CONSTITUTIONAL LAW:
MEDIATION, BOARD OF:
COMPTROLLER:
ATTORNEY GENERAL:

When Attorney General holds an act unconstitutional, the salary and expenses of officers acting thereunder should not be paid after the date the opinion is issued.

April 3, 1951

4-4-51

Honorable Elmer L. Pigg
Comptroller and Budget Director
Jefferson City, Missouri

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Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

> "Your opinion issued March 19th holding the King-Thompson law void, raises a question for this office.
>
> "The payroll and expense accounts of the State Board of Mediation for the month of March have been filed for payment. In view of your opinion, can I now legally approve these accounts for payment? I would like to have your official opinion on this question as soon as possible."

As stated in your request, this department, on March 19, 1951, rendered an opinion to the Members of the House of Representatives of the 66th General Assembly of Missouri, the holding of which opinion was that the so-called King-Thompson Act is in conflict with federal legislation enacted under the Commerce Clause of the Constitution of the United States, and that the King-Thompson Act is therefore unconstitutional. A copy of this opinion was immediately given to you for your information and guidance, and a copy was sent to the Chairman of the State Board of Mediation.

As a part of the King-Thompson Act (Chapter 295, Sections 295.010 to 295.210, inclusive, R.S. Mo. 1949), Section 295.030 provides that the Governor shall appoint five persons to serve as a State Board of Mediation. Section 295.050 of the act provides for a chairman of the board, one of whose duties it is to supervise the work of the employees of the board. Section 295.060 states that the chairman shall receive a salary of five

thousand dollars per annum, payable monthly; that each of the other members of the board shall receive fifteen dollars per day for the time spent in the performance of their duties; and that all members shall receive traveling and other expenses incurred in the performance of their duties.

Thus we have the problem wherein there is a state board operating under a statute which the Attorney General has declared to be unconstitutional. At the outset, we believe it is necessary to determine the effect of a ruling by the Attorney General that a statute is unconstitutional and the weight to be given the opinion by state officers.

The Attorney General in this state is a constitutional officer and he not only possesses the powers and duties as may be prescribed by the Legislature but he also is invested with all the powers and duties pertaining to the office at common law. (State ex rel. McKittrick v. Missouri Public Service Comm., 352 Mo. 29, 175 S.W. (2d) 857.) One of the duties of the Attorney General at common law was that duty to render advisory opinions to public officers. (5 Am. Jur. 243; 7 C.J.S. 1224.)

Section 27.040, R.S. Mo. 1949, relating to the duties of the Attorney General, reads as follows:

> "When required, he shall give his opinion, in writing, without fee to the general assembly, or to either house, and to the governor, secretary of state, auditor, treasurer, commissioner of education, grain warehouse commissioner, superintendent of insurance, the state finance commissioner, and the head of any state department, or any circuit or prosecuting attorney upon any question of law relative to their respective offices or the discharge of their duties."

In the case of State ex rel. S.S. Kresge Co. v. Howard, 357 Mo. 302, 208 S.W. (2d) 247, the Supreme Court of Missouri, en Banc, discussed the responsibility of the Comptroller when he had been advised by the Attorney General that a law was unconstitutional. Judge Douglas, in speaking for the court, said at l.c. 249:

> "Ordinarily a public officer may not question the constitutionality of a statute as a defense to mandamus to compel him to

> perform a ministerial duty. State ex rel. Thompson v. Jones, 328 Mo. 267, 41 S.W. (2d) 393. But in this case such defense is a proper one. Sec. 11008.46, Mo. R.S. A., provides that if the comptroller shall knowingly certify a claim not authorized by law he may be deemed guilty of a felony. Upon the Attorney General's advice that the claim was unauthorized, the comptroller was justified in taking the position he has in refusing to certify it."

Our Supreme Court, en Banc, in the case of State ex rel. Wiles v. Williams, 232 Mo. 56, 133 S.W. 1, laid down the rule that public officers must follow an opinion of the Attorney General that a law is unconstitutional. The court said, l.c. 71:

> " * * * In this State we have the Attorney-General and the prosecuting attorneys of the various counties, whose duty it is to give legal advice to other officers of the State and counties when called upon for advice regarding the administration of the affairs of their respective offices. (Secs. 4941, 4950 and 4951, R.S. 1899.) In the case at bar, it appears from the record that the Attorney-General of the State was called upon and gave a written opinion to the county court of Nodaway county, which was the fiscal agent thereof, to the effect that the act in question was unconstitutional, null and void, and that said court informed relator of said opinion, and notified him not to pay the warrant mentioned in the pleadings; and that if he did so, he would be held liable upon his bond for the amount so paid thereon. In the light of those disclosures, the respondent not only had the legal right to raise the constitutionality of the act, but under those facts it became his legal duty to do so, otherwise he would have paid the warrant at his peril."
> (Emphasis ours.)

In the case of State ex rel. Johnson v. Baker, 74 N. Dak. 244, 24 N.W. (2d) 355, the Supreme Court of North Dakota discussed the status of an opinion of the Attorney General under

a constitutional provision and a statute practically identical with those in Missouri. The court said at N.W. (2d) l.c. 364:

> " * * * Thus the attorney general is made the legal adviser of both the legislative assembly and the state officers and it is particularly to be noted that he shall give written opinions to the legislative assembly upon legal questions and shall consult with and advise the governor and all other state officers and, when requested, give opinions not only on all legal questions but also on all constitutional questions relating to the duties of such officers. And the opinions so written must be recorded in a book which must be delivered to his successors in office. Reading this statute we can reach no other conclusion than that the legislature, thus imposing these duties upon the attorney general, made him the chief law officer of the state - the responsible legal adviser for the state auditor as well as for the other state officers, whose opinions shall guide these officers until superseded by judicial decision; that it took note of the fact that these officers are not required to be learned in the law and contemplated that when any constitutional or other legal question arises regarding the performance of an official act their duty is to consult with the attorney general and be guided by the opinion that officer, if requested to do so, must give them. If they follow this course they will perform their duty, and even though the opinion thus given them be later held to be erroneous, they will be protected by it. If they do not follow this course, they will be derelict to their duty and act at their peril."

In view of the above it will be seen that the opinion of the Attorney General that the King-Thompson Act is unconstitutional imposes upon the Comptroller, the members of the State Board of Mediation, and all other officers affected thereby, the legal duty to follow and conform to such opinion, and failure to do so would make such officers derelict in their duty and they would be acting at their peril.

The questions arise whether or not public officers and employees are entitled to any compensation for services rendered under an unconstitutional act, and whether or not the state is liable for supplies sold to a department created by an unconstitutional act.

The rule in this state is that an unconstitutional statute is "to be regarded as void ab initio, and as though it had never been in existence." (Lieber v. Heil, 32 S.W. (2d) 792.) However, it has been held by the courts of this state that a person who is exercising the duties of an office under an unconstitutional law before said law is declared to be unconstitutional is a de facto officer. In the case of Redman v. St. Joseph Hay & Grain Co., 209 Mo. App. 682, 239 S.W. 540, the court said, l.c. 543:

> " * * * The general rule is that there cannot be such a thing as a de facto incumbent of an office that does not exist. * * * The only general exception to this rule that we have been able to find is stated in State v. Carroll, 38 Conn. 449, 472, 9 Am. Rep. 409, where the court, in enumerating instances where a person becomes a de facto officer, states that he is such where he exercises the duties of the office 'under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such.' * * *"

The question of compensation of public officers or employees for services rendered under an unconstitutional act is reviewed in 101 American Law Reports 1417. The cases of most jurisdictions hold that an officer appointed or elected under an unconstitutional statute is a de facto officer and as such is not entitled to any compensation. (Meagher v. Storey County, 5 Nev. 244; Nagel v. Bosworth, 148 Ky. 807, 147 S.W. 940; Maud v. Terrell, 109 Tex. 97, 200 S.W. 375; Morris v. People, 3 Denio (N.Y.) 381.) However, this view is contrary to the position taken by the courts of this state.

In the recent case of Gershon v. Kansas City, 215 S.W. (2d) 771, the Kansas City Court of Appeals had occasion to review the law in Missouri relating to the right of a de facto officer to compensation. The court, in conclusion, said at l.c. 775:

> "It is our opinion that the rule, therefore, in this state is, in effect, that one who is accepted and assigned to an office or position in a municipality, and, in good faith, and under color of right, takes and holds possession of said office and discharges the duties thereof, relying upon the prescribed salary therefor, may sue the municipality and recover any such compensation not paid. Especially would this rule apply in the instant case where no one else disputed the right, title or possession of claimant's office."

The Gershon case, above, points out that the holding of the office and the discharging of duties thereof must be in good faith. In this regard we call your attention to the case of Cosgrove v. Perkins, 139 Mo. 106, 40 S.W. 650. While that case dealt with the rights of third persons in their relations with a de facto officer, still we believe what was said is equally true as to the de facto officers themselves. The court, through Judge Sherwood, said:

> "The foundation stone of this whole doctrine of a de facto officer, as gathered from all the authorities, seems to be that of preventing the public or third persons from being deceived to their hurt by relying in good faith upon the genuineness and validity of acts done by a pseudo officer. However much color of authority may clothe the person who assumes to perform the function of an office and discharge its duties, yet, if the public or third persons are not deceived thereby, - if they know the true state of the case, - the reason which gives origin or existence to the rule which validates the act of an officer de facto ceases; and with it cease, also, all of its ordinary validating incidents and consequences."

In the case of Alleger v. School District of Newton County, 142 S.W. (2d) 660, the Springfield Court of Appeals held that a teacher who was employed by a de facto board of directors of a school district could not recover her salary because she knew

at the time the contract was entered into that one of the directors did not possess the qualifications to authorize him to serve as a director, and that therefore she was lacking in good faith.

In the instant case there is no doubt that the Legislature enacted a statute providing for a State Board of Mediation and that the Governor, under authority of that statute, appointed members to such Board. The members of the State Board of Mediation, under color of authority of the statute and of the appointment, have in good faith held their offices and discharged the duties thereof. Until March 19, 1951, neither the members of the State Board of Mediation nor you had ever been advised either by this department or by a court that the King-Thompson Act was unconstitutional. On that date you, as Comptroller, and the members of the State Board of Mediation were notified that the law under which the Board was operating was unconstitutional. After you and the Board were advised by this office that the law was unconstitutional it became your duty to follow the opinion, and it was further your duty to refuse to approve for payment any salaries and expenses incurred by the Board after the date of the opinion.

Therefore, it would appear that under the ruling in the Gershon case, above, the members of the Board would be entitled to their compensation until the date when this office ruled that the King-Thompson Act was unconstitutional. What is said in regard to the salary of the members of the Board of Mediation is equally applicable to the employees of such Board and to the debts and obligations that the Board has contracted in good faith.

CONCLUSION

It is therefore the opinion of this department that the State Comptroller may legally approve for payment the payroll and expense accounts of the State Board of Mediation which accrued or were incurred prior to the rendition of the opinion of this department on March 19, 1951, holding the King-Thompson Act unconstitutional, but the Comptroller should not approve for payment the payroll and expense accounts of the State Board of Mediation which have accrued or were incurred after the opinion was given.

Respectfully submitted,

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APPROVED:

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