WORKMEN'S COMPENSATION: The election by a county may be made by the County Court. Such acceptance does not cover elective officers.

OFFICERS:

February 7, 1950 2/9/50

Mimeo copies available 1-23-54

FFD 33

Honorable Spencer H. Givens
Director
Division of Workmen's Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Dear Director Givens:

We have given further consideration to your written request to this department for an opinion respecting the application of Section 3693, R. S. Mo. 1939, to the public employments and employers named in said section. In reply to your request there was submitted to you the opinion of this department dated September 30, 1949. In the former opinion it was said that that part of Section 3693, in the fifth paragraph thereof, authorizing the public bodies named therein, to elect to bring themselves under the terms of the Compensation Act, is in violation of Section 38(a) of Article III and Sections 23 and 25 of Article VI of the present Constitution of this State, in that it is in excess of legislative power to pass an Act authorizing public bodies to grant public monies to private persons, and is, therefore, unconstitutional.

Upon further consideration it is believed that the former opinion was erroneous and the same is overruled and withdrawn.

You submit three questions in your letter for consideration. They are:

"(1) By whose authority a county may accept the Law;
(2) if such acceptance is filed, does it cover elective officers, and
(3) if such acceptance does cover elective officers can they reject the Law as employees."

This department now believes that said Section 3693 is valid and effective; that any of the public

employers referred to in the fifth paragraph thereof may elect to bring itself within the provisions of the Act and that the use of public funds for such purposes as workmen's compensation would not be contrary to said sections and provisions of our Constitution, because the operation of such public bodies and acts of such public bodies in the employment of their employees and the performance by their employees of their duties directed by such employers, are in themselves the carrying on and performing the functions of public government for the benefit of the public, and that the use of public funds for the payment of workmen's compensation to such employees would not constitute the grant or gift of public money to private individuals, and, therefore, would not violate such named sections or any other provisions of our Constitution. The payments of workmen's compensation or of premiums on insurance for such purpose are not grants or gifts but a part of, or incident to, the wages of the employee.

The Supreme Court of Missouri has not had occasion to pass upon the question of whether the use of public funds to pay workmen's compensation by such public bodies would be permissible under the Constitution, but the Court has had before it numerous cases where the question arose whether the payment of money to private individuals who were performing services in the public interest could be made out of public funds, appropriated for such services for cities, or to be paid to hospitals, industrial homes, county farm bureaus which are formed by private citizens, for the establishment of a municipal airport, and other like matters, and in which cases the Court held that such services and such enterprises were for public purposes and justified the payment therefor out of public funds and that such payments did not violate the provisions of the Constitution prohibiting the use of public funds as a gift or grant to private individuals. (State ex rel. Crow, Attorney General vs. City of St. Louis, et al., 174 Mo. 125; State ex rel. vs. Seibert, 123 Mo. 424; State ex rel. vs. Industrial Home for Girls, 144 Mo. 275; Jasper County Farm Bureau vs. Jasper County, 315 Mo. 569, and Dysart vs. St. Louis, 321 Mo. 514, et cet.)

The case of State ex rel. Crow, Attorney General vs. City of St.Louis, 174 Mo. 125, was considered by the

Supreme Court on the constitutional question of the right of the city to appropriate public money to reimburse a city officer for money expended arising out of the discharge of his official duties. Holding that the appropriation of such funds and the payment thereof to the officer for such purposes were constitutional, the Court, l.c. 149, said:

> "Here the municipal corporation had a duty to perform, rights to defend, and interests to protect in removing or having removed, the nuisance from the streets. The officer acted bona fide, within the scope of his duties, lawfully. The indemnity was legal and proper."

In many of the States having Workmen's Compensation Acts the Courts have held that public bodies such as are named in said Section 3693, which have accepted such Acts may use public funds for the payment of compensation and that such payment does not violate any constitutional provision prohibiting the use of public money as a private grant or gift to individuals.

The following cases have considered statutes defining the status of different classes of employments such as are named in said Section 3693 as to being public employments authorizing them to pay compensation to their employees out of public funds, and have held that such statutes did not violate any constitutional provision prohibiting the granting of public funds to private individuals. (Michigan---Wood vs. Detroil, 188 Mich. 547, 155 N.W. 592, L.R.A. 1916 C 388 (1915); Montana---Re Lewis & Clark County, 52 Mont. 6, 155 P. 268, L.R.A. 1916 D 628 (1916); Ohio---Porter vs. Hopkins, 91 Ch. St. 74, 109 N.E. 629 (1914); Illinois---McLaughlin vs. Industrial Board, 281 Ill. 100, 117 N.E. 819 (1917); Arizona---Fairfield vs. Huntington, 23 Ariz. 528, 22 A.L.R. 1438 (1922); Maryland---Clauss vs. Board of Education, 30 A. (2d) 779 (1943); Nevada---Nevada Industrial Commission vs. Washoe County, 41 Nev. 437, 171 P. 511 (1918); Colorado---School District No. 1 vs. Industrial Commission, 66 Colo. 580, 185 P. 348 (1919); Georgia--City of Macon vs. Benson, 175 Ga. 502, 166 S.E. 26 (1932); City of Atlanta vs. Pickins, 176 Ga. 833, 169 S.E. 99 (1933); State Highway Department vs. Bass, 29 S.E. (2d) 161 (1944); and Louisiana--- Kroncke vs. Caddo Parish School Board, 183 So. 86 (1938).)

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The Colorado case of School District #1 vs. Industrial Commission, 66 Colo. 580, 185 P. 348, after referring to a constitutional provision similar to those in Missouri, said: (l.c. 350):

> "It has repeatedly been held that the object is a public one even where the sole purpose of the act was to provide compensation for private employes only. It can be none the less for a public purpose when the statute, as in the case at bar, is so framed as to provide for compensation to public employes also. * * * * * * * * *."

> "The manner in which a state, a municipality or a school district, shall treat its employers appears to be peculiarly a matter for legislative determination. * * * ."

This decision is logical and sound and in harmony with the spirit and purpose of Workmen's Compensation Acts in the design of such Acts to serve a public benefit as well as to establish social justice for employees, and constitutes, with the other cited cases, persuasive authority for our belief that if this question were before our Supreme Court for decision, it would hold the same view.

Considering the above cited Missouri cases as directive and the decisions cited from other States as persuasive, we believe that neither the terms of said Section 3693, nor the operation thereunder of the public bodies named therein who may elect to accept the terms of the Workmen's Compensation Act, by providing and paying public funds to their employees as workmen's compensation, due for injuries sustained under the Act, are violating the provisions of our Constitution in so doing.

It follows, we believe, that such employers as are named in said Section 3693 as public bodies, and being governmental agencies performing duties for the benefit of the public, may elect to bring themselves under the terms of the Act, and may use public money for the payment of workmen's compensation, when due their employees under the Act.

The first specific question you submit is: "By whose authority a county may accept the Law." The statute is silent as to who shall make the election to accept the act for the employers named in Section 3693. In the case of a county, the election should be made by the county court which has the general management and control of the business of the county (Section 7, Article VI, Constitution of Missouri, 1945; Section 2480, R. S. Mo. 1939).

Your second specific question is: "If such acceptance is filed, does it cover elective officers?" The determination of this question depends upon the construction of Section 3695(a), R. S. Mo. 1939, as amended, Laws of Missouri, 1947, Vol. II, page 438, which defines the word "employee." The relevant part of this section is:

> "The word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, * * *"
> (Emphasis ours.)

The phrase "under any appointment or election" would include elective officers if they were employees as defined in this section. However, the words "in the service" have been construed by the courts of this state in numerous cases to require the relation of master and servant to exist before one is considered an "employee" within the meaning of the Workmen's Compensation Act. In construing this definition of "employee," the courts have given consideration to the definition of "employer" in Section 3694, R. S. Mo. 1939, which defines "employer" as one "using the service of another for pay." It seems obvious that there cannot be an "employee" unless there is an "employer." In a recent case, McQuerrey v. Smith St. John Mfg. Co., 216 S.W. (2d) 534, l.c. 537, the court said:

> " * * * The phrase, 'using the service of another for pay', means the right to control the means and manner of that service, as distinguished from the results of such service. * * *"

In another recent case, Stout v. Sterling Aluminum Products Co., 213 S.W. (2d) 244, l.c. 246, after referring to the requirement of the statute itself and the holdings of the court that the law should be liberally construed as

to the persons to be benefited, the court said:

> " * * * The relationship of master and servant must exist in any case to make it compensable, and when that relationship ceases to exist, whether temporarily or permanently, the liability of the employer for accidental injury to the employee ceases to exist."

Other cases construing the Workmen's Compensation Act holding that the relationship of master and servant must exist before one is an "employee" within the meaning of the act are: Knupp v. Potashnick Truck Service, 135 S.W. (2d) 1084; Bernat v. Star-Chronicle Publishing Co., 84 S.W. (2d) 429; Langley v. Imperial Coal Co., 138 S.W. (2d) 696, 234 Mo. App. 1087; Schultz v. Moerschel Products Co., 142 S.W. (2d) 106.

No discussion of the relation between elective officers of a county and the county itself is necessary to show that the relation of master and servant does not exist. It is perfectly obvious that neither the county nor the county court has that control over the work and duty of elective officers which is necessary to establish the relationship of master and servant. The duties of the elective officers are fixed by statute, and each officer is essentially independent and responsible to only the people who elected him.

Elective officers of a county are not employees of the county and are not covered by the Workmen's Compensation Act if such act is accepted by the county. The answer to this question renders unnecessary any answer to your third question, which is: "If such acceptance does cover elective officers, can they reject the Law as employees?"

CONCLUSION

Considering the above authorities, it is therefore the opinion of this department that:

1. The public employers named in said Section 3693, R. S. Mo. 1939, may severally elect to bring themselves within the terms of the Workmen's Compensation Act.

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2. The use of public money by such public employers in the payment of workmen's compensation to their employees for injuries by accident arising out of and in the course of their employment is not in conflict with any section or provision of the Constitution of this state.

3. An election to accept the provisions of the Workmen's Compensation Act by a county may be made by the county court.

4. Such acceptance does not cover elective officers.

Respectfully submitted,

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APPROVED:

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