Opinion Request No. 178 answered
by letter by Joseph Nessenfeld

October 11, 1963

Honorable Charles D. Trigg
Comptroller and Budget Director
Jefferson City, Missouri

Dear Mr. Trigg:

You have requested our opinion concerning the liability of the state for certain items included in the list of expenses certified to you by the Board of Election Commissioners of St. Louis County, Missouri, following the special election held on March 6, 1962. At that election a question was submitted to a vote of all the electors throughout the state. No other question was submitted for a vote in St. Louis County at the same election. Section 111.405, RSMo., provides that in such situation "all costs of such election shall be borne by the state, and after audit by the state comptroller, the state treasurer shall pay the amounts claimed by and due the respective political subdivisions out of any moneys appropriated by the legislature for that purpose."

The certification by St. Louis County contains thirteen items of costs. The first six of these items are not questioned. The precise question with which you are concerned involves the construction of the statutory phrase "all costs of such election." The statute does not define the phrase and we have found no case which contains a definition thereof applicable to the instant facts. It is clear, however, that the Legislature intended to distinguish between those costs which constitute part of the administration of the office of whatever official performs the duties of conducting elections and those expenses which are specifically incurred therefor.

In our opinion, the phrase "costs of such election" means all those costs which in no event would have been incurred but for the election. By way of example, items such as salaries of judges and clerks of election, rent of polling places and the cost of printing ballots would in no event

have been incurred but for the election. In this frame of reference we have considered each of the Items 7 to 13, inclusive, and have concluded that Items 7 to 11, inclusive, may properly be deemed "costs of such election" but that Items 12 and 13 do not constitute part of such costs.

Items 7 to 11 may be considered together inasmuch as they all relate to a pre-election canvass. A part of Item 7 (which we are informed amounts to $18.48) is for postage for absentee ballots, an expense which in any view is part of the costs of the election. The balance of Item 7, amounting to $869.34, is for postage in connection with the pre-election canvass.

Section 113.210, RSMo., paragraph 5, applicable only to St. Louis County, specifically provided:

> "The board of election commissioners shall order a canvass of all registered voters not later than three weeks before each election and revise each canvass in the same manner as provided for in sections 113.010 to 113.420." (Emphasis supplied)

It is to be noted that paragraph 3 of that section, 113.210, specifically refers to special elections in fixing the closing date of registration. And Section 213.290, RSMo., specifically provided for a revision of the registration preceding special elections and the latter section refers to the duty of the canvassers during such revision.

When all of these statutes are read together as part of a consistent whole, it is clear that the Board of Election Commissioners of St. Louis County was required to order a canvass before any special election as well as to order a canvass before any general or primary election. Therefore, such board was under the specific statutory duty to order a canvass before the special election of March 6, 1962, and solely by reason thereof.

Parenthetically, it is to be noted that Section 113.210 was amended by the 72nd General Assembly (Senate Bill 333) so that in the future a canvass will be required in St. Louis County only before general and primary elections. The effect of the amended section, which goes into effect October 13, 1963, is

to eliminate any requirement of a canvass preceding a special election and further evidences the legislative recognition that theretofore such a canvass was mandatory.

In view of the fact that the pre-election canvass ordered and held by the Board of Election Commissioners of St. Louis County was in terms specifically required by statute as part of the election procedure, the board had no discretion in the matter. And it is our opinion that the costs of such canvass constitute part of the costs of the special election. The canvass, as required by Section 113.270, RSMo., was conducted by the clerks of election rather than by the board's employees as such. The costs thereof would in no event have been incurred but for the election.

It follows that Item 10 (amount paid for salaries of the canvass clerks), Item 9 (the cost of printing forms used in the canvass), Item 8 (cost of preparation of voter registration lists for the canvass), and Item 7 (that portion thereof for postage in connection with the canvass), all of which were part of the costs necessarily incurred in conducting the mandatory pre-election canvass and which in no event would have been incurred but for the election, are proper items of expenses constituting part of the costs of the election for which the state is liable.

Item 11 ($556.80) is the amount paid for automobile mileage allowed canvassers in pre-election canvass. Our investigation has revealed that the Board of Election Commissioners authorizes such mileage allowances to be paid in those instances <u>only</u> where it is necessary to enable the canvassers to perform their duties as required by the statute. It is to be noted that St. Louis County covers a total area of some 496 miles, and as the board has pointed out to this office "it would be impossible to conduct a canvass in many of our precincts without the extensive use of transportation facilities." Such mileage allowances are not made as a matter of course but only where they are found necessary in order to conduct a proper canvass within the period of time allotted. Viewed in this light, it is our opinion that such mileage payments constituted expenses incurred in the necessary fulfillment of the statutory duty of conducting the pre-election canvass, and therefore Item 11 is a proper item of expense constituting part of the costs of the special election for which the state is liable.

Item 12 is the amount paid for salaries of "temporary employees in Election Board Office" during the period February 1 to March 9, inclusive. The Board of Election Commissioners of St. Louis County is authorized by statute to employ assistants and clerks in order to enable such board properly to perform its statutory duties. We find no statutory limitation upon the number of such assistants and clerks, except with respect to those who are paid monthly on a yearly basis. "All other assistants, if any, employed by the board" are paid on a daily basis. Section 113.180, RSMo., authorizes a maximum number of employees who are paid monthly and the board has informed us that it employs such maximum number as a regular policy. However, the volume of work incident to the conduct of a registration, canvass and election is greater than can be handled by the total number of assistants and clerks paid monthly, and for such reason additional assistants on a daily basis were employed to share the work load.

The board has designated the employees paid monthly as "regular" employees and those employed on a daily basis as "temporary" employees. Item 12 refers to the latter group of employees. In our view, such assistants are "temporary" only in the sense that their services were discontinued shortly after the special election was held. They are no more "temporary" than would be additional assistants and clerks employed on a monthly basis if the statute had authorized a greater number of such assistants. Parenthetically, Section 113.180 as amended by the 72nd General Assembly, effective October 13, 1963, now authorizes an additional twenty-four clerks in the category the board designates "regular," but does not affect the board's authority to employ additional assistants payable on a daily basis.

The determination of the proper number of clerks and assistants necessary to enable the board to carry out its prescribed duties is within the administrative discretion of the board, whether such employees are those paid on a monthly or on a daily basis. The services performed by those assistants paid on a daily basis are no different than those performed by the assistants and clerks paid at a monthly rate, and the amounts paid them as compensation on a daily basis no more constitute part of the costs of the election than do the amounts paid these assistants and clerks employed at a monthly rate.

While it is no doubt true that the additional work load resulting from an intermediate registration, canvass and election was a major factor (if not the sole factor) in the board's decision to employ additional assistants, the expense incident thereto does not constitute a direct cost as such of the election. The increase in the number of assistants and the cost thereof cannot be said to be such as would in no event have resulted or been incurred but for the election. That is, had the number of the so-called "regular" employees authorized by the statute in 1962 been greater, it is obvious that the "temporary" employees would not have been employed. Hence, their employment resulted from the fortuitous circumstance that the number of "regular" employees were insufficient to handle the work load in the judgment of the board.

In this connection, we take note of a statement made by the board to the effect that a part of the increased work load resulted from holding an intermediate registration which "would tend to add to such work because of an increase in the number of new registrations to be processed." As indicated above, the pre-election canvass is not conducted by the board's assistants, either "regular" or "temporary," but by clerks of election, so that the cost thereof is an identifiable cost which could not have been incurred but for the election. On the other hand, the amount paid as compensation to assistants and clerks of the board is not identifiable as specifically incurred for the election.

The remaining Item 13 ($603) is the amount paid for supper money allowance to employees on the "regular staff" of the election board during a period of overtime work. Without regard to whether the board has authority to make such allowance, it is clear that such item is not a cost which in no event would have been incurred but for the election. It resulted from the fact that the board required the overtime work of its monthly employees rather than employ additional assistants on a daily basis. We do not believe that such item is any more a cost of the election than would be a payment of lunch money to the same employees. In any event, what we have said as to the liability of the state for the cost of the additional assistants employed on a daily basis is determinative of this issue.

Summarizing, it is the opinion of this office that the state is liable for the payment of Items 7 to 11 inclusive, and is not liable for the payment of Items 12 and 13 of

Honorable Charles D. Trigg

the amounts certified by St. Louis County in connection with the special election of March 6, 1962.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

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