PENSIONS: Social Security Commission may appoint someone to preside at hearings.

February 10, 1938

FILED
38

Mr. George I. Haworth,
State Administrator,
State Social Security Commission,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your request for an opinion, under date of January 28th, which reads as follows:

> "Under Section 16, C.S.S.B. 125, it is provided that aggrieved applicants may appeal to the State Commission in the manner and form prescribed by the State Commission for a fair hearing. It is further provided that the State Commission shall, upon receipt of such appeal, give the applicant reasonable notice of and opportunity for a fair hearing. The State Commission is directed to determine all questions presented by the appeal.
>
> Section 4, under 'Powers and Duties of the Commission', it is provided that the State Commission shall have power "to administer oaths, issue subpoenas for witnesses, examine such witnesses under oath and to make and keep a record of same."
>
> QUESTION: Can an examiner be authorized by the Commission to hold such hearings and transmit transcripts of all evidence adduced at such hearings to the Commission for their determination of all questions presented at the hearing?"

Section 15, C.S.S.B. No. 125, page 475, Laws of 1937, provided the administrator or someone designated by him shall decide whether an applicant is eligible for benefits and to also determine the amount said applicant is entitled to receive.

> "Whenever the county office receives an application for benefits an investigation and record shall be promptly made of the circumstances of the applicant by the county office in order to ascertain the facts supporting the application. Upon the completion of such investigation the State Administrator, or some one designated by him, shall decide whether the applicant is eligible for benefits and if entitled to benefits determine the amount thereof and the date on which such benefits shall begin. The Secretary of the County Commission shall notify the applicant of the decision."

Section 16, of C.S.S.B. No. 125, page 475, Laws of 1937, provides for an appeal from the decision of the State Administrator or someone designated by him to the State Social Security Commission and said section reads as follows:

> "If an application is not acted upon within a reasonable time after the filing of the application, or is denied in whole or in part, or if any benefits are cancelled or modified under the provisions of this Act, the applicant for pensions or old age assistance, or aid to dependent children, may appeal to the State Commission in the manner and form prescribed by the State Commission. The State Commission shall upon receipt of such appeal give the applicant reasonable notice of and opportunity for a fair hearing. The State Commission shall determine all questions presented by the appeal. Any applicant aggrieved by the action of the State Commission in the denial of benefits in passing upon the appeal to the State Commission may appeal to the circuit court of his or her judicial circuit within

> ninety days from the decision appealed from, by giving the State Commission notice of such appeal. Such appeal shall be tried in the circuit court de novo on the sole question of whether the applicant is entitled to benefits and not as to the amount thereof, and the circuit clerk shall notify the State Commission of such decision. If the judgment be in favor of the applicant, a certified copy of same shall be mailed to the State Commission. Appeals may be had from the circuit court as in civil cases."

The above section clearly states the procedure in case said applicant decides to appeal from the decision of the Administrator or someone designated by him.

Section 16, supra, further requires the State Commission to give the applicant reasonable notice of and opportunity for a fair hearing. A fair hearing has been defined by the courts as an opportunity to be present and present testimony in support of his cause and to meet testimony presented against him.

Volume 29, C.J., page 284, Section 2, defines a hearing as follows:

> "The receiving of facts and arguments thereon for the sake of deciding correctly."

In Ex Parte Petkos 212 Federal 275 - 277, the court said:

> "Fair hearing of an alien's right to enter the United States means a hearing before the immigration officers in accordance with the fundamental principles that inhere in due process of law, and implies that the alien shall not only have a fair opportunity to present evidence in his favor, but shall be apprised of the evidence against him, so that at the conclusion of the

> hearing he may be in a position to know all the evidence on which the matter is to be decided, it being not enough that the immigration officials meant to be fair."

A general principle of law is that only ministerial duties can be delegated to someone else to perform and no duty which requires discretion may be delegated.

The State Social Security Commission, therefore, can only delegate such acts required by them to perform as are ministerial. If any act required to be performed by the Commission requires any discretion on the part of said Commission, then this power cannot be delegated by them.

Mechem on Public Officers, Section 567, page 368, in part reads as follows:

> "It is a well settled rule, in the case of private agents, that where the execution of the trust requires, upon the part of the agent, the exercise of judgment or discretion, its performance can not, in the absence of express or implied authority, be delegated to another. In such cases it is presumed that the agent was selected because his principal desired and relief upon the agent's personal judgment and discretion, and, unless authority to delegate it be expressly or impliedly given, the agent can not entrust the performance to another to whom the principal may be, perhaps, a stranger, and in whom he might not be willing to confide.
>
> This rule applies also to public officers. In those cases in which the proper execution of the office requires, on the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his

> place has been given to him, he can not delegate his duties to another.
>
> The applicability of the principle would be obvious in the case of judges of courts, who clearly could not be permitted to delegate or farm out their judicial duties to others, but it applies as well to all cases in which judicial and discretionary power is to be exercised. Thus the power to fix and to admit to bail is a judicial one which can not be delegated.
>
> It is also frequently invoked in the case of municipal boards and officers. Wherever these boards and officers are vested with discretion and judgment, to be exercised in behalf of the public, the board or officer must exercise it in person and can not, unless expressly or impliedly authorized to do so, delegate it to others. * * * * * * *"

Section 568, page 370, provides mechanical and ministerial duties may be delegated and reads in part as follows:

> "Where, however, the question arises in regard to an act which is of a purely mechanical, ministerial or executive nature, a different rule applies.***."

Volume 46, C.J., Section 303, page 1036, makes a distinction between ministerial and discretionary duties.

> "A ministerial duty is a simple and definite duty imposed by law, arising under conditions admitted or proved to exist, and regarding which nothing is left to discretion. If the prescribed duty is definite and precise, it is none the less ministerial because the person who is required to perform it may have to satisfy himself of facts which raise the duty or are collateral to its performance, or because he is per-

> mitted a choice of methods or instrumentalities in its decision. An act which requires the exercise of judgment in its performance, or an act which an officer may, or may not, do in the exercise of his official discretion, is not ministerial, but discretionary. A discretionary duty may be executive or judicial, according to the nature of its subject matter."

In State vs. Toliver, 287 S.W. 312, l.c. 316, it was held the county court had certain discretionary duties to perform in appointing another justice of the peace. The court said:

> * * * "Thus the situation provides for the exercise of a discretion on the part of the county court. An act which an officer may do or may not do, in the exercise of his official discretion, cannot be considered a ministerial act.
>
> It is not necessary to lengthen this opinion further in the consideration of cases. We hold that the act of making the appointment of respondent necessarily involved a finding by the county court that such a state of facts existed as to authorize it to appoint an additional justice of the peace, including the finding that two additional justices of the peace had not already been appointed, or if they had previously been appointed, that both were not qualified and acting at the time." * * * * * *

Section 3, C.S.S.B. No. 125, page 469, Laws of Missouri, 1937, in part reads as follows:

> *** "Each Commissioner shall receive no salary or other compensation, but shall be paid his traveling expenses and other necessary expense in the performance of his duty, to be paid out of funds appropriated for use of the State Commission."

Section 8, C.S.S.B. No. 125, page 472, Laws of Missouri, 1937, in part designates the number of commissioners required to constitute a quorum.

> * * * "Three members of the State Commission shall constitute a quorum for the transaction of business and for the exercise of any of the powers and the discharge of any of the duties now or hereafter authorized or imposed by law."

One of the cardinal rules of construction is to determine the intention of the legislature. Wallace vs. Woods, 102 S. W. (2d), 91.

Another fundamental rule of construction is that all facts of an act should be construed together and harmonized if possible. In Re: Rosings Estate, 85 S.W. (2d), 495; 375 Mo. 544.

Section 16, supra, does not specifically require the Commission to appear in person and hold these hearings, but requires a fair hearing in the manner and form prescribed by the Commission and further that the Commission shall determine all questions presented by the appeal. In view of the above and foregoing, the requiring of three commissioners to constitute a quorum, the Commission shall act without compensation other than their actual expenses incurred in the performance of their duties requiring the Commission to prescribe the manner and form of these appeals and that they shall determine all questions presented by the appeal. We are of the opinion that the General Assembly, in enacting C.S.S.B. No. 125 never intended the State Commission should be actually present and hear each and every hearing on appeal.

In our opinion the State Commission cannot delegate any discretionary power vested in them; also that the authority vested in them to determine all matters presented at the hearing is discretionary. We are further of the opinion the holding of the hearing does not in itself constitute a discretionary power, but is more in the nature of a ministerial duty. It requires no decision on any particular matter to be made at that particular time.

In Waring vs. Metropolitan Life Insurance Company, 39 S.W. (2d), 418, l.c. 423, the court rendered a decision which was somewhat analogous to the instant case. A request for rehearing before the full Workmen's Compensation Commission, as required by law, was made and without any objection one

commissioner heard the testimony. The appellate court held on appeal from the circuit court that complainant waived any right to be heard to complain. The court held further and admitted it was the practice for litigants to agree that a referee may take the testimony and waive the right to have it heard before the court.

> "Respondent insists that under section 3341, just quoted, it was imperative that the full commission hear the additional testimony after the case was once reopened, and that the hearing of additional evidence by a single commissioner was improper, and resulted in placing before the full commission incompetent evidence, as well as that which had been properly received, and that the act of the commission in reviewing the whole case and making the final award was in excess of its power. The reason which is now urged by respondent in support of the judgment of the circuit court was not the reason assigned in the finding made by that court. This reason may have been in the mind of the trial judge, although it was not stated. However, we do not believe it a sufficient ground to support the judgment in view of the fact s in this case. The rehearing was to accommodate plaintiff. He appeared before the commissioner and submitted his additional testimony and examined the witness who was called by the commissioner at plaintiff's request. There was no objection at any time to the competency of any of the evidence so offered on the ground that it was not being received before the full commission, and, when the whole transcript of the evidence reached the full commission, it was with the implied, if not with the express, consent of plaintiff that all the testimony was properly before the commission for review.
>
> The conduct of plaintiff's case, by him and by his attorney, was equivalent to

> an agreement that all proof shown in the record should be treated as the evidence in the case. We think the point urged by respondent was waived. Even though it was incompetent for a single commissioner to hear testimony upon reopening the case, we think it was competent for plaintiff to consent, and that he did consent, that one commissioner hear the testimony; and that it was competent for plaintiff to waive, and that he did waive, his right to have all the members of the commission personally view the witnesses and observe their conduct and demeanor while testifying. This was the only right, if any, of which plaintiff was deprived. He deprived himself of it.
>
> It is common practice in the trial of lawsuits for litigants to agree that a written statement, or an affidavit, or a statement of facts contained in an application for a continuance, or in a deposition, or in a bill of exceptions, may be received and accepted as the testimony of an absent witness the same as though he were personally present testifying in court. It is also the practice for litigants to agree that a referee may take testimony and waive their right to have it heard before the court."

In State vs. Shain, 108 S.W. (2d), 122, l.c. 128, the court said:

> "We are also of the opinion that respondents' holding, that the claimant did not waive her right to have all of the commissioners hear the evidence on review, is in conflict with controlling decisions of this court. The principle of law is well established that a party objecting to evidence on certain grounds, cannot, on appeal, rely upon an entirely different theory. The claimant, at the hearing held on April 1, did not insist that all the members of the commission be

> present to hear the evidence. Having failed to make a request that all the commissioners hear the evidence, the point was waived."

In view of the above decision complainant waives any right he might have by failure to object at the proper time to the holding of any hearing by someone other than the State Commission. Likewise any agreement of the parties to permit the holding of these hearings by others than the State Commission would waive any right complainant might otherwise have.

However, we think this not material for the reason the holding of these hearings does not constitute a discretionary power and the authority given the Commission to hold said hearings may be delegated to someone else.

With regard to the administering the oath to witnesses who may testify at these hearings, the appointee is not authorized to perform this duty. Such authority is vested in the State Commission and cannot be delegated by them.

Section 4, C.S.S.B. No. 125, reads in part as follows:

> * * * "To administer oaths, issue subpoenas for witnesses, examine such witnesses under oath, and may make and keep a record of same."

In 46 C.J., Section 6, page 840, in part reads as follows:

> "An oath, to be effective, must be administered by some officer authorized by law to administer oaths. Any officer possessing general authority to administer oaths or affirmations may administer an oath or affirmation in a particular case or for a particular purpose where no particular officer is designated for the case or purpose in question, or even, it is held, where a particular officer is designated. * * * "

Volume 46, C.J., Section 7, reads in part as follows:

> "A court has inherent authority to administer an oath; an oath administered by an officer or other person in open

> court under the direction of the court is administered by the court, even though the officer or person would otherwise be incompetent to administer the oath; it seems that an oath administered out of the presence of the court by its delegate is likewise deemed to be administered by the court through its agent." * * *

It is the opinion of this department that anyone authorized by law to administer oaths may administer same to witnesses testifying at these hearings. As a general rule these hearings will be held where an officer of the court, a notary public, or some other person authorized to administer the oath will be available.

Therefore, in view of the above and foregoing, it is the opinion of this department that merely presiding at these hearings does not constitute a discretionary duty, but it is a ministerial duty, and the State Commission may appoint some competent person to preside and hold these hearings in the absence of the Commission and present a transcript of all the evidence adduced at said hearings for consideration by the State Commission and for final decision.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General