee on Elections made its report to the House on May 16th but the report was not acted upon by the House of Representatives until June 24th, at which time the House accepted the report of the Election Committee which held that Mr. Mosier was the duly elected Representative of Clark County, Missouri.

We would like to have an opinion from your office concerning the payment of mileage, per diem, postage and salary to Mr. Mosier."

In addition to the facts set out in your letter, we have ascertained from the House Journal of the 60th General Assembly that Mr. Buck was sworn in as a member of the House of Representatives on January 4, 1939, and that on the following day Mr. Mosier filed an election contest.

Section 11423, R. S. Mo. 1929, provides as follows:

"Whenever any office, elective or appointive, the emoluments of which are required to be paid out of the state treasury, shall be contested or disputed by two or more persons claiming the right thereto, or by information in the nature of a quo warranto, then no warrant shall be drawn by the auditor, or paid by the treasurer, for the salary by law attached to said office, until the right to the same shall be legally determined between the persons or parties claiming such right: Provided, however, and it is hereby further enacted, that in all cases when the person to whom the commission for such office shall have issued shall deliver to the party contesting his right to such office a good and sufficient bond in double the amount of the annual salary of such office, conditioned that if, upon final determination of the rights of the contestants, it shall be decided that the obligor is not, and that the obligee therein is, entitled to the office in controversy, he shall pay over to the obligee the amount of salary therefor drawn by him as such officer, together with ten per centum interest thereon from the date of the receipt of each installment received by him, then, and in such case, notwithstanding the provisions of this law, a warrant may be drawn by the auditor, and paid by the treasurer to the person holding the commission aforesaid, for the amount of his salary, as the same shall become due. It shall be the duty of any person contesting the election of any such officer to give notice of such contest to the state auditor, and no such contest shall be heard or determined until he shall satisfy the tribunal trying such contest that such notice has been given."

Article 4, Section 16, of the Constitution of Missouri provides that members of the General Assembly receive from the public treasury such compensation for their services as may from time to time be provided by law, as follows:

"The members of the General Assembly shall severally receive from the public treasury such compensation for their services as may, from time to time, be provided by law, not to exceed five dollars per day for the first seventy days of each session, and after that not to exceed one dollar per day for the remainder of the session, except the first session held under this Constitution, and during revising sessions, when they may receive five dollars per day for one hundred and twenty days, and one dollar per day for the remainder of such sessions. In addition to per diem, the members shall be entitled to receive traveling expenses or mileage, for any regular and extra session not greater than now provided by law; but no member shall be entitled to traveling expenses or mileage for any extra session that may be called within one day after an adjournment of a regular session. Committees of either house, or joint committees of both houses, appointed to examine the institutions of the State, other than those at the seat of government, may receive their actual expenses, necessarily incurred while in the performance of such duty; the items of such expenses to be returned to the chairman of such committee, and by him certified to the State Auditor, before the same, or any part thereof, can be paid. Each member may receive at each regular session an additional sum of thirty dollars, which shall be in full for all stationery used in his official capacity, and all postage, and all other incidental expenses and perquisites; and no allowance or emoluments, for any purpose whatever, shall be made to or received by the members, or any member of either house, or for their use, out of the contingent fund

or otherwise, except as herein expressly provided; and no allowance or emolument, for any purpose whatever, shall ever be paid to any officer, agent, servant or employe of either house of the General Assembly, or of any committee thereof, except such per diem as may be provided for by law, not to exceed five dollars."

In the case of State v. Gordon, 149 S. W. 638, 1. c. 642, 245 Mo. 12, mandamus was sought by the State Superintendent of Schools to compel the Auditor to issue a warrant for his salary. The Auditor refused because of a pending contest as to relator's right to the office, and cited Section 11423, supra requiring him to withhold issuance of warrant until the right to the office was legally determined. The court said:

"Dealing as it does exclusively with funds in the state treasury, it applies to each and every office holder who is paid directly from the treasury."

The members of the General Assembly being paid for their services from the public treasury, Section 11423, supra, would be applicable to a contest pending in the Legislature. It is to be noted, however, that the last sentence of said section provides that no contest is to be heard by the tribunal trying the contest until the party contesting the election satisfies it that notice has been given to the Auditor.

Article 4, Section 17, of the Missouri Constitution provides in part that:

"Each house * * * shall be sole judge of the qualifications, election and returns of its own members * * *."

Insofar as Section 11423, supra, seeks to impose a prohibition upon the Legislature to determine the qualifications of its members, it is unconstitutional. However, unconstitutionality of part of the statute does not render the remainder thereof invalid. In the case of Barker v. St. Louis County, 340 Mo. 986, 104 S. W. (2d) 371, the court said:

"The invalidity of a part of a statute does not render the remainder of the statute invalid where enough remains, after discarding the invalid part, to show the legislative intent and to furnish sufficient means to effectuate that intent. (State ex rel. McDonald v. Lollis, 326 Mo. 644, 33 S. W. (2d) 98, l. c. 100, and cases there cited."

That no notice was received from the contesting party of the contest could not be interposed as reason for failure to pay the de jure member in view of the expressed mandate that "no warrant shall be drawn by the Auditor", until the rights to the office be "legally determined between the persons or parties claiming such rights".

It having been determined that Section 11423, supra, is applicable, the question arises whether the de jure member is entitled to "payment of mileage, per diem, postage and salary" in view of the fact that the de facto member, Mr. Buck, has been paid "all the compensation due a representative throughout the entire session".

Mechem on Public Officers, Section 332, page 222, declares that if payment is made to an officer de facto, an officer de jure cannot recover his salary or other compensation from the government.

"But it is held that if payment of the salary or other compensation be made by the government, in good faith, to the office de facto, while he is still in possession of the office, the government cannot be compelled to pay it a second time to the officer de jure when he has recovered the office, at least where the officer de facto held by color of title.

'It is plain,' says ANDREWS, J., "that in many cases the duty imposed upon the fiscal officers of the State, counties or cities to pay official salaries, could not be safely performed unless they are justified in acting upon the apparent title of claimants. The certificate of boards of canvassers certi-

fyng the election of a person to an elective office is prima facie evidence of the title of the person whose election is certified. But it often happens that, by reason of irregularities in conducting the election, or the admission of disqualified voters, the apparent title is overthrown and another person is adjudged to be rightfully entitled to the office. But this can seldom, if ever, be ascertained, except after a judicial inquiry; and in case of an appointed officer, the validity of the appointment often depends upon complicated questions of law or fact. If fiscal officers, upon whom the duty is imposed to pay official salaries, are only justified in paying them to the officer de jure, they must act at the peril of being held accountable in case it turns out that the de facto officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary a second time. It would be unreasonable, we think, to require them, before making the payment, to go behind the commission and investigate and ascertain the real right and title. This, in many cases, as we have said, would be impracticable. Disbursing officers, charged with the payment of salaries have, we think, a right to rely upon the apparent title, and treat the officer who is clothed with it as the officer de jure, without inquiring whether another has the better right.'"

And 55 A. L. R. 998 states the majority rule similarly, as follows:

"II. MAJORITY RULE.

While there is much conflict as to whether or not payment of salary by a state or municipality to a de facto

officer who holds the office by color of title constitutes a valid defense, when the de jure officer, after establishing his title, subsequently seeks to recover salary for the same time from the same source, the general rule prevails that this is a good defense; and it seems to make little difference generally whether the public body had notice or knowledge that the incumbent's right to office was then being contested. And the rule has frequently been applied even to cases of removals or suspensions which have been found to be unwarranted, where the de jure officer sues for his salary after being restored to his office. The courts taking this view generally agree that, upon grounds of public policy, the office must be filled and the salary cannot be paid twice; and, further, that the de jure officer's sole remedy is against the de facto officer; they also appear generally to consider that the certificate of election, or the commission, or a judgment of a lower court in the incumbent's favor, is itself sufficient justification for paying the de facto officer. It will also be observed that some of the courts state other grounds for the rule."

And in 59 A. L. R. 117 it is stated that Missouri has always been in favor of the majority rule.

"The Missouri court, which appears to have been the only one that has directly passed upon this point since the original annotation, and whose position was not altogether clear at that time, now declares emphatically in the reported case (STATE EX REL. GALLAGHER V. KANSAS CITY, ante, 95) that it always has been in favor of the majority rule, which is set out in 55 A. L. R. 998."

We find no fault with the above rule, but same has no application here for the reason that we have a statute (Section 11423, supra) which provides that when the title of an incumbent of an office whose services are paid from the State Treasury is contested, no part of his salary is to be paid until the contest is finally determined.

The annotation in 55 A. L. R. 1007 recognizes that the above rule is altered under a statute similar to ours.

In the case of *Tout v. Blair*, 3 Cal. App. 180, 84 Pac. 671, the winner of an election contest in a mandamus proceeding, was held not to be entitled to any salary for the time during which the office was held by and salary paid to the contestee. Same, however, was based on a statute which, in addition to declaring that when the title of the incumbent of an office was contested no part of his salary could be paid until the contest was determined, provided "that this section shall not be construed to apply to any party to a contest * * * who holds the certification of election * * * and discharges the duties of the office, but such party shall receive the salary of such office, the same as if no such contest was pending."

It is apparent, therefore, that the above case furnishes no authority for deciding the question presented. However, under a statute similar to ours, and without the further provision as noted in the above case, the court held that payment to the de facto officer was no defense in a suit by a de jure officer to recover his salary. The latter case is commented on in 55 A. L. R. 1008, as follows:

"But, under a statute providing simply that, when the title of the incumbent of any office is contested, no warrant can be drawn for any part of his salary until the final determination of the contest proceedings (without the further provision, as noted in *Tout v. Blair* (Cal.) supra), payment of salary to one who had acted as judge, upon a lower court decision in his favor, where the office was surrendered to him by plaintiff, who served for a time after being elected and won the office back after an appeal, was held to be no defense,

being a violation of the express provision of the statute, in Dotson v. Cassia County (1922) 35 Idaho, 382, 206 Pac. 810 (without mention of Gorman v. Boise County (1877) 1 Idaho, 655, supra, II."

At this point we desire to state that we have not overlooked consideration of State v. Clark, 52 Mo. 508, and State v. Draper, 48 Mo. 213, both holding that a de facto officer is entitled to the compensation of office until ousted. Said cases, however, were not election contests so as to make Section 11423, supra, applicable. See also 46 C. J. 1059.

The argument might be advanced that in any event Mr. Mosier did not attend the session of the Legislature, however, we are not advised in the matter. It should be pointed out though that this would not deprive him of his right to recover the compensation provided him by law. In the case of State v. Gordon, supra, (S. W. 1. c. 641) the court said:

"Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed, but is incidental to the office. Throop on Public Officers (section 3) says: 'It has often been held that an officer's right to his compensation does not grow out of a contract between him and the state. The compensation belongs to the officer as an incident of his office, and he is entitled to it not by force of any contract, but because the law attaches it to his office.'

Mechem on Public Offices & Officers says:

'Sec. 855. As has been seen, the relation between the officer and the public is not the creature of contract, nor is the office itself a contract. So his right to compensation is not the creature of contract. It exists, if it exists at all, as the creation of the law, and, when it so exists, it belongs to him 'not by force of any contract, but because the law attaches it to the office.' The most that can be said is

that there is a contract to pay him such compensation as may from time to time be by law attached to the office."

Section 11231, R. S. Mo. 1929, provides as follows:

"The members of the general assembly and the president of the senate of this state shall receive, as compensation for their services, the sum of five dollars per day for each and every day they may serve as such, for the first seventy days of each session, and one dollar per day for every day they may serve thereafter to the end of the session; except during the sessions for the revision of the statute laws of the state, when they shall each receive five dollars per day for every day they may serve as such for the first one hundred and twenty days, and one dollar per day for every day they may serve thereafter, and five dollars per day for every day they may be necessarily employed in going to and from said general assembly, and shall also receive at each regular session of the general assembly the sum of thirty dollars in addition to their per diem, which shall be in full for all stationery used in their official capacity, and all postage, together with all other incidental expenses and perquisites, and no allowance or emoluments for any purpose whatever shall be made or received by the members, or any member of either house, or for their use, out of the contingent fund or otherwise; nor shall any member receive pay per diem until he has appeared in his seat and answered to his name at the meeting of each session of the legislature; nor shall any member be entitled to traveling expenses or mileage for any extra session that may be called within one

day after an adjournment of the regular session. And each member of the general assembly, at each session thereof, except sessions called within one day after the adjournment of any regular session, who shall attend at the place of meeting, shall receive the following amounts, for mileage, that is to say:

From the county of --

Clark \$37.00."

An examination of the above statute and Article IV, Section 16, of the Missouri Constitution, supra, reveals that the allowances for stationery and postage, and other incidental expenses including mileage, are not made dependent on their actual expenditure by the members.

From the foregoing, we are of the opinion that Mr. Mosier, having been determined in the contest to be the duly and legally elected member of the Legislature from Clark County and seated and sworn in said capacity, is entitled to mileage per diem, postage and salary due him under Section 11423, R. S. Mo. 1929, supra.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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