LIEUTENANT-GOVERNOR : Compensation of President and President pro tempore of Senate, authority for paying, amount of, how paid, out of what funds and whether such officers are included in 75 employees allowed Senate.

March 4, 1943.

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Honorable Forrest Smith
State Auditor
Jefferson City, Missouri.

Dear Sir:

We have your letters of February 23 and 25, 1943, presenting the following for our opinion:

(1) Is an act of the General Assembly necessary in order for the Lieutenant-Governor to be paid compensation for presiding over the Senate?

(2) What compensation is he to be paid for presiding over the Senate?

(3) On what fund is he to be paid for presiding over the Senate?

(4) How are the President and President pro tempore of the Senate to be paid for presiding over the Senate?

(5) Are the President and President pro tempore of the Senate included in the Constitutional limit of seventy-five employees of the Senate?

We shall take up the questions in the above order.

In State ex rel. Bradshaw v. Hackmann 276 Mo. 600, the State Warehouse Commissioner had incurred traveling expenses in making trips outside the State of Missouri. The auditor refused to issue a warrant in payment of such expense. Bradshaw sued to compel issuance of said warrant. The appropriation act against which Bradshaw contended the expense was chargeable appropriated a sum of money for "traveling expenses" as well as other enumerated purposes. In deciding the question, the court said, l. c. 607:

> "We approach the examination of the question whether the State is liable to pay the relator's account for traveling expenses incurred by him in going to and returning from

> Washington, D. C., with the axiom, several times ruled by us to be 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.' (State ex rel. Bybee v. Hackmann, 276 Mo. 110; Lamar Twp. v. Lamar, 261 Mo. 171.) The only exception to this rule (and it is not in fact an exception) is 'that whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties effectual, is conferred by implication.' (State ex rel. Bybee v. Hackmann, supra.) Under this rule we perforce must look to the statutes which created the office of Warehouse Commissioner and which prescribe his duties for authority to make our writ peremptory. It we find no such authority, either express, or which arises from such necessary implication as is above defined, it is manifest that we are without power to compel respondent to audit relator's expense account, for expenses incurred by him in going to and returning from Washington. * * * * * * * * * * * * * "

After making these observations, the court proceeded to demonstrate how the Warehouse Commissioner's act did not authorize the commissioner to travel without the state and held that such expense could not be paid because there was no authority to incur such expense.

In State ex rel. Bybee v. Hackmann, 276 Mo. 110, it was contended that the auditor was under no duty to pay an account for stenographic services rendered the State Board of Equalization, because no authority existed for hiring such stenographer. In ruling the point the court said, l. c. 116:

> "That question simply stated is this: Has the State Board of Equalization authority under the law to employ a stenographer at the expense of the State? If such Board of Equalization (hereinafter for brevity, called

> simply the board) has any such authority; this authority must be bottomed on some statute. 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. * * * * * * * * *"

Then the court examined the statutes and determined that the board had authority to employ a stenographer and held the account proper.

As we understand these holdings, they rule that before an appropriation of funds for a particular purpose may be expended there must also be authority granted to the persons or body drawing on the appropriation to incur the obligation that is sought to be paid.

Applying this rule, it appears that Section 18 Article V of the Constitution provides:

> "The Lieutenant-Governor or the President pro tempore of the Senate, while presiding in the Senate, shall receive the same compensation as shall be allowed to the Speaker of the House of Representatives."

Therefore, we must look to the provisions concerning the pay allowed the Speaker of the House to determine whether there is authority to incur this obligation. We find there is in Section 12891 R. S. Mo. 1939 which provides:

> "The speaker of the house of representatives as such, shall, in addition to his per diem as a member, receive as his compensation for every day he shall actually preside, the sum of two dollars, to be audited and paid as other expenses of the general assembly." (Underscoring ours)

Due to the enactment of what is now Section 16 Article IV of the Constitution (Laws 1941 p. 718) fixing the compensation of members of the General Assembly at $125.00 per month, that part of the

statute above underlined is now incorrect in speaking of "per diem" and is repealed by implication. However, that does not affect the balance of the statute and it is still operative to fix the compensation of the Speaker at two dollars ($2.00) per day for being Speaker of the House.

It therefore appears that Section 18, Article V of the Constitution, aided by Section 12891 R. S. Mo. 1939, constitutes authority to incur the obligation for the compensation of the President and President pro tempore of the Senate while presiding over the Senate and therefore an appropriation for that purpose may be drawn upon to pay said obligation without any additional legislation.

The foregoing resume also supplies the answer to your second question. The compensation of the President or President pro tempore of the Senate for presiding over the Senate is two dollars ($2.00) for each day either shall preside. Section 12856 R.S. Mo. 1939 provides in part that "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, * * * *," but since said provision, in so far as it relates to pay of members has been repealed by the new Section 16, Article IV of the Constitution, and in so far as it relates to pay of the President of the Senate, is in conflict with Section 18, Article V of the Constitution, we shall disregard it, leaving our conclusion as to the compensation of the President and President pro tempore resting on Section 18 of Article V of the Constitution, as aided by Section 12891, supra.

Relative to your third question, it appears that Section 12891, supra, which due to Section 18, Article V of the Constitution, applies to the President and President pro tempore of the Senate, provides that the compensation of such officers is "to be audited and paid as other expenses of the general assembly." Section 12870 R.S. Mo. 1939, then provides:

> "When any * * officer * * * of either house shall present his account for his compensation, and the same shall have been allowed, according to the rules of the house to which he belongs, a certificate thereof shall be granted, specifying the amount and on what account, and directing that the same be paid out of ap-

> propriations made for the pay of the general assembly; which certificate, in the case of a * * * officer of the senate, shall be signed by the president and attested by the secretary; * * * * * and upon presentation of such certificate to the state auditor, he shall draw his warrant on the treasurer for the amount."

This statute directs that the President and President pro tempore of the Senate be paid out of "appropriations made for the pay of the general assembly" and thus fixes the fund out of which they are to be paid.

The foregoing statute also supplies the answer to the fourth question, in that, said officer , in order to be paid, must present his account, have it allowed according to the rules of the Senate, obtain a certificate, signed by the President and attested by the secretary specifying the amount and on what account and directing that the account be paid out of appropriations made for the pay of the general assembly. Upon presentation of said certificate, the auditor may then draw his warrant in payment of the account.

Your fifth question involves Section 16a, Article IV of the Constitution which provides:

> "Neither house of the General Assembly shall employ to exceed in all 75 employees, elective, appointive, or any other, at any time during any session."

We are of the opinion that the President and President pro tempore of the Senate are not to be included in computing the number of employees allowed the Senate. Our reason for this is very simple. They are not employees of the Senate - they are officers and the above provision only applies to employees. That that is true is to be seen by the fact that the Constitution states, "Neither house * * * shall" do what?, and the "what" is "employ." Then when the number is fixed at seventy-five, they are described as "employees." The further description of "elective, appointive, or any other," operates only to prevent evasion of the ban by change

in the method of selection. It does not broaden the term "employees." We had occasion to extensively consider the distinction between an "officer" and an "employee" in an opinion to the Honorable Lloyd C. Stark, under date of November 8, 1937, as follows (we copy without the use of additional quotation marks):

As chief Justice Marshall in United States v. Maurice, 2 Brock 103, points out "although an office is an employment, not every employment is an office." The question as to the distinction between a public officer and a public employee has been a matter of much litigation in the State of Missouri. Judge Leedy said in State ex rel. Pickett v. Truman, 64 S. W. (2d) 105:

> "It is perfectly apparent that 'employment' and 'agency' are distinguishable from public office; but the line of demarcation between them is sometimes difficult of perception."

The Supreme Court of Kentucky in Lexington v. Thompson, 250 Ky. 96, stated:

> "It is difficult to frame an answer to the question 'what is the difference' so as clearly to indicate the lime separating the two."

Therefore, a general rule to take care of every situation cannot be laid down, because as Judge Lamm said in Gracey v. St. Louis, 213 Mo. 384, "danger lurks in mere generalizations, one sensible method of determining what is an office is to go to the written law creating the position and determining its duties * * *."

However, the courts of Missouri have in the numerous cases defined what constitutes a public office. The definition is as follows:

> "A public office is 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. The individual so invested is a public officer."

This definition was approved in State ex rel. Pickett v. Truman 64 S. W. (2d) 105; State ex rel. Walker v. Bus, 135 Mo. 325, 331, 332; State ex rel. v. Hackmann, 300 Mo. 59; and Hasting v. Jasper County, 314 Mo. 144. To the same effect is the terse statement in State ex rel. Walker v. Bus, 135 Mo. 325 - "an officer receives his authority from the law and discharges some of the functions of the government."

The general distinction and most important indication is whether "the individual is invested with some portion of the sovereign functions of government." Mechem on Public Officers, para. 4, states:

> "The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involve a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, to be exercised for the public benefit."

The term "sovereignty of the state" is defined in State ex rel. Pickett v. Truman, supra, as follows:

> "If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state. If he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state."

The Supreme Court of Missouri in the Truman case, supra, laid down certain criteria that would indicate a person is a public officer when - -

> (1) "the giving of a bond for faithful performance of the service required,
>
> (2) definite duties imposed by law involving the exercise of some portion of the sovereign power,
>
> (3) continuing and permanent nature of the duties enjoined, and
>
> (4) right of successor to the powers, duties, and emoluments, have been resorted to in determining whether a person is an officer, although no single one is in every case conclusive."

Other denotations are given in Gracey v. St. Louis, 213 Mo. 384, as follows:

> "His oath, his bond, his liability to be called to account as a public offender for misfeasance or non-feasance, the tenure of his position, etc., have been said to be indicia of a public officer. State ex rel v. May, supra; Throop v. Langdon, 40 Mich. 682. And the general doctrine is that the idea of office clearly embraces the ideas of tenure, duration, fees or emoluments, rights and powers as well as that of duty. 6 Words and Phrases, p. 4923."

It will be noted that the courts recognize their inability to lay down the precise distinction between public officers and public employees and have rested their decisions upon the statement of facts presented therein. It may be well to note instances in Missouri in which the courts have classified certain persons as public officers and those which they have held mere employees. Those who have been held officers are: a member of the Board of Water Commissioners for the City of St. Louis, State ex rel Wingate v. Valle, 41 Mo. 29; the superintendent of streets of Kansas City, State ex rel. Cannon v. May, 106 Mo. 488, 17 S. W. 660; a

deputy sheriff, State ex rel Walker v. Bus, 135 Mo. 325; 36 S. W. 636; the superintendent of water works of Kansas City, State ex rel Cameron v. Shannon, 133 Mo. 139; the chief grain inspector appointed by the Board of Warehouse Commissioners, State ex rel Tedford v. Know, 105 S. W. 1040; a deputy elevator inspector of the City of St. Louis, Gracie v. St. Louis, 213 Mo. 384, 111 S. W. 1159; the treasurer of a school district, State ex rel school district v. Harter, 118 Mo. 516; and notaries public, Wilson v. Kimmel, 109 Mo. 260, 19 S. W. 24. Those held to be employees are: the chief engineer of the city hall, State ex rel Hall v. Gray, 91 Mo. App. 438 and a delinquent tax attorney, State ex rel. Pickett v. Truman, 64 S. W. (2d) 105.* * * * * * * * The distinction between a public officer and public employee cannot absolutely be defined. The most important characteristic which distinguishes an office from an employment is the delegation and possession of sovereign power. Other indicia are: (1) tenure and permanency of duties; (2) definite duties imposed by law; (3) taking of oath and giving of bond; (4) compensation; (5) liability for misfeasance or non-feasance; although no one of the above is conclusive in every case.

We think the foregoing, as taken from our previous opinion, furnishes authority for our statement that we do not think the President and President pro tempore of the Senate are to be included in computing the seventy-five employees allowed to the Senate. The President and President pro tempore of the Senate have all the functions, powers and duties, except the bond, that are usually used in judging whether a particular position is an office or employment.

Respectfully submitted

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