

PROSECUTING ATTORNEY: May be "fee attorney" for the Reconstruction Finance Corporation.

May 17, 1943



Honorable L. E. Merrill  
Prosecuting Attorney  
Chariton County  
Keytesville, Missouri

Dear Sir:

In your letter of May 10, 1943, you ask:

"I desire an opinion of your office as to whether or not the appointment of a Prosecuting Attorney by the R. F. C. as their fee attorney violates Section 4 of Article 14 in the Constitution of Missouri, which provides that an United States Officer shall not hold a State Office."

Section 4 of Article XIV of the Constitution of Missouri reads as follows:

"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."

The first question is whether or not this section of the Constitution of Missouri is applicable to the factual situation in your question. This in turn depends upon whether or not you are an "officer" of both the United States and the State of Missouri by reason of the fact that you are a prosecuting attorney and also handle litigation for the Reconstruction Finance Corporation. The solution of the immediate problem can best be made by defining what is a "public office", and then determining whether the

activities of a "fee attorney" amount to a public office, for it generally follows that one who holds a public office is an "officer".

The term "public office" is defined in C. J., Volume 46, page 922, Section 2, as follows:

"'Office,' in the sense of public office, may be defined broadly as a public station or employment conferred by the appointment of government, or more precisely as 'the right, authority, and duty, created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public.' The term embraces the ideas of tenure, duration, emolument, and duties, \* \* \* \* \*

There is no doubt that your office, as prosecuting attorney, comes within that definition. The question then becomes, are the activities of a "fee attorney" for the Reconstruction Finance Corporation a public office within the criteria of the above definition. The primary criterion is whether or not the activity or "office" has delegated to it a portion of the sovereign power. This criterion is deemed the most important and reliable of the various tests. The court in the case of State v. Gray, 91 Mo. App. 438, l. c. 445, the court said:

"\* \* \* \* \* But, aside from the declaration of a competent lawmaking body, no one should be considered a public officer whose duties do not pertain to an exercise of sovereignty or governmental function in some of the departments of government. Bun v. The People, 45 Ill. 397, 408. It will be found on examination, that no other definition shows a distinction between office and employment nearly so well. \* \* \* \* \*

Other criteria are tenure of the office and the permanency of the duties connected therewith, whether or not the office was created by statute or constitutional provision, whether or not it

is necessary for the holder of the office to give bond or take an oath before entering upon the duties therein, whether or not there is a specific designation as a public office, whether or not there is compensation for the discharge of the duties of the office and the liability which attaches to the holder of the office for nonfeasance or misfeasance. These tests have been used to determine whether or not the activity is a "public office."

If the facts give rise to a public office it is generally held that the holder of said office is an officer. In Words and Phrases, Volume 29, page 326-327, the term "one who holds office" is defined. Generally, the citations may be said to be summarized as in the case of State v. Kelly, 77 S. W. 996, 997; 103 Mo. App. 711, where the court said, quoting Bouvier's Law Dictionary:

"An officer is defined to be 'one who is lawfully invested with an office.'"

We understand the term "fee attorney" to mean one who may be hired by a person, corporation or so on, to handle a specific matter or controversy, and while so engaged to owe only a duty to that particular incident. Further, that while so employed the "fee attorney" owes no duty to accept future employment, but may reject or accept the employment as he sees fit. Also, this activity may be spasmodic in nature, that is the one hired may or may not receive future litigation to dispose of for the employer. Furthermore, whatever compensation the "fee attorney" receives is entirely dependent upon the work done, if any, and is not a set or predetermined compensation.

We do not believe that the activities of a "fee attorney", if our definition of such activities is correct, come within the scope of any or all of the above listed criteria so as to be classified as a public office. It follows that there being no office of "fee attorney" the fee attorney cannot be an officer. Not being an officer, the constitutional provision is not applicable. There being no other statutory or constitutional restriction applicable, a prosecuting attorney may accept such employment with the Reconstruction Finance Corporation.

However, a prosecuting attorney must discharge the duties of that office under Section 18, Article II of the Constitution of Missouri by personal devotion to said office. Also, Section 12942, R. S. Missouri 1939, provides generally as to the duties of a prosecuting attorney. It would be the emphatic suggestion of this

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office that you at no time subordinate the duties of prosecuting attorney to the demands of the Reconstruction Finance Corporation to act as attorney for that corporation.

CONCLUSION

A "fee attorney" for the Reconstruction Finance Corporation is not an office within the meaning of that term as used in Section 4, Article XIV of the Constitution of Missouri. Furthermore, a prosecuting attorney may be employed to act as "fee attorney" for the Reconstruction Finance Corporation.

Respectfully submitted

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Assistant Attorney General

APPROVED:

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ROY MCKITTRICK  
Attorney General of Missouri

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