

MAYOR:
OFFICE OF PROFIT:
FEDERAL EMPLOYEE:

(1) Under Article 7, Section 9 of the Missouri Constitution of 1945, the mayor of a third-class city in the State of Missouri would be the holder of an office of profit in this state. (2) A civil service employee under the Small Business Administration Act of the Federal Government is not necessarily by virtue of such employment a holder of an office of profit under the United States, but depending upon the facts of each situation of employment that civil service employee might be deemed an employee as distinguished from a holder of public office.

July 21, 1958

FILED
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Mr. Dick B. Dale, Jr.
Attorney at Law
110 South College
Richmond, Missouri

Dear Mr. Dale:

This is in response to your request for an opinion from this office of May 26, 1958, which is stated as follows:

"I would appreciate an official opinion from your office concerning an interpretation of article seven section nine, of the Constitution of Missouri of 1945.

"The Mayor of the City of Richmond, Mayor James A. Weltmer, has recently been appointed as a civil employee under the small business administration act of the Federal Government. This is a civil Service appointment, and it is my understanding that the appointment will be permanent after Mr. Weltmer has served for ninety (90) days. It would appear that under article seven section nine of the Missouri Constitution Mr. Weltmer could no longer serve as Mayor of the City of Richmond, which is a third (3rd) class City. There is the possibility, however, that a Mayor of a municipality would not be 'any office of profit in this state' as set forth in article seven section nine. The question would then be whether a Mayor of a third (3rd) class City, receiving a salary as such Mayor could remain in office after having been appointed to a Civil Service appointment for profit under the Government of the United States.

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"When Mr. Weltmer was first appointed to the Civil Service position, he felt that he could not continue to serve as Mayor; however, it is my understanding that he has a letter from the Civil Service Bureau which states in effect that his office as Mayor is not inconsistent with his Civil Service appointment under the small business administration act.

"Mr. Weltmer has indicated that he does not want to remain in office as Mayor if by so doing he is violating any constitutional provision of the State of Missouri. If it is the opinion of your office that a Mayor of the third (3rd) class City is included in article seven section nine, then I will merely show the opinion of your office to Mayor Weltmer, and he will resign. I do not anticipate any ouster proceeding of any nature in this matter. If, for any reason you would be of the opinion that the returning of such an opinion on this question would be beyond the perview of your office, I would appreciate any authority which you might be in a position to give me concerning the cited constitutional provision."

As you are aware we are confronted with some problems which arise in the interpretation of Article 7, Section 9, of the Missouri Constitution of 1945. We state that section as follows:

"No person holding an office of profit under the United States shall hold any office of profit in this state, members of the organized militia or of the reserved corps excepted."

You may also have observed that this section is changed somewhat from Article 14, Section 4, of the Missouri Constitution of 1875 which provided that:

"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."

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It would appear that in view of the 1945 constitutional section any office of profit "in this state" would be more likely to include an office of profit not necessarily an office "under this state."

We think that there is no question but that the office of mayor is a public office in this state. The courts of Missouri have in numerous cases defined what constitutes a public office, and we quote a definition which was approved in *State ex rel. Pickett vs. Truman*, 64 S.W. 2d, 105:

"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."

The Supreme Court of Missouri in the Truman case 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."

We feel that under the definitions set forth that the office of mayor in a third-class city is a public office in this state.

Hence, we come to the question of whether the public office of mayor of a third-class city is an office of profit in this state. Section 11, 46 C.J., page 927, states the rule as to an office of profit and an honorary office, wherein it says:

"Offices are classified with reference to compensation as offices of profit and honorary offices. An office of profit, or a lucrative office, is one to which is attached a compensation for services

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rendered. An honorary office is one to which are attached no fees, perquisites, profits, or salary."

In following this rule there would seem to be no question in our mind but that the office of mayor of a third-class city, assuming it one to which is attached a compensation for the services of mayor, is an office of profit in the State of Missouri.

Nevertheless, in the situation which you have set forth in your letter it is our belief that the appointment of a person as a civil employee under the Small Business Administration Act of the Federal Government is not necessarily an appointment to an office of profit under the United States. Again, we come to the problem as to the distinction between the public office and a position of mere employment. It would appear that we should use the criteria as set forth in the Truman case, and that in so doing there may be an instance in which a civil employee is not a holder of an office of profit under the United States. This determination would rest on the particular facts of each case of employment, and it may be that you are in a position to readily determine that Mayor James A. Weltmer, by holding the office of mayor of the City of Richmond, Missouri, would not be in violation of Article 7, Section 9, of the Missouri Constitution of 1945 while also a civil employee of the Federal Government.

For your convenience we also enclose a former opinion of this office, November 8, 1945, which may be of assistance in determining whether Mayor Weltmer is a civil service employee.

CONCLUSION

It is the opinion of this office that:

(1) Under Article 7, Section 9 of the Missouri Constitution of 1945, the mayor of a third-class city receiving compensation for his services as mayor, in the State of Missouri, would be the holder of an office of profit in this state.

(2) A civil service employee under the Small Business Administration Act of the Federal Government is not necessarily, by virtue of such employment, a holder of an office of profit under the United States, but, depending upon the facts of each situation of employment, that civil service employee may be deemed an employee as distinguished from a holder of public office.

Sincerely yours,

JOHN M. DALTON
Attorney General