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Hon. Bert Cooper
Director, Department of
Business and Administration
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The Insurance Division of the Department of Business and Administration has had no actuary since Alex Good died several months ago and is obliged to depend upon the services of out of town consulting actuaries.

"Due to a statutory limitation of \$5000 on salary, we have been unable to interest any suitable applicant. We now have an opportunity to join with the Public School Retirement System of Missouri and employ an actuary up to \$8000 per year. The Division of Insurance paying \$5000 payable monthly, and the Public School Retirement System paying remainder up to \$3000 additional, payable monthly. The actuary's office to be with the Insurance Division and he would do the work of the Retirement System when called upon to do so.

"1. Would such a plan comply with the laws of Missouri?

"2. If the answer to question one is yes, what specifications would you suggest for the contract?"

Section 5784, R. S. Mo. 1939, provides, in part, as follows:

"Said superintendent of insurance may appoint and employ an actuary, who shall be subject to removal at the pleasure of said superintendent. The salary of said actuary shall not exceed the sum of five thousand dollars (\$5,000.00) per annum, and shall be payable in the same manner as the salary of the superintendent of insurance; said actuary shall have had at least five years' experience in actuarial work. The duties of said actuary shall be those usually performed by actuaries and he shall further do such things connected with the department of insurance as he may be directed to do by the superintendent of insurance. All fees, allowed or paid to the actuary as provided by the laws of the state, shall be paid to the state treasurer in the same manner as other fees collected by the superintendent of insurance. * * *"

Statutes pertaining to the Insurance Department make no requirement that such actuary devote his full time to his duties for that department.

The Public School Retirement System of Missouri was established by an act of the 63rd General Assembly, found in Laws of Missouri, 1945, at page 1353. Section 2 of that act contains the following provisions:

"(11) The board of trustees shall employ an actuary who shall be its technical adviser on matters regarding the operation of the retirement system, and shall perform such duties as are essential in connection therewith, including the recommendation for adoption by the board of mortality and other necessary tables, and the recommendation of the level rate of contributions required for operation of the System.

"(12) As soon as practicable after the establishment of the retirement system,

and annually thereafter, the actuary shall make a valuation of the System's assets and liabilities, on the basis of such tables as have been adopted.

"(13) At least once in the three-year period following the establishment of the retirement system, and in each five-year period thereafter, the board of trustees shall cause to be made an actuarial investigation into the mortality, service, and compensation experience of the members and beneficiaries of the system, and shall make any changes in the mortality, service, and other tables then in use which the results of the investigations show to be necessary."

No provision is made regarding the portion of his time which the actuary employed by the Public School Retirement System should devote to his duties for that agency.

In the absence of any statutory requirement that the actuary employed by the Department of Insurance or the Public School Retirement System devote his full time to his duties for each of said agencies, we perceive no legal objection to their employing the same person if, in the judgment of each of said employers, the person employed under such arrangement can properly carry out his duties for each of said employers. There would be no legal objection to his being paid the maximum salary permitted to be paid by the Department of Insurance to an actuary employed by it. No provision is made in the Public School Retirement System Act regarding the salary of the actuary employed by that agency. The fixing of his salary for his services for that agency is a matter to be determined by the trustees of the Public School Retirement System.

There is no statute prohibiting such an arrangement as you have suggested, and the common-law rule which forbids the same person from holding two inconsistent public positions would not be applicable. That rule, as set out in 46 C. J., Officers, Section 46, page 941, is that one person may not at the same time hold two inconsistent offices. "The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject

in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other." Although that rule may not affect the present question, in view of the fact that each of the positions in question is probably employment rather than office (46 C. J., Officers, Section 18, page 927), nevertheless there would be no such incompatibility in the two positions as that to which the common-law rule has reference. State ex rel. v. Bus, 135 Mo. 325, 331, 36 S.W. 636.

As for your question relating to the provisions to be inserted in the contract, public office or employment cannot be made a matter of contract. City of Springfield v. Clouse, 206 S. W. (2d) 539, 545(8). The Superintendent of Insurance must be free to exercise at any time the right conferred upon him by statute to remove at his pleasure any actuary employed by him. The details of the method by which the time of the actuary is to be divided between the Department of Insurance and the Public School Retirement System must be determined by the Superintendent of Insurance and the trustees of the Public School Retirement System.

Conclusion.

Therefore, it is the opinion of this department that the Division of Insurance and the Public School Retirement System may jointly employ an actuary, and such actuary may be paid by the Division of Insurance the maximum amount of \$5,000 per year, provided by Section 5784, R. S. Mo. 1939, and may receive in addition such salary from the Public School Retirement System as the trustees of that agency may determine.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General

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