

DENTAL BOARD:

Members of the Missouri Dental Board are state officers within the meaning of the constitutional prohibition against pay raises during current term. S. B. 216 imposes additional duties but manifests no intent that the pay raise effected by S.B. 154 should be compensation therefor.

STATE OFFICERS:

July 5, 1961



Reuben R. Rhoades, D.D.S.
Secretary, Missouri Dental Board
Central Trust Building
Jefferson City, Missouri

Dear Dr. Rhoades:

We have your letter of recent date which reads as follows:

"Senate Bill No. 216, known as the 'Specialty Law' and Senate Bill No. 154, raising the per diem of the members of the Missouri Dental Board, introduced and passed by the 70th General Assembly, were signed by Governor Blair, and became effective August 29, 1959.

"Senate Bill No. 216 has added many duties, including the giving of additional examinations, to the services rendered by the board members.

"Senate Bill No. 154 repealed Section 332.310 RSMo. 1949, and enacted in lieu thereof one new section to be known as Section 332.310, to read as follows:

'Out of the dental fund the members of the board shall receive as compensation twenty-five dollars for each day actually engaged in the duties as members of the Missouri Dental Board
....'

"The Comptroller of Missouri has advised the Missouri Dental Board that this section would not become effective until each member of our board is reappointed for a new term, regardless of the extra duties imposed by Senate Bill No. 216.

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"The Missouri Dental Board feels that it was not the intent of the members of the Legislature to raise the per diem of each member only upon re-appointment, thus discriminating against the remaining members of the board who would continue to receive the old per diem of \$5.00.

"Our board, in session in Kansas City, Missouri, Monday, January 30, 1961, is requesting a written opinion from you concerning the raising of the per diem, as the appropriation bills are now pending before the present session of the Legislature, and we are anxious to include this raise, if, in your opinion, we are entitled to same."

Comparison of the statute which emerged from Senate Bill No. 154, Seventieth General Assembly, and the former Section 332.310 reveals that the sole change with regard to compensation received by board members is the substitution of the words "twenty-five dollars" for the words "five dollars". Both the old and the new section provide the amount specified therein should be paid to the members "for each day actually engaged in the duties as members of the Missouri Dental Board". No reference is made in the revised version of 332.310 to any new or additional duties, though some were assigned by the enactment of Senate Bill No. 216, Seventieth General Assembly.

Senate Bill No. 216 repealed former Section 332.030 and re-enacted it adding another paragraph which permits the board to require additional qualifications of any licensee who specializes in a particular area of dentistry. Senate Bill 216 also brought into existence four new sections (332.062, 332.064, 332.066, 332.069) which set out the requisite qualifications of those who may be certified as specialists without examination, require all other licensed dentists to take an examination prior to certification, provide for the appointment of a board of examiners in the various specialties to monitor the qualifications of the examinees as well as to originate and conduct the examinations. The new sections also set out the fees related to the various steps of certification, examination, renewal, compensation of examiners, etc.

Senate Bill 216 also amended Section 332.160. These revisions were minor and obviously directed at harmonizing that section with the newly created ones.

Your inquiry as to whether the members of the board are entitled to the increased compensation provided for in the amended Section 332.310 places the following questions before us: Are

the members of the Board state officers within the meaning of Section 13, Article VII of the 1945 Constitution; if so, does the additional twenty-dollars per day provided for in the amended form of the cited statute amount to an "increase" as prohibited by Section 13, Article VII of the 1945 Constitution?

That section of the Constitution provides as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

In 1933, members of the State Board of Health were held to be state officers within the meaning of the constitutional provision which gave the Supreme Court jurisdiction in cases where any state officer was a party. *State v. State Board of Health* (Mo. Sup. 1933) 65 SW2d 943. However, the issue upon which that determination was made was entirely different from the one presented by the instant case. For that reason, we will examine the cases where the ingredients of state officer status were discussed with relation to Section 13, Article VII of the 1945 Constitution.

The most recent case in which this subject was extensively discussed is *State ex rel. Webb v. Pigg*, (Mo. Sup. 1952) 249 SW 2d 435, an original proceeding in mandamus brought by the clerk of the Springfield Court of Appeals to compel payment of a pay raise awarded him by that court during his term of office. The principal issue was whether the clerk was a "state officer" within the meaning of the constitutional provision with which we are here concerned.

After a thorough examination of the law on this subject, our Supreme Court held that the clerk was not a "state officer" and thus could receive the pay raise during his current term. In arriving at that determination the court said, l.c. 437-438:

* * *"[1] This court has questioned the possibility of specifically defining the words, 'public office', 'public officer', or 'state officer', but it has determined each case involving the matter in question in view of the particular facts presented and the applicable statutes and constitutional provisions. Among the matters taken into consideration are the duties to be performed, the method of performance, the end to be attained, the powers granted and, generally, the surrounding circumstances. These circumstances include tenure, oath, bond, official designation, compensation and the dignity of the position in question, but no particular fact or circumstance is

considered to be conclusive. (Citing cases).

"In the case of State ex rel. Walker v. Bus, 135 Mo. 325, 331, 36 SW 636, 637, 33 L.R.A. 616, the court said: 'A public office is defined to be "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." Mechem, Pub. Off. 1. The individual who is invested with the authority and is required to perform the duties is a public officer.' And see State ex rel. Zevely v. Hackmann, 300 Mo. 59, 254 SW 53, 55; State ex inf. McKittrick v. Whittle, 333 Mo. 705, 63 SW 2d 100, 102. This definition has been somewhat modified by the subsequent decisions of this court.

"[2] The parties to this action in effect concede that, under the more recent decisions of this court, a different test has been formulated and applied in reaching a conclusion as to whether or not a particular official is a 'state officer' within the meaning of the quoted constitutional provision. In order to be considered a 'state officer' within the purpose and meaning of said constitutional provision, the official in question must have been delegated a portion of the sovereign power of government to be exercised for the benefit of the public and such delegation of sovereign power must be 'substantial and independently exercised with some continuity and without control of a superior power other than the law.' (Citing cases).

"[3] In considering the meaning of the term 'sovereign power', and as illustrative thereof, this court has repeatedly quoted from the case of State ex rel. Landis v. Board of Commissioners of Butler County, 95 Ohio St., 157, 115 N.E. 919, 920, 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.' (Citing cases).

"[4] Whether or not relator has been delegated any portion of the sovereign functions of government within the afore-said definition and the extent to which he has been invested with such 'sovereign power' to be exercised by him for the benefit of the public, independently and without control of a superior power other than the law, can be ascertained only by a careful review of the applicable statutory and constitutional provisions."

Summing up its position, the Court said, l.c. 441:

"In recent opinions of this court special emphasis has been placed upon whether the particular individual in question performs his duties independently and without control of a superior power other than the law, that is, whether he is endowed by law with the power and authority to use his own judgment and discretion in discharging the sovereign functions of government which have been vested in him by statute and which functions are to be exercised by him for the benefit of the public."

In *State ex rel. Scobee v. Meriwether*, (Mo. Sup. 1947) 200 SW 2d 340, wherein a court reporter was held not to be a "state officer" as contemplated by Section 13, Article VII of the 1945 Constitution, the court en banc quoted with approval the following from *Pickett v. Truman*, 64 SW 2d 105, 106:

* * *"[1] Numerous criteria, such as (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."

Another criterion also employed in many cases in this area is whether the duties of the office in question "are co-extensive with the boundaries of the state." *State ex rel. Holmes v.*

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Dillon, (Mo. Sup. 1886) 2 SW 2d 417, 419; State ex rel. Rucker v. Hoffman, (Mo. Sup. 1926) 288 SW 16, 17; State ex rel. Kirks v. Allen (Mo. Sup. 1952) 250 SW 2d 348, 350.

Independence in the exercise of some part of the sovereign power as a measure of officer status seems to be the element which appears most frequently in cases on this subject; and, perhaps, provides the firmest foundation on which a judgment can be rendered. Indeed, the other criteria - taking of an oath, posting of a bond, continuing nature of duties - all seem incidental to this test inasmuch as they simply tend to reflect the presence or absence of such freedom within a particular area. In State ex inf. McKittrick v. Bode, (Mo. Sup. 1938) 113 SW 2d 805, 806, the Court said: "It is not possible to define the words 'public office or public officer'," yet in the same paragraph the court observed "it is not necessary that all criteria be present in all cases. For instance, tenure, oath, bond official designation, compensation, and dignity of position may be considered. However, they are not conclusive. It should be noted that the courts and text-writers agree that a delegation of some part of the sovereign power is an important matter to be considered."

Discussing the quoted portion of the Bode case in a subsequent opinion, Kirby v. Nolte, (Mo. Sup. 1942) 164 SW 2d 1, the court en banc characterized the definition of public officer as "rather vague" and continued, l.c. 8: "But the definition is clear and satisfying if to it the further requirements be added, that such power must be substantial and independently exercised with some continuity and without control of a superior power other than the law."

Section 332.290, RSMo 1959, provides that after the running of the initial terms of those appointed to the Missouri Dental Board "all members shall be appointed for terms of five years each," that the Board "shall provide and maintain for itself a seal," for authenticating documents and that "All courts shall take judicial notice of said seal." Section 332.300 requires a bond of the secretary-treasurer of the board. Other duties and powers of the board include issuance of licenses to and registration of persons qualified to practice dentistry, 332.020; accreditation of dental colleges, 332.030, 332.090; preparation and conducting of qualifying examinations for those desiring to enter the general practice of dentistry as well as for specialists 332.050, 332.030; convening of hearings and the power to suspend or revoke licenses for cause, 332.160, 332.180; issuance of subpoenas to compel attendance at such hearings, 332.340; inspection of any dental office and investigation of any violation of the dental laws, 332.350. The board has similar powers and duties with respect to the regulation of dental hygienists, 332.400 through 332.580.

Legislative control of the practice of medicine in Missouri has recently been scrutinized judicially in several "naturopath" cases and held to be a valid exercise of the sovereign power. In *State ex rel. Collet v. Scopel*, (Mo. Sup. 1958) 316 SW 2d 515, a petition for an injunction prohibiting the unlicensed practice of medicine by a naturopath was dismissed in the trial court. The Supreme Court remanded the case with directions that the naturopath be permanently enjoined, stating, l.c. 518: "It is clear that for protection of the public health and welfare, the legislature is empowered to regulate the practice of medicine in such manner as it reasonably may believe to be proper and wise."

In a case which was factually very similar to *Scopel*, the Supreme Court again ordered a permanent injunction against a naturopath who contended that legislative regulation of naturopathy violated the Fourteenth Amendment of the United States Constitution in that it deprived him of the inalienable right to follow a common occupation. In confirming the state's authority to dictate the qualifications of those who would treat the infirm, the Court said, "Medical practice acts are upheld as valid exercises of the police power for the protection of the public health and safety." *State ex rel. Collet v. Errington*, (Mo. Sup. 1958) 317 SW 2d 326, 330; *Certiorari denied*, 79 S. Ct. 1122, 359 U.S. 992, 3 L. Ed. 980.

The *Scopel* and *Errington* cases unequivocally establish the existence of sovereign power in the control of the practice of medicine, and, by analogy, in the practice of dentistry. That power to regulate the practice of dentistry in Missouri has been delegated in part to the Missouri Dental Board is obvious from the statutes creating and empowering the board.

In view of the powers and functions of the board, there can be little doubt that the members of the board are "state officers" within the meaning of Section 13, Article VII. The members have tenure, official designation, compensation, and dignity inherent in membership in such a body. Its powers are "co-extensive with the boundaries of the state" and are exercised "without control of a superior power other than the law." The board, to paraphrase *State ex rel. Webb v. Figg*, *supra*, has authority to exercise its judgment and discretion in discharging the sovereign functions of government which have been vested in it by statute and which functions are exercised by it for the benefit of the public. In short, the members of the board enjoy every significant characteristic of state officer status as defined by the courts of this state.

It is now necessary to inquire whether the new per diem rate is an increase of the type prohibited by Section 13, Article VII, of the 1945 Constitution, for "There can be no doubt but that the legislature may award extra compensation to an incumbent for the

performance of certain newly imposed duties without violating the constitutional inhibition under consideration." *Mooney v. County of St. Louis*, (Mo. Sup. 1956) 286 SW 2d 763, 766. The new statutory sections emerging from Senate Bill No. 216 unquestionably impose additional duties on the board, but the concurrently re-enacted Section 332.310 does not relate these duties to the raise in per diem.

In *Mooney v. County of St. Louis supra*, an almost identical factual situation existed. The plaintiffs therein were all former members of the St. Louis County Board of Election Commissioners who were attempting to collect additional salary for a certain period. During their term of office, the Missouri Legislature had voted an increase in their salaries and had concurrently passed another bill which substantially increased the duties of the board by raising from nine to fifteen the number of cities under the board's jurisdiction. As in the instant case, both bills became law on the same date but the increase in salary was not denominated in either bill as compensation for the additional duties.

It was conceded by the plaintiff board members that they were "'officers' as would come within the scope of the constitutional prohibition * * *" l.c. 765. This left as the principal issue whether the legislature intended the increase in pay as compensation for the added duties. On this subject, the Court said, l.c. 766:

"[5-6] * * * At every session of the legislature laws are enacted which affect the duties of many state and county officers. The mere fact that such legislation may result in an increase in the work and responsibility of an officer does not entitle him to claim additional compensation. We must assume that the members of the General Assembly were fully cognizant of the instant constitutional limitation. In all of the cases we have examined in which an increase during the term of office has been upheld, the legislature, in the Act creating the additional duties, has specifically provided that the extra compensation was for the performance of those duties. We do not intend to say that this is the only method of proving the legislative intent, but it certainly is the most satisfactory and conclusive proof and apparently is the customary method of legislative expression. * * *"

Speaking of the two bills, the Court observed, l.c. 767, *id.* "The most that can be said is that they both dealt with the same general subject in that they each related to the St. Louis County

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Board of Election Commissioners and were enacted at the same session of the General Assembly. This, we are convinced, is not sufficient to support the judgment" for the plaintiffs below.

Inasmuch as there is no more in the instant case indicative of legislative intent to provide compensation for the additional duties than there was in the Mooney case, we must conclude, as the Court did, that no such intention existed and that the increase in per diem salary herein is prohibited during the terms of those serving when the increase became law.

CONCLUSION

It is the opinion of this office that the increase in the per diem salary of the members of the Missouri Dental Board effected by Senate Bill No. 154, Seventieth General Assembly, may benefit only the members of the board who were or will be appointed subsequent to August 29, 1959, the effective date of the bill.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Albert J. Stephan, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

AJS:BJ