

BOARD OF FUND COMMISSIONERS: Comparison of paid bonds and coupons does not have to be done personally by Board of Fund Commissioners, but may be delegated.

April 11, 1941

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

4-14



Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"Does the Board of Fund Commissioners have authority to delegate to some other person, or persons, the duty of comparing paid bonds and coupons, abstract of bonds and coupons paid, and bank account between the Board of Fund Commissioners and the State Fiscal Agent, required by Section 13117, Article V, Chapter 87 of the Revised Statutes of Missouri for 1939?"

Section 13117, Article V, Chapter 87, R. S. Missouri, 1939, provides as follows:

"The board of fund commissioners shall require the bank selected as state's fiscal agent, as hereinbefore provided, to transmit to them, and to the governor, state auditor and state treasurer, within thirty days after payment of any installment of interest or bonds, an exact copy of the account between the bank and the fund commissioners, with an abstract of the coupons or bonds taken up by said bank, and to the fund commissioners the coupons or bonds; which abstract and coupons or bonds shall be carefully compared by the fund

commissioners, and if found to be correct, they shall certify to the fiscal agent the correctness of the abstract, and thereupon direct the state auditor and state treasurer to credit said fiscal agent with the amount of bonds or coupons paid, as shown by said abstract, and turn the coupons or bonds over to the state auditor." (Underscoring ours)

The word "compare" is defined as follows in Webster's New International Dictionary, Second Edition:

"To examine the character or qualities of, two or more persons or things, for the purpose of discovering their similarity or differences; to bring into comparison."

While no cases have been found directly on the matter of comparison, it would seem that a comparison of this nature would be a ministerial duty.

In the case of State ex rel. v. Hudson, 226 Mo. 239, l. c. 265, a ministerial duty is defined as follows:

"In State of Miss. v. Andrew Johnson, President of the United States, 4 Wall. l. c. 498, a ministerial duty enforceable by a court through a writ of mandamus was thus defined: 'A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted, or proved to exist, and imposed by law.'"

And in the case of State ex rel. v. Meier, 143 Mo. 439, at l. c. 447, the Court quoted and adopted the following

definition of a ministerial act.

" * * * 'A ministerial act is one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed.' Merrill on Mandamus, sec. 30; Marcum v. Com'rs., 42 W. Va. 263, and cases cited."

In the recent case of State ex rel. Donnell v. Osburn, 147 S. W. (2d) 1065, it was ruled by the Supreme Court that the adding of figures was purely ministerial. And the comparison of a bank account and paid bonds and coupons would be an act of a similar nature, purely ministerial and requiring the exercise of no discretion.

It is a well settled general rule that the discharge of a duty involving the exercise of discretion cannot be delegated and no authority is cited on the proposition.

And it is equally as well settled that the performance of purely ministerial functions can be delegated to others to be performed. This was a principle of the common law, and has been followed in the decisions in this and other states.

In the early case of Hunter v. Hemphill, 6 Mo. 106, the Court, at l. c. 21, said:

" * * * Before that question could be determined, it would be necessary to look into the nature of the act which was to be performed, if a mere clerical act, it might have been performed by deputy; if a judicial act, and the register does, for some purposes, and in some matters, act as a judicial officer (as in granting pre-emptions) the act could not have been performed by deputy. * * * "
(Underscoring ours)

And in the case of *Small v. Field*, 102 Mo. 104, in passing upon the right of a clerk of a court to appoint a deputy where no statutory authority was found, the following quotation is found at l. c. 119:

"The office of clerk of a court seems to be one which, from its nature and constitution, implies a power or right to execute it by deputy. Whenever nothing is required but superintendency in office a ministerial officer may make a deputy. 7 Bac. Abr. 316, 317, -- Tit. Offices and Officers. And the rule is general that a deputy may do every act which his principal might do. Com. Dig. Officers, D. 3; Confiscation Cases, 20 Wall. 92."

And in Volume 46 of *Corpus Juris* at pages 1033 and 1063, it is stated that the performance of ministerial duties may be delegated to others.

In the case of *Blades v. Hawkins*, 240 Mo. 187, the Supreme Court upheld the right of a County Court to employ accountants to audit the accounts of county officers where no statutory authority was conferred, holding that the power was implied as the County Court was the general fiscal agent of a county holding supervisory powers over the collection and preservation of its powers.

The Board of Fund Commissioners has supervisory control over the treasury department of the state; it is composed of members who have a great many other duties to perform, and while upon some occasions this task of comparison might take very little time, upon others it might require a great deal of time and the members of the Board not be able to perform the duty personally because of their other duties.

In the case of *State ex rel. v. Reyburn*, 158 M. A. 172, a case in which mandamus was granted against a county clerk to compel him to permit the examination of the books and papers in his office by an accountant employed by one member of the County Court, the St. Louis Court of Appeals said, at l. c. 176-177:

"The matter of inspecting the books and papers of the clerk's office is purely ministerial and in no respect judicial in its character. It is therefore entirely clear that the law does not devolve it as a personal duty upon a judge of the county court which he may not delegate to another who is competent to perform such a task, especially when it appears the judge himself is from any cause unable or incapacitated to effectually discharge it. But that matter is unimportant, for the judge might cause the investigation to be made by expert accountants or others of his choosing though he were entirely competent himself. The principle announced in State ex rel. Johnson v. Transit Co., 124 Mo. App. 111, 100 S. W. 1126, is equally relevant here."

Again, in the case of Menefee v. Taubman, 159 M. A. 318, the Kansas City Court of Appeals upheld the act of a city engineer delegating to an assistant the duty of preparing plans and specifications of a public improvement and the following is taken from this case at l. c. 325:

"Finally defendants contend that the estimate, plans and specifications were not prepared by Duncan, the engineer, but by an assistant employed specially by him or by the city. The rule we applied in Paving Co. v. O'Brien, 128 Mo. App. 267, is invoked. We held that a city engineer had no authority to delegate such work to a private person but must bestow upon it his own care and skill, but we did not hold that he could not avail himself of the services and skill of his assistants. On the contrary, we expressed the opinion that 'such work might have been performed legally by assistants in his office under his supervision.' The evidence discloses that

Duncan was not well qualified to perform the work in question and that he relied almost altogether on the skill and judgment of his assistant who was expert in such matters. But, further it appears that Duncan gave to the task the full measure of his skill, such as it was, and that to the best of his ability, he supervised the work of his assistant. This was all he could do and all the law as interpreted in the O'Brien case required of him."

CONCLUSION

From the nature of the duty, to compare the bank statement, the abstract of the coupons and bonds paid, and the bonds and coupons paid, placed upon the Board of Fund Commissioners, the composition of the Board and the numerous other duties of the members of this Board, it is the conclusion of the writer that the Board would have authority to delegate to some other person or persons this duty of making the comparison required by Section 13117, R. S. Mo. 1939.

Respectfully submitted,

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APPROVED:

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WOJ:VC