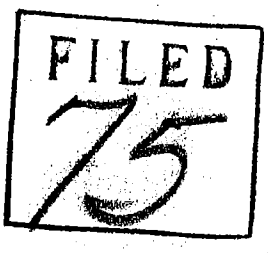
CIRCUIT JUDGES: A circuit judge may accept an appointment as arbitrator between private interests, and he may accept compensation therefor, so long as the acceptance of such position does not interfere with the proper discharge of his duties as circuit judge.



December 29, 1954

Honorable Henry A. Riederer
Judge of the Circuit Court
Division No. 1
Kansas City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Attached please find copy of letter dated November 24, 1954, in which the writer is asked to serve on an Arbitration Board constituted pursuant to a private Collective Bargaining Agreement between the two parties mentioned therein.

"I should like to be able to answer officially the inquiry contained therein as to whether I am in a position to accept this appointment. Therefore, your opinion thereon is requested. This request is further predicated upon the assumption that the time required for the performance of these arbitration duties will not interfere with the regular duties performed by the court.

"I have examined the Canons of Judicial Ethics issued by the Executive Secretary of the Judicial Conference of Missouri dated October 4, 1954, and find nothing therein contrary to the assumption of such additional employment. However, I respectfully call your attention to the provisions of Section 478.013 contained in the Missouri Revised Statutes Cumulative Supplement for 1953, and particularly to the last sentence thereof, which reads as follows:

> 'No circuit judge shall practice law or do a law business nor shall he accept, during his term of office, any public appointment or employment for which he receives compensation for his services.'
>
> "I do not believe this sentence has been construed and would like your opinion as to whether or not the proposed service on my part would constitute 'a public appointment or employment' within the meaning of this section.
>
> "I should also like to be advised whether or not there is any other section of the law which would make the acceptance of such proposed employment improper or illegal."

You do not so state, but we feel justified in concluding from the general tone of your letter that you would receive compensation for serving on this arbitration board, apart from and in addition to your salary as circuit judge.

Let us first examine that portion of Section 478.013 of the Missouri Revised Statutes, Cum. Supp. 1953, quoted by you above. We note that it contains two prohibitions as to circuit judges. The first is that a circuit judge "shall not practice law or do a law business." We do not believe that serving as a member of an arbitration board could be construed as practicing law or doing a law business. It is well known that membership on such boards is by no means confined to lawyers, nor are the issues presented to such boards exclusively, even predominantly, legal. No doubt legal training and knowledge would enhance the qualifications of a person to sit upon such a board, but we do not believe that such sitting could be construed as practicing law or doing a law business.

The second prohibition of Section 478.013, supra, is that no circuit judge shall accept any public appointment or employment for which he receives compensation for his services. Service on the arbitration board would no doubt be by "appointment," but would such service constitute a "public appointment or employment"? In this regard we desire to discuss two matters pertinent to this issue. One of these is the obvious fact that a person could only receive a public appointment or public employment from a public officer or a public body of some sort.

There are many cases which define a "public officer." We here note a few of these cases and their holdings.

In 111 P. (2d) 824, the court held that a "public officer" is one whose duties are fixed by law, and who in the discharge of the same knows no guide, but established laws.

In the case of Sowers v. Wells, 95 P. (2d) 281, the court held that a "public officer" is an officer whose functions and duties concern the public, involving the idea of tenure, duration, fees, or emoluments and powers, as well as duty, all of which taken together constitute an office.

In the case of Martin v. Smith, 1 N.W. (2d) 163, the court held that a person employed cannot be a "public officer" unless there is devolved upon him by law the exercise of some proof of the sovereign power of the state in the exercise of which the public has a concern.

In the case of Spivey v. State, 104 P. (2d) 263, the court held that an individual invested with some portion of the sovereign powers of the government to be exercised by him for the benefit of the public, is a public officer.

In the case of McKinley v. Clarke County, 293 N.W. 449, the court held that to constitute one a public officer, his duties must either be prescribed by the constitution or the statutes, or necessarily inhere in, and pertain to, the administration of the office itself, and must embrace the exercise of public powers or trusts.

In the case of Whitney v. Rural Independent School Dist. No. 4, 4 N.W. (2d) 394, the court held that in determining whether one is a "public officer," the office itself must be created by the constitution of the state or authorized by statute.

We could quote numerous cases of the same purport, but the ones which we have noted above clearly indicate the general law upon this subject, in our estimation.

In the light of the above cases, we do not believe that it can be said that either the Kansas City Power and Light Company or Local Union 412, is a "public officer" or "a public body," or that a person appointed or employed by them was accepting a "public appointment or employment," because the appointing bodies were not themselves "public."

In the second place, looking at this matter from a slightly different angle, we do not believe that the position of arbitrator in a controversy between the Kansas City Power and Light Company and Local Union 412 is a "public appointment or employment," because it is private rather than public. On this point we note the following cases which represent the general law:

In the case of People v. Powell, 274 N.W. 372, the court held that "private" means affecting or belonging to individuals, as distinct from the public generally, and "public" means the whole body politic or all the citizens of the state, the inhabitants of a particular place.

In the case of State v. Whitesides, 9 S.E. 661, the court stated that the term "public" is opposed to the term "private," and means pertaining to or belonging to the people, relating to the nation or state, or community.

In the case of Ex Parte Horn, 292 Fed. 455, the court held that "public" is the whole body politic or all the citizens of the state.

Here also we could quote numerous cases of the same purport, but we do not feel that it is necessary to do so. In the light of the cases quoted, we believe, as we stated above, that the position of arbitrator under the conditions stated by you would not constitute a "public appointment or employment." It is therefore our conclusion that the portion of Section 478.013, supra, quoted by you, would not prevent you from accepting the position of arbitrator which has been offered to you. Neither do we find any other law or laws which would serve as prohibitive. We are, of course, accepting as fact, in reaching the above conclusion, your statement that your acceptance of this position will not interfere with the regular duties of your office of circuit judge.

We do not believe that the matter of incompatibility enters into this situation. In this regard we direct attention to the case of People ex rel. Bagshaw v. Thompson, 130 P. (2d) 237, l.c. 241. In its opinion in that case the court states:

> " * * * The right to perform duties does not exist until there is at least tenure or term of office; that is, the right to perform the duties incidental thereto; tenure of office refers generally to the right to hold office subject to its termination by some contingency

> such as age limitation, resignation, death, removal, etc. 'Tenure' is sometimes held to be synonymous with 'term of office' (Hunt v. Superior Court, 178 Cal. 470, 173 P. 1097), which ordinarily refers to a fixed period. 62 Corpus Juris, 714. Until tenure in the sense of term of office exists, there can be no incompatibility of official duty for the simple reason that there is no '"right * * * and duty * * * invested (by law) * * * to perform a public function for public benefit."' People ex rel Chapman v. Rapsey, supra."

CONCLUSION

It is the opinion of this department that a circuit judge may accept an appointment as arbitrator between private interests, and that he may accept compensation therefor, so long as the acceptance of such position does not interfere with the proper discharge of his duties as circuit judge.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

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