

BOARD OF HEALTH: No limit on inspectors in Food & Drug and cosmetology departments or their salaries.

State Board through president may sign all payroll vouchers, except water and sewage division which Commissioner of Health may sign, but such duty may be delegated.

October 25, 1941

10-28

Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your letter of September 30, 1941, presenting for our opinion the following questions:

- "1. How many inspectors may the State Board of Health employ in its Food and Drug Department?
- "2. What compensation may they receive?
- "3. How many employees may the State Board of Health employ in its Cosmetology Department?
- "4. What compensation may they receive?
- "5. Who is authorized to sign pay-roll vouchers in the Board of Health, the President of the State Board of Health or the Secretary of the State Board of Health?"

In Laws of 1909, p. 559, the office of Hotel Inspector was created and certain duties were imposed upon said officer. In Laws of 1923, p. 227, said office was abolished and the duties thereof imposed upon the Food

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and Drug Commissioner.

In Laws of 1919, p. 379, the office of Beverage Inspector was created and certain duties were imposed upon said officer. In Laws of 1923, p. 228, said office was abolished and the duties thereof were imposed upon the Food and Drug Commissioner.

In 1923 the Food and Drug Commissioner was a separate office existing under the provisions of Chapter 38, Article VI, R. S. Missouri, 1919, with the duty to make certain inspections relative to the manufacture and sale of food products and drugs.

It therefore appears that in 1923, after the enactment of the laws above mentioned, relative to hotel and beverage inspections, the Food and Drug Commissioner became vested with duties relative to three subjects -- hotel inspections, beverage inspections and inspections of food and drugs.

In Laws of 1933, p. 255, the office of Food and Drug Commissioner was abolished and the duties thereof were conferred upon the Commissioner of Health.

In Laws of 1939, p. 416, the act of the General Assembly in 1933, abolishing the office of Food and Drug Commissioner and imposing the duties thereof on the Commissioner of Health, was repealed and a new act passed which conferred the duties of said Food and Drug Commissioner on the State Board of Health of Missouri.

Since the Act in 1939, no further changes have been made, and it thus appears that the administration of the laws relating to hotel inspections, beverage inspections and inspections of food and drugs is now vested in the State Board of Health.

Under Section 9737, R. S. Missouri, 1939, the State Board of Health is directed to establish certain divisions in said agency, and we assume that under such authority there has been established the Division of Food and Drugs. This division includes the duties pertaining to hotel inspections, beverage inspections and inspections of food and drugs.

Chapter 58, Article VI, R. S. Missouri, 1939, contains the duties and authority of the State Board of Health relative to hotel inspections. As the article now stands, there is no provision made therein for employees or inspectors or for a salary for such employees or inspectors. The only reference is found in Section 9925 thereof, wherein it is made the duty of the "commissioner and his deputies to see that all the provisions of this article are complied with," and Section 9954, referring to method of payment of deputies. Prior to 1923, when the office of Hotel Inspector was abolished, the statute (Sec. 5889, R. S. Missouri, 1919) provided for not to exceed three deputies with a salary of not to exceed \$100.00 per month. This statute was expressly repealed by the 1923 Act (Laws 1923, p. 227).

Chapter 58, Article VII, R. S. Missouri, 1939, contains the duties and authority of the State Board of Health relative to beverage inspections. As the article now stands, there is no provision made therein for employees or inspectors or for their salaries. The only reference found is in Sections 9969, 9976 thereof, providing that "the expense of said office, including the salaries of the commissioner and his deputies, shall be paid monthly out of the amount appropriated by law, \* \* \*." Prior to 1923, when the office of Beverage Inspector was abolished, the statutes (Secs. 5959, 5960, R. S. Mo. 1919) provided for four deputies with an annual salary of \$1800.00, and such chemical and clerical help as was necessary, with no fixed salary or any provision made for a salary for such employees, except for provision for payment of all salaries out of such sums as may be appropriated for such purpose. These statutes were expressly repealed by the 1923 Act (Laws 1923, p. 228).

Chapter 58, Articles I to V, inclusive, R. S. Missouri, 1939, contains the duties and authority of the State Board of Health relative to inspection of food and drugs. As the articles now stand, Section 9856 thereof authorizes the appointment of one deputy with a salary of \$1200.00 annually; not to exceed six inspectors with a salary of \$1000.00, annually and allows the commissioner not to exceed \$50.00 per month for clerk hire. Prior to 1933, when the office of Food and Drug Commissioner was abolished, this section was the same (Sec. 13006, R. S. Mo. 1929).

A summary of the foregoing results in the following: In only one (the article pertaining to food and drugs) of these articles is any express provision made of inspectors and their salaries, but all contain reference to deputies by either referring to the duties or the method of paying the salary of such deputies.

Chapter 57, Article V, R. S. Missouri, 1939, contains the duties and authority of the State Board of Health relative to Cosmetology, Hairdressers and Manicurists. Examination of that Article discloses that it makes no provision for any employees or inspectors and does not even make a reference thereto, such as was found in the articles heretofore examined.

We have further examined all other articles of Chapter 57 and 58, R. S. Missouri, 1939, which the Board of Health is charged with administering, and except as heretofore noted, find only one provision made for employees. That is found in Section 9761, Chapter 57, Article II, R. S. Missouri, 1939, relating to vital statistics.

However, we do not think that the failure of the law to expressly authorize the appointment of employees and inspectors in the Food and Drug division (treating section 2856 as inoperative, later to be explained), and in the Cosmetology division, prevents the appointment of such employees and inspectors.

In 59 Corpus Juris, p. 128, Section 188, appears the following rule:

"State officers or boards have power to hire or appoint agents or other employees whenever such power is expressly conferred by law or implied from the nature of the duties to be performed, \* \* \* \* \*" (Underscoring ours)

In *Wines v. Garrison*, 214 P. 56, 26 A. L. R. 1302, 1309 (Cal.) the following statement appears:

"\* \* \* By section 59 of the County Government Act (1897) above quoted, and the corresponding section of the Political Code (Sec. 4024), the officer has the authority to appoint as many deputies and assistants as may be necessary to enable him to perform the duties of his office. This would be the rule without any statutory authority. \* \* \* \* \*"  
(Underscoring ours)

In John Taylor v. Brown, 4 Cal. 188, it appears that no statute existed authorizing the appointment of a deputy constable. When this right was called into question, the court said:

"A constable, like any other ministerial officer, has the right to appoint as many deputies as he pleases, \* \* \* \* \*"

In Jobson v. Fennell, 35 Cal. 711, the point was involved that was ruled in the preceding case. The court said, l. c. 712:

"The general rule of the common law is, that officers who exercise judicial functions cannot act by deputy, but those who exercise merely ministerial functions may, without express authority to that effect, \* \* \* \* \*"

"The statute of this State in relation to Constables is silent as to the appointment of deputies. (Stats. 1850, p. 263.) Such being the case, the rule of the common law applies, and it has accordingly been held that Constables may act by deputy in the exercise of their ministerial functions."

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In Franklin v. Hammond, et al., 45 Pa. 507, it appears that the State Treasurer was authorized by statute to settle certain debts due the state from corporations. The treasurer, to carry out this power, appointed Thomas B. Franklin, Attorney-General of Pennsylvania, to be his agent. The Attorney-General in turn appointed J. W. Hammonds to act for him. The authority of Franklin to make this appointment was drawn into question. The court said, l. c. 512:

"Although not necessary to a determination of this case, we will look for a moment at the controverted point of authority. The authority to Franklin was 'to discover and bring to settlement corporations' in default to the Commonwealth, 'on account of non-payment of their dues, and to adopt such measures in the premises as to him may seem best calculated to carry out the authority hereby conferred.' If assistance were necessary in the performance of the duty assigned and accepted, surely here was authority to employ it. He was only limited in the measures to be employed by his own discretion, and the legal requirement that they should be lawful. If personal intercourse with the corporations was deemed better than a correspondence, he might employ the former in preference to the latter; he might attend in person or employ an agent. The proceedings were not restricted to process, so as to come within the prohibitions of the Act of 1806. It was an agency outside of that, effectuating what doubtless it was thought could not be as successfully accomplished by a resort to formal proceedings. Viewed in this light, we see the reason of the appointment of an agent, and at the same time the general authority conferred. \* \* \* \* \*

In Opinion of the Justices, 54 Atl. 951 (N.H.), the point involved was the right of the Governor to appoint an attorney to collect certain claims against the United States. The court said, l. c. 951:

"By section 3, c. 2479, p. 2435, Laws 1861, the Governor, with the advice and consent of the council, was 'authorized and empowered to negotiate, adjust and settle all questions, accounts, matters and things, between this state and the United States, in any way \* \* \* growing out of \* \* \* any contracts or expenditures which may be made for the public defense or the payment of troops.' The Governor and Council at the date of the appointment in question (this act being still in force) were therefore expressly authorized to negotiate, adjust, and settle any accounts or claims of this character then existing in favor of the state against the general government. That there were such claims appears to have been then contended, and is now established. The power so conferred, by necessary implication, included authority to do whatever was reasonably necessary for its proper and efficient execution. It is not to be supposed the Legislature understood the Governor and Council would or could personally perform all the services incident to the proper investigation, proof, and prosecution of such claims by the state. Such matters are commonly conducted by persons having special training, experience, and skill. The appointment of suitable persons to represent the state in the prosecution of its claim before the appropriate tribunals must therefore have been understood to have been embraced

within the general terms by which power in the matter was conferred upon the executive. Evidence in support of this conclusion is furnished by section 1, c. 4076, p. 3120, Laws 1865, in which the Governor and Council were empowered 'to pay the authorized agent or agents employed by the state in prosecuting the claims of said state against the United States.' No other statutory provision in the matter being found, this act appears to be a legislative recognition of the legal employment of 'agents' for the purpose named, under the act first cited. \* \* \* \* \*

The foregoing authorities, while some are perhaps silent as to the rule invoked, invoke the rule that an officer or board has by implication all powers necessary to effectuate the express power granted. This rule has long been recognized and applied by the courts in this State. In *Hudgins v. Mooresville Consolidated School District, et al.*, 312 No. 1, 278 S. W. 769, 771, it is stated:

"\* \* \* The rule of interpretation being that a power granted carries with it, incidentally or by implication, powers not expressed, but necessary to render effective the one expressed; \* \* \* \* \*"

Applying the foregoing rules to our precise question, it appears that the State Board of Health is composed of seven (7) persons (Section 9733, R. S. Missouri, 1939), and the statutes fixing their compensation at Ten Dollars (\$10.00) for each day engaged in carrying out their duties (Section 9740, R. S. Missouri, 1939), certainly contemplates only part time service. As was pointed out in the case of *Opinions of the Justices (54 Atl. 951)*, it cannot be sup-



posed that the Legislature intended for these seven (7) men to personally make the necessary inspections of hotel, beverages and food and drugs, and as we have heretofore pointed out, the statutes pertaining to such function by referring to the duties of or method of payment of deputies and employees expressly recognizes that there will be persons employed to actually perform the duties imposed on the Board of Health. If it were not the rule that the State Board of Health could employ all persons necessary to carry out their powers, then those powers granted are empty and amount to nothing because of the impossibility of seven (7) men, with other duties besides, to carry them into effect.

The expressed power given the Board of Health is to inspect hotel, beverages, food and drugs, and license those desiring to become cosmetologists. In order to make this power effective, by implication said board has authority to employ all personnel necessary.

However, even this conclusion leaves one thing yet undeciphered. What effect is to be given Section 9856, R. S. Missouri, 1939, providing for certain employees and their salary to inspect food and drugs? It has been suggested that said section has been repealed by implication on the theory that it is inconsistent with the act abolishing the office of food and drug commissioner and conferring the duties on the Board of Health (Laws 1939, p. 416). We do not believe this to be so. "Courts will not hold that a later statute repeals an earlier one by implication, nor by an express provision to the effect that it repeals former acts inconsistent with it, unless the inconsistency clearly appears. If the two statutes may be read together without repugnancy or unreasonableness, they will be read together and given effect." (Nichol v. Hobbs, 197 S. W. 258, 259, Mo. Sup.) As we see it, the Act in Laws of 1939, p. 416 and Section 9856, R. S. Missouri, 1939, are in no way repugnant to each other. One abolishes an office and transfers the powers and duties. The other contains one of the powers attached to the office abolished and of course, was carried on over as one power which the Board of Health could exercise. We think a reasonable view could, if said statute had a subject on which to operate, produce the result that now the Board of Health has the authority to

make the appointments mentioned in Section 9856, subject of course, to the limitations contained therein as to numbers and salary. However, this view in no way detracts from the power of said board to appoint as many persons as may be necessary to enforce the hotel and beverage inspections laws. The limitation is only on those appointments respecting food and drugs, and even so, we do not think it operates as a barrier to the appointment of more than one deputy and six inspectors on that phase of the work.

Our reason is that Section 9737, R. S. Missouri, 1939, provides as follows:

"In addition to the divisions of vital statistics and laboratories already established, the board shall establish the following divisions: Preventable diseases, including tuberculosis, child hygiene, venereal diseases; and other divisions as it may deem necessary from time to time. \* \* \* \* \*

As we understand it, the Board has, under this broad authority, established the Division of Food and Drugs, which administers, under the supervision of the board, the laws pertaining to hotel, beverage and food and drug inspections. That being so, these subject matters have lost their identity so far as it may be said that one inspector was hired to do this duty and another to do that duty. And this is true, irrespective of the terms of Section 9737. When the offices of hotel and beverage inspector were abolished and the duties conferred on the Food and Drug Commissioner, the effect of such action was to weld the three into one single department -- The Food and Drug Department. Thus, when the duties of the food and drug commissioner were placed on the Board of Health, that officer's department went into the board of health as a single unit. Therefore, it appears to make little difference whether it has been constituted a division by the board or has been merely left as it was, the result either way is the same. It is a single unit with

no line being drawn between the three types of work it performs, so far as the employees of said unit or division are concerned.

We think the Legislature has recognized this view. In Laws of 1937, p. 113, we find an appropriation to the Food and Drug Department and it makes no break down as to what part of the funds are allocated to hotel, beverage and food and drug inspections. The same appears in the appropriation in Laws of 1939, p. 128. The same is also true of the appropriations in Laws of 1941, p. 98, 218.

We, therefore, fail to see how it can be said that an inspector employed in the "Food and Drug Department" with the duty of enforcing the law pertaining to said department, can be said to be limited as to salary by the terms of Section 9856, which clearly applies to only a portion of his duties. By the same reasoning, we do not see how the Board of Health is in any way limited by said section as to the number of inspectors it may employ to enforce said laws, which are articles 1 to 7, inclusive, of Chapter 58, R. S. Missouri, 1939. We are further fortified in this view by the terms of Section 9856, R. S. Missouri, 1939, which specifically restricts the duties of the employees provided for under Section 9856, to enforcing "all laws that now exist or that may hereafter be enacted regarding the production, manufacture or sale of any food products \* \* \* or drug." The present inspectors do not have these duties alone, they have those and the further duty to inspect hotels and beverages. Section 9856 stands unrepealed, but inoperative because there is nothing in existence to which it applies. There are no inspectors of food and drugs. The present inspectors are inspectors of the Food and Drug Division of the Board of Health.

It is, therefore, our opinion that the board of health may employ as many inspectors as necessity demands in the division of Food and Drugs and division of Cosmetology, subject only to the limitation of the available appropriation.

Your question as to the salary that may be paid said inspectors seems to be completely answered by the case of State ex rel. Hueller v. Thompson, 289 S. W. 338 (Mo. Sup.)

That case involved the right of the Board of Permanent Seat of Government to appoint an assistant commissioner and the fixing of his salary. The statutes involved authorized the appointment of a commissioner at a salary of Two Thousand Five Hundred Dollars (\$2,500.00), and authorized the appointment of as many watchmen as was necessary but did not fix their salary. No provision was made for the appointment of an assistant commissioner or fixing a salary for the same. The court disposed of the question as follows, l. c. 340:

"Since the Legislature has not, by any general law, fixed the compensation of any employees or appointees of the board of the permanent seat of government, except that of the commissioner thereof, and has not named or limited the number of such employees or appointees, save and except certain temporary employees (section 9267, R. S. No. 1919), it is to be presumed that it intended to give the board a discretion as to the kind and number of assistants and helpers necessary to carry on the duties enjoined upon the board by said chapter 84, as well as the compensation of such employees, helpers, and assistants. Indeed, the number of persons necessary to take care of and protect the property of the state, as contemplated and required by law, is a matter which the Legislature could not foresee. Therefore the placing of no inhibition upon the employment of such help, but to leave the same to the wisdom and discretion of the board of the permanent seat of government, reflects a wholesome legislative policy. We hold, therefore, that the board, in its discretion, had the power to appoint an assistant commissioner and to fix his compensation. \* \* \* \* \*." (Underscoring ours)

Just previous to this ruling the court said, l. c. 340:

"\* \* \* As to the compensation of these watchmen, the statute makes no provision, thereby leaving it within the authority of the board to fix such compensation as the board may deem fair and reasonable."

It is clear that, under the rule laid down by this case, the Board of Health has authority to fix the salaries of the inspectors in the Division of Food and Drugs and Division of Cosmetology in such sums as the board may deem fair and reasonable.

The remaining question is: Who is authorized to sign payroll vouchers in the Board of Health? We take you to mean by this question all branches of said board and not just the two with which we have been dealing in the foregoing.

As we see it, this question is partially answered by the statutes and where the statute makes no express provision, it will depend upon who or what body is charged with administering the various provisions of Chapters 57 and 58, R. S. Missouri, 1939.

Under Section 9740, R. S. Missouri, 1939, it is expressly provided that the members of the board are to receive a per diem allowance, plus necessary expenses and that "The president of the board shall certify the amount to the Commissioner of Health and the per diem, traveling and other expenses of members and on presentation of this certificate the auditor of state shall draw his warrant on the state treasurer for the amount."

Our view of the meaning of this statute is that the board members are authorized to be paid their per diem and expenses on the certificate of the president which certify the Commissioner of Health is to present to the auditor.

Under section 9752, R. S. Missouri, 1939, the division of Water and Sewage is maintained out of the fees collected for the service performed under section 9751, R. S. Missouri, 1939. Said section provides "the state auditor shall draw his warrant for claims against this fund (created out of the fees collected) after such claims have been approved by the secretary of the state board of health."

The Commissioner of Health, under Section 9744, R. S. Missouri, 1939, is constituted the secretary of the board. Therefore, the salaries attendant to administration of the Water and Sewage Division should be paid upon the voucher of the Commissioner of Health.

Article II of Chapter 57, R. S. Missouri, 1939, relates to the bureau of vital statistics. Section 9761 thereof makes the secretary of the board of health, (now the Commissioner of Health) the titular head of said department. The statute then provides, "The state board of health shall provide for such clerical and other assistance as may be necessary for the purposes of this article, who shall serve during the pleasure of the board, and may fix the compensation of persons thus employed within the amount appropriated therefor by the legislature." No provision is made in said article relative to who shall be authorized to submit payroll vouchers of these employees. However, since the Board of Health has the power to appoint and dismiss these persons, we are of the opinion said board, through its president, is the proper party to sign such vouchers.

Article IV, Chapter 57, R. S. Missouri, 1939, relates to chiropodists. The administration of this law is vested in the Board of Health (Sections 9795, 9808) and by section 9807, thereof the board members are allowed Ten Dollars (\$10.00), and expenses for each day spent in performance of his duties thereunder. The statute provides, "The said compensation and traveling expenses, and any incidental expense necessarily incurred by the board or any member thereof, shall, if approved by the board, be paid from the treasury of the state" out of the fees received under the provision of article IV.

It is, therefore, clear that this expense and compensation is to be paid, if approved by the board, and we think said board must act through its executive head, the president, in submitting the vouchers. Any other salary vouchers would be submitted in the same manner as indicated for the vital statistics bureau.

Article V of Chapter 57, R. S. Missouri, 1939, relates to Cosmetologists, etc. No provision is made in this article as to the method to be followed in seeking payment of salaries. The act is to be administered by the Board of Health, who has power to appoint and dismiss the employees. Therefore, the salaries should be paid as indicated for the vital statistics bureau.

Article VI, Chapter 57, R. S. Missouri, 1939, is the Narcotic Drug Act. The Board of Health has the duty of administering the same. No provision is made relative to the method in which salaries are to be paid. Therefore, the salaries should be paid upon vouchers signed by the president of the board.

Chapter 58, R. S. Missouri, 1939, contains seven (7) articles. The duties pertaining to each are vested in the Board of Health. Articles I to VI, inclusive, pertain to the food and drugs and by Section 9864 of Article I the duty of signing payroll vouchers is expressly placed upon the board which must act in that respect through its president. Article VI on hotel inspections in Section 9954 makes the same provision. Article VII on Beverage inspections in Sections 9969 and 9976, makes the same provision.

We have stated that the statutes referred to in Chapter 58, R. S. Missouri, 1939, expressly place this duty on the board. The term used in said statutes is the "commissioner," meaning the commissioner of food and drugs whose duties, under Section 9855, R. S. Missouri, 1939, are now vested in the Board of Health.

From the foregoing, it appears that all the persons that may be employed to administer the provisions of Chapters 57 and 58, R. S. Missouri, 1939, (except the Commissioner of Health, Section 9744), are appointed by and

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subject to dismissal by the State Board of Health. All the payroll vouchers for such persons should be signed by the board acting through its president, except those in the Water and Sewage divisions, which are to be signed by the Commissioner of Health (Section 9752, R. S. Missouri, 1939).

However, we believe that after the board has selected its employees and fixed their salaries, the mere signing of monthly payroll vouchers is a ministerial function which may be delegated by the board, by appropriate action, to some person to act in its stead.

Respectfully submitted,

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APPROVED:

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VANE C. THURLO  
(Acting) Attorney General

LLB/rv