

STATE REPRESENTATIVE: A state representative may serve as real
REAL PROPERTY APPRAISER: property appraiser for the Probate Court
PROBATE COURT: in Jackson County, without violating any
state statute or Article III, Section 12
of the Missouri Constitution.

January 19, 1966



OPINION NO. 57 (1966)
OPINION NO. 420 (1965)

Honorable Kenneth L. Growney
Representative 6th District
Missouri House of Representatives
3707 Madison
Kansas City, Missouri

Dear Representative Growney:

This is in response to your request for an opinion of this office which asks whether a member of the General Assembly may serve in the capacity of a real property appraiser for the probate court in Jackson County, without violating any state statute or constitutional provision?

I direct your attention to the Missouri Constitution, Article III, Section 12, which states in part:

" . . . When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative . . . "

The term "office" or "employment" as used in this section is an office or employment by the United States, this state, or any municipality thereof. This implies that an office or employment not within these areas is not prohibited.

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Sections 145.150 to 145.190 RSMo 1959, deal with the duties of the appraiser. Section 145.150, subsection 3, states in part:

"If it appears that the estate may be subject to such tax, the court shall set a day for the hearing and determining the amount of the tax . . . or the court, before determining such matters, may of its own motion, or on the application of any interested person, . . . appoint some qualified tax paying citizen of the county, . . . as appraiser to appraise and fix the clear market value of any property, estate or interest therein, or income therefrom which is subject to the payment of a tax under this chapter."

Subsection 4 states:

"Every such appraiser shall make and subscribe, and file with the court appointing him, an oath that he will faithfully and impartially discharge his duties as appraiser and that he will appraise all the property, estate, interest therein, or income therefrom involved in the proceeding in which he is appointed at its clear market value and shall forthwith fix a time and place for hearing the evidence and shall file notice thereof with the court appointing him not less than ten days prior to the date fixed and shall also give notice by mail to all interested persons whose address he may have, always including the director of revenue and the prosecuting attorney of the county."

Section 145.160 states:

"The appraiser shall appraise all property, estate, assets, interest or income at its clear market value and he is hereby authorized to issue subpoenas and compel the attendance before him of witnesses and the production of books, records, documents, papers, and all other material evidence, to administer oaths and to take the testimony of all witnesses under oath.

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"He shall make report of his appraisement to the court in writing and shall return the testimony of the witnesses and all other evidence and such other facts in relation thereto as the court may by its order require, and such report shall be made within twenty days after the appointment of such appraiser, unless the court, for good and sufficient cause, by order gives such appraiser further time in which to report; provided, when the estate consists of personal property only, the prosecuting attorney may, with the consent of the director of revenue agree with the parties liable to pay any tax upon the amount of the same, and the court, if it approves such agreement, shall enter judgment accordingly and no appraiser shall be appointed."

Section 145.170 allows for exceptions to appraiser's report and appeal from such report.

Section 145.180 deals with the appraiser's duty to file a report with the court.

Section 145.190 states:

"The appraiser shall be entitled to a reasonable fee for the time he is engaged in hearing the evidence, viewing the property, and preparing and filing his reports, and the actual and necessary expenses incurred by him in the performance of his duties, which together with all witness fees and other costs shall be taxed against and paid by the administrator, executor, or trustee as other costs of the estate, and if no administration is pending, then by the persons liable for the tax, but before the appraiser shall be entitled to his fee or expenses he shall file with the court appointing him a sworn statement of the same and the court shall allow him a reasonable fee and expenses actually and necessarily paid by him in the performance of his duty as such appraiser."

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"And such appraiser who shall take, directly or indirectly, any fee or reward other than such as may be allowed him by law from any executor, administrator, trustee, legatee, next of kin, or heir of any decedent or from any other person liable to pay said tax or any portion thereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five hundred dollars, or be imprisoned in the county jail six months, or both."

In State vs. Truman, 333 Mo. 1018, 64 S.W. 2d 105, 106, the Court said:

"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, 46 C.J. 928, §19, n. 1; 53 A.L.R. p.595. It is the duty of his office and the nature of the duty that makes one an officer and not the extent of the authority (Mechem on Public Officers, p.7, §9; Throop on Public Officers, pp.2,3 §2), although designation by law has some significance. 46 C.J. p.931 §24; State ex rel. v. Gray, 91 Mo.App. 438, 445; State ex rel. Cannon v. May, 106 Mo. 488, 505, 17 S.W. 660; State ex rel. v. Shannon, 133 Mo. 139, 164, 33 S.W. 1137; Gracey v. St. Louis, 213 Mo. 384, 393, 394, 111 S.W. 1159.

"In Mechem on Public Officers, pp. 1 and 2, §1, it is said: '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

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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"

An examination of this criteria in conjunction with the Sections pertaining to the appraiser's duties reveals:

(1) That the appraiser is not required to give bond for the faithful performance of his duties.

(2) The exercise of the power delegated to the appraiser to wit: to issue subpoenas, to administer oaths, and to take testimony of witnesses, are not the exercise of sovereign powers for public benefit as pointed out by dicta in *Mulnix vs. Elliott*, 62 Col. 46, 156 P. 216, 217, which states that the exercise of the authority to issue subpoenas, administer oaths, and take testimony, are not necessarily an exercise of sovereign functions for the public benefit so as to require classifying a person exercising such authority as a public officer.

(3) The duties of the appraiser are not continuing and permanent. The court, in *Fairbanks v. Mann*, 19 R.I. 499, 34 A. 1112, 1113, states:

"An appraiser is not an officer of the probate court. He is simply a person appointed by that court to appraise the goods and chattels, rights and credits of the deceased . . . and to make return thereof under oath to said court This being done, he has discharged his trust, and his duties are at an end."

It should be mentioned at this time that the statutes dealing with the appraiser's duties do not refer to him as a public officer or employee.

6 C.J.S. Appraisers, p.92, states:

"A person appointed by competent authority to ascertain and to state the true value of property submitted to his inspection, and who is usually sworn to perform such duty. The term imports disinterestedness, and, in particular connections, implies appointment by, but not as an officer of, the court, the term having

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been construed not as an official or technical appellation, but rather as descriptive of the duties which he has been commissioned to perform . . ."

As indicated above, the appraiser is not an officer of the state, but Article III, Section 12, supra, also mentions employment by the state or municipality thereof as being prohibited.

The Court, in Rider vs. Julian, 365 Mo. 313, 282 S.W. 2d 484, states at p.493:

"None of the . . . employees were paid by the state. This is a strong factor indicating that they were not state employees . . . In 81 C.J.S. States, §53, p.973, with reference to state employees, it is stated: 'payment of particular persons by the state is a very strong circumstance showing that they are state employees, and it has been held that one becomes a civil servant or employee only when he furnishes his services or labor for compensation directly paid to him by the state . . .' "

Section 145.160, supra, specifically provides payment by the estate or persons liable for the tax.

In Parker vs. Riley, 18 Cal. 2d 83, 113 P. 2d 873, the court, interpreting a similar constitutional provision as Article III, Section 12, supra, states:

"The . . . provision has been said . . . to have been designated to prevent the acquiring by members of the legislature of positions on the state pay roll which might prevent their maintaining a desirable independence of mind . . ."

As there are no other statutory or common law prohibitions against a representative holding a position as appraiser, it is the opinion of this office that a representative will not violate Article III, Section 12, of the Missouri Constitution by accepting appointment as appraiser of the probate court of Jackson County, because his duties and functions are not such as would justify his being called an officer or employee of the state or municipality thereof.

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CONCLUSION

It is the opinion of this office that a state representative may serve as real property appraiser for the probate court of Jackson County, without violating any state statute or Article III, Section 12, of the Missouri Constitution.

The foregoing opinion which I hereby approve was prepared by my assistant, Gerald L. Birnbaum.

Yours very truly,


NORMAN H. ANDERSON
Attorney General