

OFFICERS)
EMPLOYEES)

No person entitled to compensation as de facto officer or employee unless there is a legal of

September 27, 1933.

10-2

Sanders

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Hon. Dan M. Carr
Secretary
Department of Penal Institutions
Jefferson City, Missouri

Dear Mr. Carr:

This is to acknowledge your letter which reads as follows:

"Under statute, the Board of Penal Commissioners changed from five to three members, July 24, 1933; but no official announcement of the continuing members was made until August 4, 1933.

In the meantime, all members continued their usual line of service.

On August 4, the official announcement was made--three of the members continued their status under reduced salary, one continued as warden without membership on the board and the fifth was relieved of service.

This fifth member was paid for twenty-three days' service at the old salary rate, and no further payment to him has been made, which brings about these questions:

1 Is he entitled to additional remuneration?

2 If so, at what rate should he be paid--the former member rate of \$3500 per annum or the new member rate, \$3200 per annum?"

Laws of Missouri, 1933, page 327, Section 1, reads as follows:

"REPEALING AND REENACTING CERTAIN SECTIONS.
That Sections 8316, 8317, 8318 and 8319,
Article 1, Chapter 44, Revised Statutes
of Missouri, 1929, be and the same are
hereby repealed and four new Sections enact-
ed in lieu thereof, to be known as Sections
8316, 8317, 8318 and 8319, and to read as
follows:"

You will note that the Legislature specifically repealed four sections of the Revised Statutes, 1929, and enacted in lieu thereof four new sections. Repealed Section 8316 R. S. 1929, provided for the creating and establishment of the Department of Penal Institutions; and Repealed Section 8317 R. S. 1929, provided for the appointment of five commissioners by the Governor. New Section 8316, Laws of Missouri, 1933, provides for the creating and establishment of a department to be known as the Department of Penal Institutions by name; and new Section 8317, Laws of Missouri, 1933, page 328, provides in part:

"Immediately after the taking effect of this act it shall be the duty of the governor, by and with the consent and approval of the senate, to appoint three commissioners, of the department of penal institutions, etc. The governor shall designate one of said commissioners as director of penal institutions, and the commissioner so designated etc. The governor may also, at his discretion designate any one of said commissioners as warden of the Missouri state penitentiary; one as commissioner of paroles and pardons, and one as superintendent of any department or departments, etc."

You will note that the 1933 section, supra, reduced the commissioners from five to three and was approved March 16th, 1933, and passed without an emergency clause. The Legislature adjourned and ninety days thereafter these four (1933) enacted laws became effective, to-wit, July 24th, 1933. Thus, the Legislature repealed four of the 1929 statutes and enacted in lieu thereof four like and similar sections, and when these became effective (July 24th, 1933) such, thereafter, govern the Department of Penal Institutions.

The effect of this mode of repealing and amending the 1929 statutes is (pertaining to your inquiry) that now three commissioners are provided for instead of five. By delay in not designating who the three commissioners were to be, created the situation that all five commissioners (appointed under 1929 statutes) remained in their respective positions and performed duties under the old law until August 4th, 1933, when three commissioners were designated or appointed. Thus, as stated in your letter, one former commissioner was relieved of duty. You ask whether or not the unappointed person, so remaining, shall be entitled to compensation for services he rendered during this interim. The first question to be determined is when the act took effect.

In State ex rel. Brunjes v. Bockelman, 240 S. W. 209, (Supreme Court, in Banc) 1. c. 212, the court said:

"The real issue in this case is to determine from what exact date such a statute speaks. In our judgment it speaks as of the date it becomes effective and not otherwise."

And further,

"The law discussed was passed February 4, 1859, and has not been passed with an emergency. Such a law became effective in 90 days."

Thus, this new law, being passed without an emergency clause, became effective ninety days thereafter. Therefore, after July 24th, 1933, said office, as was held by the person sought to be compensated, did not exist. The question, then, must be determined as to whether or not he was a de facto officer, and, if so, is he entitled to the compensation?

In State ex inf. Mytton v. Rackliffe, 164 Mo. 453, the Supreme Court, in Banc, 1. c. 460, said:

"But how he can be the legal incumbent of an office created by statute when the statute creating it has been expressly repealed, it is difficult to see."

And further at page 461:

"The courts have no power to reform legislation. As it comes from the hands of the

Legislature so we must take it, good or bad, perfect or imperfect, and however much we may regret the unfortunate situation in which this legislation leaves cities of the second class in regard to one of the most important departments of municipal government, it is beyond our power to relieve it."

And, in Ex Parte Babe Snyder, 64 Mo. 58, l. c. 62, the court said:

"* * * Numerous cases can be instanced from the books, where the acts of an incumbent of an office have been held valid, upon the ground that such incumbent was an officer de facto. But an officer of that description necessarily pre-supposes an office which the law recognizes. And a quite extensive research has failed to discover an instance where an incumbent has been held an officer de facto, unless there was a legal office to fill; * * * * *"

And, in State ex rel. Binghamton v. Reynolds, 218 S. W. 334, l. c. 336, the court said:

"There is no claim here of a de facto incumbency of the office. Harwell was a mere intruder. The office of township collector had been abolished; and, there being no de jure office, there could be no de facto officer."

Therefore, we conclude that the 1933 sections, supra, in repealing the old statutes reduced the commissioners from five to three so that now the office of only three commissioners is provided and the holding of an office by one, after the 1933 sections became effective, would not constitute such person so holding thereafter even a de facto officer, because he filled no legal office.

We now proceed as to whether or not such person who holds office, not being de facto or de jure, is entitled to compensation. In Cunio v. Franklin County, 285 S. W. 1007, l. c. 1008, the Supreme Court of Missouri, Division No. 1, held:

"It is well-established principle that a salary pertaining to an office is an incident of the office itself, and not to its occupation and exercise, or to the individual discharging the duties of the office."

And further,

"On the other hand, it is equally well settled that, if a person exercising the functions of an office is not entitled to the office, he cannot maintain an action for his services."

From the above and foregoing, it is our opinion that the person mentioned in your inquiry is not entitled to compensation from July 24th, 1933, to August 4th, 1933. We are sorry such is our ruling but we can only say as did the Court in *State ex inf. Mytton v. Rackliffe*, supra; "As it comes from the hands of the Legislature so we must take it, good or bad, perfect or imperfect."

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED: _____

ROY McKITTRICK
Attorney-General.

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