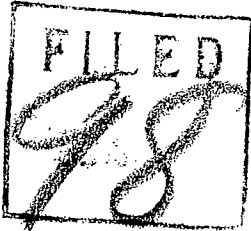


PUBLIC HEALTH & WELFARE, Dept. of: Attorney for Division may act as referee on appeals to Director of WELFARE, Division of: Department and may participate in hearings.



March 12, 1956

Honorable John F. Winchester  
Member, House of Representatives  
Stoddard County  
Bernie, Missouri

Dear Sir:

I have received your request for an opinion of this office, which request reads as follows:

"My information is that when hearings are to be held on claims for Welfare benefits either the Director of Welfare or the Director of the Department of Public Welfare and Health designates one of the attorneys of the Department or the Division of Welfare to act as Referee at such hearing while at the same time actively conducting the defense as attorney before himself acting as Referee.

"Is this procedure allowable under Sec. 208.080, Subd. 3, if claimant objects to or protests against such attorney acting as referee before the hearing is begun?

"Again, can these Directors do anything they are not prohibited from doing by the Constitution or laws or can they do those things that they are authorized to do by the Constitution or laws and those only?

"Is there any officer authorized to act as Referee under the Welfare Code, taken as a whole?"

Section 208.080(3), RSMo, 1955 Supp., provides:

"The director of the department of public health and welfare shall give the applicant reasonable notice of, and opportunity for,

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a fair hearing in the county of the residence of the applicant. The hearing shall be conducted by the director of the department of public health and welfare or a referee duly appointed for such purpose. Every applicant on appeal to the director of the department of public health and welfare shall be entitled to be present, in person and by attorney, at the hearing, and shall be entitled to introduce into the record at said hearing any and all evidence, by witnesses or otherwise, pertinent to such applicant's eligibility, and all such evidence shall be taken down, preserved and shall become a part of the applicant's record in said case, and upon the record so made the director of the department of public health and welfare shall determine all questions presented by the appeal, and shall make such decision as to the granting of assistance and the amount thereof as in his opinion is justified and in conformity with the provisions of this chapter."

It is our understanding that at least one of the attorneys employed by the Division of Welfare acts as referee in hearings conducted under this section. It is our further understanding that the position of referee is one for which the Personnel Department has prescribed the qualifications and the functions to be performed. We also understand that the referee, in hearing an appeal to the Director of the Department of Public Health and Welfare, does participate in the hearing by interrogating witnesses and by endeavoring to obtain, as completely as possible, all of the facts pertinent to the subject matter of the appeal. Presumably, when you speak of his "activity conducting the defense," this is the activity to which you refer, inasmuch as there is no other attorney in the hearing who represents the Division of Welfare.

Section 208.080(3), above quoted, in providing for the referee's conducting a hearing, still requires the decision to be made by the Director of the Department of Public Health and Welfare. The function of the referee is to procure, for the benefit of the Director, all of the evidence which will enable the Director to decide the matter. In such circumstances, we do not believe that the referee's participation in the hearing would be a violation of the appellant's constitutional rights or that it would prevent the procedure's being a fair hearing. Of course,

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it would be possible to conceive of some circumstances under which the referee's conduct might be such as to cause the hearing to be unfair. In such circumstances, such unfair conduct of the hearing would be grounds for reversal of the cause on appeal to the circuit court under Section 208.100, RSMo 1949. We shall not attempt to detail matters which might cause the hearing to be considered unfair. Each such hearing would have to be considered on its own facts. However, the mere fact that the referee is also an attorney employed by the Division would not, in our opinion, cause the hearing to be unfair.

The only reference which we find in the reported cases in this state on this subject is found in the case of *Bollinger v. State Dept. of Public Health and Welfare* (St. Louis Court of Appeals), 254 SW2d 257. In that case the hearing had been conducted before a referee, and the court stated, 254 SW2d 1.s. 259:

"In the case at bar there could be no contention that the hearing itself was not conducted in a fair and impartial manner. Respondents were present in person and represented by an attorney. The referee carefully explained the issues and procedure. Without any restraint or objection the applicants were permitted to submit all the evidence they desired to offer."

The question presented by you is somewhat akin to the often-discussed problem of an administrative agency's acting as both prosecutor and judge in matters before it. However, as pointed out in 42 Am. Jur., Public Administrative Law, Section 21, page 312, Footnote 2:

"The spectacle of an administrative tribunal acting as both prosecutor and judge has been the subject of much comment but it has never been held that such procedure denies constitutional right."

Under the circumstances, we are of the opinion that the conduct of the hearings in the matter referred to in your opinion request does not violate constitutional or statutory rights and an objection prior to the hearing would not affect the situation.

As for your inquiry regarding the authority of the Director, that his power is limited by the Constitution and statutes, is elementary. In 43 Am. Jur., Public Officers, Section 249, page 68, the following statement of the law in this regard is found:

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"In general, the powers and duties of officers are prescribed by the Constitution or by statute, or both, and they are measured by the terms and necessary implication of the grant, and must be executed in the manner directed and by the officer specified. If broader powers are desirable, they must be conferred by the proper authority. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions. \* \* \*"

Of course, the Director also has incidental and implied powers necessary to enable him to perform the duties expressly imposed upon him. Thus, in 43 Am. Jur., Public Officers, Section 250, page 69, the law is stated as follows:

" \* \* \* The duties of a public office include all those which fairly lie within its scope, those which are essential to the accomplishment of the main purposes for which the office was created, and those which, although incidental and collateral, are germane to, or serve to promote or benefit, the accomplishment of the principal purposes. But these implications are not to be extended beyond the fair inferences to be gathered from the circumstances of each case."

As for your question as to the authority of any officer to act as a referee under the Welfare Code, we are of the opinion that Section 208.080, above quoted, is sufficient to authorize the Director of the Department to designate referees to hear appeals to his office. In such circumstances, the matter of what particular officer shall be designated to perform such function rests within the discretion of the Director and his designation is sufficient to confer the authority upon the person so designated.

#### CONCLUSION

Therefore, it is the opinion of this office that:

1. An attorney employed by the Division of Welfare may be designated as referee by the Director of the Department of Public Health and Welfare to hear appeals to the Director under Section

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208.080, RSMo, 1955 Supp.; such referee may actively participate in the hearing conducted by him; and an objection by the appellant prior to the hearing against the attorney's acting as referee would not preclude such procedure;

2. The Director of the Department of Public Health and Welfare and the Director of the Division of Welfare possess only such authority as may be conferred upon them by the Constitution and statutes and such as necessarily might be implied to enable them to perform the duties expressly imposed upon them;

3. The designation by the Director of the Department of Public Health and Welfare of a person to act as referee in a hearing, under Section 208.080, RSMo 1949, is sufficient to confer authority to act in such capacity upon the person so designated.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON  
Attorney General

RRW:ml