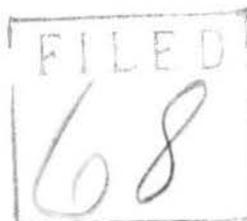


SUPERINTENDENT OF INSURANCE: Fees of Referee as set forth in Section 5945, Laws of Mo. 1933, p. 65 are the only fees that can be allowed the Referee, and the statute cannot be waived.

11-30
November 28, 1936.



Honorable R.E. O'Malley,
Superintendent of Insurance,
Jefferson City, Missouri.

Attention: Mr. J.F. Allebach

Dear Sir:

This department is in receipt of your letter of November 27, which is as follows:

"R.E. O'Malley, Superintendent of Insurance, has filed a receivership action against the Missouri National Life Insurance Company, and the cause is pending in the Circuit Court of the City of St. Louis, Missouri.

"The Court appointed a referee pursuant to Section 5945, R.S. Mo. 1929, as amended by the Extra Session of the 57th General Assembly. The amended section is found in the 1933 Session Acts at page 65. This section among other things provides:

'The referee may be allowed for his services not exceeding \$1.50 for each hour actually spent by him in hearing the testimony in the case, and for taking down the testimony and writing out the same in his report, not exceeding fifteen cents per each hundred words in his report, no pay or allowances whatever being made for exhibits or their contents, or for figures or numerals; and in addition to the above, he may be allowed a fee of not exceeding \$100 for his services in making his report; besides these no other fees or allowances shall be taxed in favor of the referee or any one employed by him, and he shall pay his own clerk or reporter, if he employ one.'

"The referee appointed by the Court under the authority of this section has stated that he will

not proceed as such referee for the meager compensation therein provided. Both the referee and counsel for the defendant indicated their belief that this section of the statutes could be waived by the parties to the action and a compensation higher than that provided by the statute could be paid. It should be borne in mind, of course, that any compensation paid to the referee would be paid out of the assets of the company as administration costs.

"The Office of Superintendent of Insurance of the State of Missouri is a statutory office and he is proceeding against the company under authority given him by certain statutes. That being the case, we would like to know whether the Superintendent of Insurance has the power to waive the provisions of Section 5945 and to permit the payment to the referee of compensation higher than that designated in the statute, out of the assets of the company.

"The Superintendent of Insurance, the company and the referee would like to have your opinion on this matter, and we would appreciate it if you could favor us with your opinion within the next day or two, if that will be possible."

The portion of Section 5945, Laws of Mo. (Extra Session 1933-34), which you quote with reference to the fees to be allowed the referee, also contains provision for the court or judge to

"refer the hearing of the case to a referee, with power to hear the testimony and report his conclusions on the same to the court or judge. If the case is referred, the referee shall forthwith proceed to hear the same, and shall file his report within ten days after the conclusion of the testimony. Any referee failing to at once proceed with the hearing, or to file his report within the time aforesaid, may be removed by the court or judge, in which case he shall not receive any pay or allowance whatever for his services; and the court or judge may thereupon hear the case or appoint a new referee. The fees of the referee shall be taxed and paid as costs in the case."

The remainder of the statute with reference to the fees of the referee are set forth in your letter and will not again be quoted.

Briefly, your question is: Are the fees set forth in Section 5945, Laws of Mo. 1933, page 65 (Extra Session) the only fees that can be allowed to the referee, or can he be compensated in addition to the statutory fees? In other words, are the fees enumerated in the statute the only fees that can be allowed the referee, or can the terms of the statute be abrogated and he be given additional fees?

We think when a referee is appointed by the court to take and hear testimony and report his findings, he becomes an official of the court--a public officer--and he must look solely to the statutes for his compensation. The statute sets forth plainly and concisely the fees he is to receive, and it contains an express provision against additional fees, as follows:

"besides these, no other fees or allowances shall be taxed in favor of the referee or anyone employed by him, and he shall pay his own clerk or reporter."

In the case of *King v. Riverland Levee District*, 218 Mo. App. l.c. 493, the St. Louis Court of Appeals offers the following general principles of law regarding fees of officers, which we think are applicable to the instant case:

"It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. (State ex rel. *Evans v. Gordon*, 245 Mo. 12, l.c. 27, 149 S.W. 468; *Sanderson v. Pike County*, 195 Mo. 598, 93 S.W. 942; State ex rel. *Troll v. Brown*, 146 Mo. 401, 47 S.W. 504) Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. *Wedeking v. McCracken*, 60 Mo. App. l.c. 565, to the effect that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute and that if by statute compensation is

provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same. (State ex rel. Evans v. Gordon, supra)"

A further decision which we believe precludes the waiving of the terms of the statute is that of State ex rel. v. Gordon, 245 Mo. 12, wherein the Court said (l.c. 28):

"Not only is the right to compensation dependent upon statute, but the method or particular mode provided by statute must be accepted. On this point the Kansas City Court of Appeals says: 'It seems the general rule in this country, as announced by the decisions and text-writers, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute. And further, it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or to any different mode of securing the same. (Throop on Public Officers, Secs. 446, 450; Shed v. Railroad, 67 Mo. 687, 690; Gammon v. Lafayette County, 76 Mo. 675; Williams v. Chariton County, 85 Mo. 645; Ford v. Railroad, 29 Mo. App. 616) Such statutes, too, must be strictly construed as against the officer. (Ford v. Railroad, supra, and Shed v. Railroad, supra)' (State ex rel. v. McCracken, 60 Mo. App. l.c. 656)"

CONCLUSION

Section 5945 provides for the fees of the referee to be appointed in accordance with the provisions of said section; it has definitely fixed the same and has emphatically stated that no other fees shall be allowed. We are of the opinion that the foregoing decisions preclude any referee appointed under the provisions of Section 5945, supra, from receiving compensation in any manner or mode other than as set forth in said statute, and that you, as Superintendent of Insurance, have no authority to waive the terms of said section.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

OWN:AH