

STATE HIGHWAY COMMISSION:

Commission may establish position of Director, having general charge and supervision of state highway department, and may determine qualifications. Provisions of Section 226.040, RSMo 1959, relating to "chief engineer" are not effective to limit this authority.

OPINION NO. 294

July 11, 1969

Honorable William C. Phelps
State Representative
5016 Grand
Kansas City, Missouri 64112

Dear Representative Phelps:

This official opinion is issued pursuant to your request dated June 10, 1969, in which you state that:

". . . . the Highway Commission of the State of Missouri has appointed an administrator whose duties will supersede certain of the duties of the chief engineer."

You then ask whether:

". . . . the highway commission has authority under the constitution and statutes of the State of Missouri to delegate duties to a non-statutory employee which supersede the duties of the chief engineer. . . ."

Robert L. Hyder, Esq., Chief Counsel of the Highway Commission, has furnished us some additional information which bears on your inquiry. He advises us that the Commission by resolution has established the position of "Director" and has made an appointment effective July 1, 1969, at a salary of \$23,500 per year. The resolution specifies the duties of the director to be as follows:

"(The director) shall have general charge and supervision of the State Highway Department and shall perform such duties and have such authority as the commission may designate."

Section 226.040 RSMo provides that the State Highway Commission shall appoint a "chief engineer"

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" . . .who is a resident of this state, and he shall have had executive or administrative experience for at least five years next prior to his appointment and he shall have had experience in highway work. Under the direction of the commission, the chief engineer shall have general supervision of the state-highway department, and shall perform such duties and have such authority as the commission may designate." (Emphasis supplied)

The duties of the chief engineer as set out in this statute are the same as those of the director as set out in the commission's resolution. The apparent differences are as follows: (1) The title of the position is different; (2) The statute prescribed detailed qualifications for the chief engineer, whereas the resolution is silent as to qualifications for the director; and (3) The salary of the chief engineer is established by Section 226.080, RSMo Supp. 1967, at \$22,500 maximum. The apparent conflict makes necessary an inquiry as to the authority of the Legislature with respect to employees of the State Highway Commission.

The Missouri State Highway Commission was first established as a constitutional agency by the Missouri Constitution of 1945, although amendments adopted prior to that time made reference to it. Article IV, Section 29 of the Constitution provides as follows:

"The department of highways shall be in charge of a highway commission. The number, qualifications, compensation and terms of the members of the commission shall be fixed by law, and not more than one-half of its members shall be of the same political party. The selection and removal of all employees shall be without regard to political affiliation. It shall have authority over and power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitations and conditions imposed by law as to the manner and means of exercising such authority; and authority to limit access to, from and across state highways where the public interest and safety may require, subject to such limitations and conditions as may be imposed by law."

The State Highway Commission, therefore, derives its basic authority from the constitution and not from the Legislature. In two instances (construction and reconstruction, and limited access),

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its authority is subject to "limitations and conditions imposed by law," but the balance of its authority is not subject to any such expressed limitation. The Commission, in contrast to some agencies and departments of the state government, is specifically constituted as a bipartisan body.

The Commission, therefore, has a constitutional responsibility. The determination of lines of authority and the selection of employees is basic to a body having such authority. The constitution is silent as to the organization of the commission and as to its staffing, except for the provision against discrimination on account of political affiliation in the selection and removal of employees. The clear intentment, then, is that the Commission is to have the authority to establish positions, to prescribe the duties of the employees in those positions, and to determine the qualifications for the employees in the positions so established.

The Legislature clearly would be exercising control over the commission if it could prescribe the positions to be filled and the qualifications of the employees eligible for these positions. If the Legislature has such a power it could deny the commission the services of the person considered to be best qualified by those having the responsibility for the highways. This control is not sanctioned by the constitutional provisions establishing the commission.

A comparable problem is illustrated by the opinion in Myers v. United States, 272 U.S. 52 (1926), in which the Supreme Court held that Congress could not place restrictions on the removal by the President of an employee of the executive branch of the government. The Court found that Congress was interfering with the exercise of the executive power by attempting to impose restrictions.

It is important to observe that many of the provisions of Chapter 226 of the Missouri Revised Statutes were adopted prior to 1945, and exist at the present either in the same form or (as in the case of Section 226.040) with minor modifications, as they had at the time the Constitution of 1945 became effective. The adoption of a Constitution, of course, may effect changes in existing statutory patterns. To the extent that there is a conflict, the constitution prevails and supersedes the statutes. This historical information is of some importance in showing that there was no explicit legislative purpose of limiting the constitutional authority of the Commission, but rather the modification of a statutory pattern by subsequent constitutional enactment.

The very terms of the statutes, furthermore, recognize the Commission as the controlling agency. The chief engineer is required "to operate under the direction of the commission." The commission has the authority to specify his duties. There is no

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express statutory prescription of duties of the chief engineer which the commission may not effectively regulate or control.

The phrase "in charge of" has been construed numerous times. The normal construction is a broad one, as synonymous with "control." Numerous definitions are found in Words and Phrases.

We conclude, therefore, that the State Highway Commission has the authority to establish the position of "director" whose duties are as specified in the above-mentioned resolution, and that it has the authority to determine the requisite qualifications for the position. The commission in exercising this authority is not subject to limitation by reason of anything contained in Section 226.040. To the extent that that section might be read as containing a limitation on the commission's authority, it is invalid and ineffective because it is in derogation of the commission's authority and responsibility as established by Article IV, Section 29 of the Constitution.

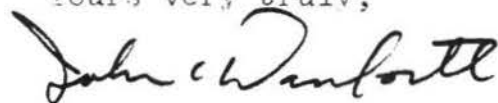
There is an additional problem regarding the salary established by the commission for this position. One might argue that the sense of Section 226.080, RSMo Supp. 1967, is that no employee of the commission is to receive a salary higher than that established for the chief engineer, who by the statutory pattern is the principal employee of the commission. We do not have to speculate about the problem which would be presented if there were an express statutory provision to this effect. The present statutes have no specific restriction, and we are unable to say that there is a violation of any statutory provision in establishing a salary of \$23,500 for the Director.

CONCLUSION

It is the opinion of this office that the State Highway Commission has the authority to establish the position of Director, and to provide that the Director shall have "general charge and supervision of the State Highway Department," and that the commission has the authority to establish the qualifications for the position and to fix the compensation out of funds available to it. We are also of the opinion that this authority is derived from the commission's general grant of power under Article IV, Section 29 of the Constitution of Missouri and that any statutory provisions which purport to limit this authority are pro tanto invalid.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Charles B. Blackmar.

Yours very truly,



JOHN C. DANFORTH
Attorney General