

May 24, 1965



Honorable Warren E. Hearnes  
Governor  
State of Missouri  
Executive Office  
Jefferson City, Missouri

Dear Governor Hearnes:

This letter is being written pursuant to your request for advice concerning the appointment of non-residents of Missouri to the State Mental Health Commission.

In determining whether such Mental Health Commission members must be residents of the State of Missouri, we first look to the statutes dealing with such commission.

The statute authorizing appointment of members to the State Mental Health Commission and prescribing their powers and qualifications is Section 202.031, RSMo 1959. This section does not by its terms require residence in the State of Missouri.

However, Section 8 of Article VII of the Missouri Constitution of 1945 does contain a residency requirement for officers of this state. This section reads as follows:

"No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment, except that the residence in this state shall not be necessary in cases of appointment to administrative positions requiring technical or specialized skill or knowledge." (Emphasis ours)

From the terms of this constitutional provision, it is seen that in order for the Governor to appoint non-resident members to the State Mental Health Commission, such person must either: (1) Not be "officers" in the sense of this constitutional provision, or (2) Such positions on the State Mental Health Commission must be "administrative positions requiring technical or specialized skill or knowledge" so as to fall within the exception of Section 8, Article VII of the Missouri Constitution of 1945.

It is our opinion that members of the State Mental Health Commission are "officers" within the sense of the provision of Section 8, Article VII. Criteria bearing upon the question of who is a public officer is discussed in the case of State ex rel. v. Bus, 135 Mo. 325, 331, 332 where 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. Offices, 1. The individual who is invested with the authority and is required to perform the duties is a public officer.

"The courts have undertaken to give definitions in many cases, and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law and discharges some of the functions of government he will be a public officer. \* \* \*."

In State inf. McKittrick v. Bode, 342 Mo. Rep. 162, 113 S.W. 2d 805, 806, 807, the Missouri Supreme Court discussed the question of who is a public officer under Section 10 of Article VIII of the Missouri Constitution of 1875, now Section 8 of Article VII under our present Constitution. The Court said:

"It is not possible to define the words 'public office or public officer.' The cases are determined from the particular facts, including a consideration of the intention and subject-matter of the enactment of the statute or the adoption of the constitutional provision. In other words, the duties to be performed, the method of performance, end to be attained, depository of the power granted,

and the surrounding circumstances must be considered. In determining the question it is not necessary that all criteria be present in all the 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. The question is considered at length in 46 C.J. p. 924. In determining that a deputy sheriff was a public officer, we stated the rule as follows:

"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." Meehem, Pub. Off., 1. The individual who is invested with the authority, and is required to perform the duties, is a public officer.

"The courts have undertaken to give definitions in many cases; and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law, and discharges some of the functions of government, he will be a public officer. \* \* \*".

Chapter 202 of the Revised Statutes 1959 relating to members of the State Mental Health Commission contains provisions which demonstrate that such members are officers under the above cited authorities. Section 202.031 provides in part:

"1. There is hereby created a 'State Mental Health Commission' composed of five members, to be appointed by the governor by and with the advice and consent of the senate, at least three of whom shall be physicians skilled in the treatment of nervous and mental diseases and none of whom may be otherwise employees of the state of Missouri.

\* \* \* \* \*

"6. (1) The commission shall advise the director of the division of mental diseases as to all phases of professional standards including patient care, training of personnel, establishment of treatment programs, obtaining adequate staffs, establishment of medical and statistical records and operation of practices in order that they may be compatible with professional requirements.

"(2) The commission shall advise the director in the approval and guidance of research projects and the distribution of research funds.

"(3) The commission shall assist the director in establishing and maintaining the best possible practices in all mental institutions."

The ultimate holding in the Bode case cited above where the court quoted from the Bus case, supra, is that a public officer is one who receives his authority from the state and discharges some of the functions of government in the performance of his official duties. We believe that members of the state mental health commission qualify under these authorities and thus are "officers" within the meaning of Section 8, Article VII, Constitution of Missouri 1945.

The next problem then is -- are such members of the commission "administrative positions requiring technical or specialized skill or knowledge" within the meaning of the exception clause of Section 8, Article VII, of the Constitution. The Supreme Court of Missouri has not apparently had occasion to define what is meant by "administrative positions" as used in this clause. Likewise, we have been unable to find cases that definitely define "administrative positions."

Bouvier's Law Dictionary, Third Revision being the Eighth Edition, Volume 1, page 138, defines "Administration of Government" as:

"The management of the executive department of the government. Those charged with the management of the executive department of the government."

Black's Law Dictionary, Fourth Edition, page 65, defines "administer" as:

"To manage or conduct; to discharge the duties of an office; to take charge of business; to manage affairs; \* \* \*."

Black's Law Dictionary at page 67 defines "administrative officer" as:

"Politically and as used in constitutional law, an officer of the executive department of government and generally one of inferior rank; legally a ministerial or executive officer as distinguished from a judicial officer."

The Fair Labor Standards Act and regulations of the administrator issued pursuant thereto have made definite and clear distinctions between executive positions and administrative positions. See 56 C.J.S., Section 151 (12) b, pages 666-670, and Section 151 (12) c, pages 670-672. While these distinctions between executive and administrative positions in business enterprises have become well established by many cases with much legal writing on the subject, it is likely that the framers of the constitution did not have these definitions in mind.

It seems more likely that the framers of the constitution had in mind an officer or a position more nearly akin to the definition in 67 C.J.S., Officers, Section 3, page 105:

"An officer who is neither a judicial nor a legislative officer necessarily belongs to the executive department of the government, and is an executive or administrative officer, whether it be a state, county, or precinct office. As contradistinguished from judicial officers, all executive officers are ministerial."

See also discussion, 42 Am. Jur., Public Officers, Section 29, page 899-900.

This view is confirmed by the debates on this section of the constitution in the Constitutional Convention. See pages 788-803; 5682-5689; 5716; 5965-5968.

We hold, therefore, that "administrative positions" was intended by the framers of the constitution to mean persons possessing either technical or specialized skill or knowledge in either executive or administrative positions, as well as persons in positions in somewhat more subordinate positions who possessed unusual special training and skills. It was intended to include persons who might be chosen to administer and conduct the affairs of departments, agencies and institutions. We find no evidence that it was intended to apply to boards and commissions.

Referring back again to Section 202.031 respecting the duties imposed on the Mental Health Commission, it is apparent that the primary function of the commission is advisory in nature. Their principal duties are to advise the director with respect to a number of matters set out in the statute. It is possible to say that the commission has one executive function and that is to choose the director. Nevertheless, its principal function is advisory. Nothing in the exception clause of Section 8, Article VII, indicates that it has application to "advisory positions." We, therefore, conclude that the term "administrative positions", as used in the said clause, was not intended to include advisory positions with the state. This being so, the first part of the section is applicable to the physicians appointed as members of the State Mental Health Commission. That is, that they shall be a citizen of the United States and shall have resided in this state one year next preceding their appointment.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

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