

BOARD OF EQUALIZATION: Deputy Surveyor in Jackson County is not entitled to sit as a member of the Board of Equalization in absence of surveyor and is not entitled to per diem compensation.

July 10, 1942.

Mr. Floyd R. Gibson  
County Counselor's Office  
Kansas City, Missouri



Dear Mr. Gibson:

Your letter of July 3, 1942, requesting an opinion has been referred to me. This request, omitting caption and signature, is as follows:

"The Presiding Judge of the County Court of Jackson County has requested me to write you for an opinion on the following: Is the Chief Deputy Highway Engineer, who is recognized by the Court as being the acting Highway Engineer in the place of Col. Thompson, Highway Engineer recently called to army service, authorized to sit as a member of the Board of Equalization in the place of the elected Highway Engineer? And if so, would the acting Highway Engineer be entitled to the same per diem compensation as is paid other members of the Board?"

Article 9, Chapter 46 of the Revised Statutes of Missouri, 1939, provides for the office of County Highway Engineer. Section 8660, R. S. Mo., 1939, which is in the Chapter aforesaid provides as follows:

"The county court of the several counties in this state may, in their discretion appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, as provided in section 8657, in lieu of all fees, except such fees as are allowed by law for

his services as county surveyor: Provided, that in counties in which the provisions of this article with reference to the appointment of a county highway engineer have not been suspended as hereinafter provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court: Provided, however, that in all counties in this state which contain or which may hereafter contain more than fifty thousand inhabitants, and whose taxable wealth exceeds or may hereafter exceed the sum of forty-five million dollars, and which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than 100,000 inhabitants by the last decennial census, the county surveyor shall be ex officio county highway engineer, and his salary as surveyor and ex officio county highway engineer shall be not less than three thousand dollars and not more than five thousand dollars, as may be fixed by the county court, and all fees collected in such counties by the surveyor, for his services as surveyor, shall be paid into the county treasury, to be placed to the credit of the county revenue fund; Provided, also, that in the counties last above mentioned the county surveyor, as surveyor and ex officio county highway engineer, may appoint, subject to the approval of the county court, such assistants as may be necessary, and no assistant shall receive more than twenty-one hundred dollars per annum: Provided further, that in all counties in this state which contain or may hereafter contain two hundred thousand and less than four hundred thousand

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inhabitants, and which county or counties contain one hundred and fifty miles or more of macadamized roads, outside of municipal corporations, and which county or counties pay to the county surveyor a salary of three thousand dollars or more annually, the county surveyor of such county or counties shall be ex officio county highway engineer: Provided further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

As can be seen, the Surveyor of Jackson County is the ex officio County Highway Engineer in view of the fact that such County has a population of over fifty thousand (50,000) inhabitants and has a taxable wealth in excess of forty-five million dollars, to-wit, approximately six hundred and thirty-five million dollars (\$635,000,000.00) and contains Kansas City, which city has a population of over one hundred thousand (100,000).

Section 13208, R. S. No., 1939, pertaining to surveyors is as follows:

"Deputies may be appointed by any surveyor who, before they proceed to discharge their duties, shall take an oath well, truly and faithfully to discharge the duties of deputy surveyors."

Section 11001, R. S. No., 1939, in speaking of the County Board of Equalization provides as follows:

"There shall be in each county in this state, except the city of St. Louis, a county board of equalization, which board shall consist of the county clerk, who shall be secretary of the same, but have no vote, the county surveyor, the judges of the county court, and the county assessor, which board shall meet at the office of the county clerk on the first Monday in April of each year: Provided, that in any county having adopted township organization, the sheriff of said county shall be a member of said board of equalization; Provided further, that in counties containing a population of more than seventy thousand, such board shall meet upon the first Monday of March in each year."

It will be seen from this Section that the Surveyor of a County is a member of the Board of Equalization and not necessarily the County Highway Engineer. As stated above, however, the Surveyor of Jackson County is ex-officio County Highway Engineer, and would serve on the Board of Equalization, but in his capacity as Surveyor. Therefore, if a Deputy is to serve, it would be the Deputy Surveyor of Jackson County and not the Chief Deputy Highway Engineer. Of course, it is possible that the latter is also a Deputy Surveyor, but he will serve on the Board of Equalization as Deputy Surveyor and not as Chief Deputy Highway Engineer.

As to the powers of deputies, we will first cite you to 46 Corpus Juris, at page 1063, which is as follows:

"When the law authorizes an officer to appoint a deputy without any express limitation upon his power, the duties of the office may be performed by either and a deputy may exercise any of the duties pertaining to his office, as the necessity or convenience of the public may demand their use."

This question of the powers of a deputy arose in the case of State v. Carey, 1. S. W. 143, 318 Mo. 613. The Court in discussing this point cited Mechem's Office and Officers, p. 571, which stated the following:

"\* \* \* \* \*Where a public officer is authorized to appoint a deputy, the authority of that deputy, unless otherwise limited, is commensurate with that of the officer himself, and, in the absence of any showing to the contrary, it will be so presumed. Such a deputy is himself a public officer, known and recognized as such by law. Any act, therefore, which the officer himself might do, his general deputy may do also." \* \* \*

In the case of *Small v. Field*, 14 S. W. 815, 102 Mo. 104, the Court held that the deputy of an officer may do every act which his principal might do. However, there is a limitation on the powers of deputies. As shown above it is a well settled rule that deputies may perform all the duties of their superior as long as such duties are merely ministerial. But when there is occasion for discretion to be exercised then the deputy cannot act since the powers of an officer which call for the use of discretion on his part cannot be delegated.

In Revised Volume 1 of *McQuillin on Municipal Corporations*, Section 394, page 1101, we find the following:

"As appears in various parts of this work mere ministerial duties may be delegated but the general rule is that if from the nature of things to be done the officer is required to perform duties involving the exercise of discretion and judgment he cannot in any manner delegate them."

Also in 46 *Corpus Juris*, at page 1033, we find the following:

"An officer to whom a discretion is intrusted cannot delegate the exercise thereof, but ministerial duties, except where there is a statutory prohibition, may be delegated." Citing *State v. Reber*, 226 Mo. 229, 126 S. W. 397, and *Matthews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776.

Now the question arises as to the nature of the duties the surveyor has on the county board of equalization,

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i.e., are the duties of a ministerial nature or are they duties involving the exercise of the discretion on the part of the officer?

In the case of State ex rel. Arnold v. McCune, 252 S. W. 657, the court held that the board of equalization in the exercise of its powers acts judicially, and has general jurisdiction of all subject matters in regard to taxation of property in the county, and while acting within its jurisdiction its judgments and findings are not to be impeached.

Where the board of equalization acts judicially it is presumed that an officer on such board must exercise discretion on any decisions which he reaches while sitting as a member of such board. Therefore, if the deputy surveyor of Jackson County is allowed to sit as a member of such board of equalization during the absence of the surveyor, he will be required to exercise his discretion on any acts which he performs while a member of that board. In view of the fact that an officer may not delegate any powers requiring the exercise of discretion we feel that a deputy surveyor of Jackson County cannot sit as a member of the board of equalization of such county.

#### Conclusion

Therefore, it is the opinion of this Department that the Deputy Surveyor of Jackson County, Missouri, is not empowered to sit or be a member of the board of equalization of the aforesaid county; and it is further our opinion that the Chief Deputy Highway Engineer is also precluded from sitting on the Jackson County Board of Equalization. The other matter about which you asked our opinion, namely, as to whether or not the men mentioned above would be entitled to the \$5.00 per diem, of course is answered in this conclusion, since if they are not permitted to sit they certainly would not be entitled to the per diem compensation.

Respectfully submitted,

JOHN S. PHILLIPS  
Assistant Attorney-General

APPROVED:

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VANE C. THURLO