

MISSOURI REAL ESTATE
COMMISSION

Several questions on the granting of a
license.

February 3, 1942

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Mr. John W. Hobbs
Secretary
Missouri Real Estate Commission
Jefferson City, Missouri



Dear Sir:

Your request for an official opinion from this Department, in regard to various matters connected with the Missouri Real Estate Commission, has been received.

In view of the many questions involved, it will be necessary for us to give our opinion separately on each question.

The Missouri Real Estate Commission Act appears in the 1941 Session Laws, Pages 424 to 431, inclusive. Although the Legislature passed this Act no appropriation was made for the carrying out of it, and we are answering the questions contained in your request, and, at the same time are taking into consideration the fact that no appropriation was made.

Section 19, of Article 10, of the Constitution of Missouri, partially provides as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; * * * ."

Under the above constitutional limitation the state treasurer at this time cannot recognize warrants drawn by the Missouri Real Estate Commission, even though they have received the fees set out in that Act for the payment of licenses granted to brokers and other dealers. The

money received from the license fees under Section 6, of the Act, must be collected by the Commission and paid into the treasury to constitute a fund for the purpose of carrying out the provisions of the Act. Section 6 also provides:

" * * * No money shall be paid out of this fund except by an appropriation by the General Assembly. * * * "

Since there has been no appropriation the state treasurer cannot recognize warrants upon this fund.

The first question in your request reads as follows:

I

"Under the law could the Commission appoint or employ special investigators to investigate applicants throughout the State?"

It is impossible, at this time, for the Missouri Real Estate Commission to employ special investigators unless they serve without pay, for the reason that no appropriation has been made for their compensation. The Commission could be authorized to employ special investigators under Section 4 of the Act, - which partially reads as follows:

"* * * The commission shall employ a secretary and such other employees as it shall deem necessary to discharge the duties imposed by the provisions of this act, and shall outline their duties and fix their compensation, and shall require such surety bonds as deemed necessary. * * * "

It is certain that the Legislature did not expect, or intend, the members of the Commission to personally do all the administrative and clerical work necessary to effectuate the purposes of this Act and to fulfill the numerous duties placed upon them by the various laws applicable to the Commission. They were expected to provide for themselves such assistance as would be necessary to effectuate the purposes of this Act.

In the case of *Aull v. City of Lexington*, 18 Mo. 401, the city of Lexington, in 1851, adopted an ordinance providing for a City Board of Health, whose duties were prescribed and set out as follows:

"It shall be the duty of the board of health to exercise a general supervision over the health of the city, and from time to time make such report to the mayor and city council as they may deem necessary; and said board are hereby vested with all power necessary to carry the provisions of this ordinance into effect."

Under that authority the Board leased quarters for a transient hospital in which to place persons infected with cholera, who were landing from steamboats. The plaintiff in the case was suing the city for the rental agreed upon by the board. The court held that the term "general supervision over the health of the city" conferred more than mere authority to examine into the condition of the health of the city, that it was intended that the board should have active and sufficient power to be exercised for the public good, and the court provided for the payment of the agreed rental.

In the case of *Kent v. Village of Tarrytown*, 64 N. Y. Supp., 178, the court considered the power of the board of health to employ persons to carry out their rules and regulations. The plaintiff in that case had been employed by

the board to investigate local health conditions and was suing the municipality for the reasonable value of the services. The defense was made, on the part of the village, that:

"The criticism is made that it nowhere appears that any legal regulation or order was made by the Board of Health, that without such preliminary step it was not authorized to employ any person * * * the complaint should have contained an averment of the regulations and orders as made by the board of health before any legal employment could be shown."

The court overruled the contention of the defendant stating that in view of the duties of the board to execute the laws to suppress nuisances and to protect the public health, narrow construction should not be placed upon the board's authority to legally employ assistance. The above cases apply to boards of health, but the rule of law is similar to rules and regulations that will be made by the Missouri Real Estate Commission.

It is therefore our conclusion in your first question that the Commission may appoint or employ special investigators to investigate applicants throughout the State at this time, providing they serve without pay; but, at the next meeting of the Legislature, the appropriation, if made, should set out that part of the appropriation is for the employment of special investigators and other activities of the Missouri Real Estate Commission.

Your second question reads as follows:

II

"Could the Commission employ its own attorney or will they have to use the Attorney General's Office exclusively for their work?"

Section 12901 R. S. Missouri, 1939, reads as follows:

"The attorney-general shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved."

Under the above section it is the duty of the Attorney General to represent the State, which includes the Missouri Real Estate Commission, in all civil suits and other proceedings at law or in equity.

The Legislature, when it enacted the Missouri Real Estate Commission Act, could have designated in the Act that the Missouri Real Estate Commission could employ lawyers to represent the Commission, and could have appropriated the money to pay the lawyers. However, under the present Act the Missouri Real Estate Commission cannot employ its own attorney and is compelled to use the Attorney General's office exclusively for its work.

Your third question reads as follows:

III

"As secretary to the Commission, do we involve the Commission in any way in asking the Better Business Bureau's Police Officials etc, for any and all information they may have on applicants?"

Would the Secretary of the Better Business Bureau, civic organizations, or the Real Estate Exchanges of the various towns be personally liable for information they would send the Commission about an applicant, if part or all of said information not be correct?"

The above question is covered by Section 7 of the Act, which reads as follows:

"A license shall be granted only to persons who bear, and to corporations or associations whose officers bear, a good reputation for honesty, integrity, fair dealing, and who are competent to transact the business of a real estate broker or a real estate salesman in such manner as to safeguard the interests of persons whom they represent."

Under the above section, by implication, the reputation and honesty of the applicant, in regard to the business of a real estate broker, or a real estate salesman, must be investigated before a license shall be granted, and we see no reason why the Commission would be involved in making an inquiry of the Better Business Bureau, Police Officials and other officials as to the information they may have on applicants.

As to the question of whether or not the secretary of the Better Business Bureau and other organizations are personally liable for information they would send the Commission about an applicant, we think that would depend upon the correctness of the information, and is a matter of fact to be passed upon by a jury in case a suit would be brought against them.

Your fourth question reads as follows:

IV

"If we find through the above source that applicant has been convicted of crime or has had some complaints filed against him, but was not convicted, could the Commission reserve the sole right to issue or deny a license to said applicant?"

This question is covered by Section 7, as above set out, and a license may be granted or it may be refused, under Section 11, of the Act, but the holding of the Commission is not the final determination of the granting of the license to the applicant, for the reason that under Section 11, the applicant may have a hearing, as set out in said Section, which reads as follows:

"* * * If the commission shall determine that any applicant is not qualified to receive a license, a license shall not be granted to said applicant, and if the commission shall determine that any licensee is guilty of violation of any of the provisions of this act, his or its license shall be suspended or revoked. The findings made by the commission acting within its power shall, in the absence of fraud, be conclusive but the circuit court of the county in which said hearing is had or where such licensee or applicant resides shall have power to review said proceedings on writ of certiorari, or other proper proceedings, provided, that application is made by the aggrieved party within thirty days after the determination of the commission; or said hearing may be by mandamus brought in a court of competent jurisdiction and such court shall make such other orders in respect thereto as justice may require, and the return of the commission to any writ issued by said court shall

be accompanied by a transcript of the papers filed and proceedings had before said commissioner duly certified. All expenses and costs of proceeding and hearing under this section shall be assessed and paid as costs are assessed and paid in any court of record."

Also, Section 11 provides that before the applicant can be denied a license, or the license be suspended or revoked after issuance, the licensee effected shall be given at least ten days written notice specifying the reason for denying the applicant a license or in case of suspension or revocation, the offense or offenses of which the licensee is charged. The hearing on such a notice shall be at such time and place as the Commission may prescribe.

Your fifth question reads as follows:

V

"What would be the legal procedure if complaint or complaints are filed with the Commission against a licensee? Would all such complaints have to be sworn to?"

The Act does not set out specifically the procedure or manner of making complaints against a licensee, but the procedure to be followed is the same procedure set out in Section 11 of the Act. It is not necessary that the complaints be sworn to, but the Commission may make rules and regulations requiring that such complaint be sworn to by the person making the complaint.

As to the making of rules and regulations by a Board or Commission, 53 C. J. 1175, sets out the rule as follows:

"The power to regulate, it has been said, carries full power over the thing subject to regulation; and that, in the absence of restrictive words, the power must be regarded as plenary over the entire subject. The power to regulate may include the power to confine a business with reference to place or time; to control; to grant the use of a (thing) on stated conditions; to increase and reduce; to license; to refuse a license, to require bond from an applicant therefor, and to require the taking out of a license; to prescribe reasonable rules, regulations and conditions upon which a business may be conducted or permitted, to enforce them, and to prescribe punishment for violation thereof; to restrain; or to tax or to exempt from taxation."

In the case of State ex rel Wagner et al v. Fields, Mayor, et al., 263 S. W. 853, par. 5, the court, in defining "regulate" stated as follows:

"To 'regulate' means 'to adjust, order, or govern by rule, method, or established mode; direct or manage according to certain standards or laws; subject to rules, restrictions or governing principles.' New Standard Dictionary. Hence the city in granting a license would, even on the theory now conceded for argument's sake, have the right to consider the regulations and restrictions to be placed about the license and the business to be operated, including the qualifications of those operating it and the place where it was to be carried on. * * * *"

Your sixth question reads as follows:

VI

"When applicant in making application for license states that he has been convicted of crime which happened in the past and the Judge and Prosecutor and other interested parties recommend his receiving a license could the Commission still refuse applicant a license?"

This question is answered by our opinion rendered on your fourth question.

Your seventh question reads as follows:

VII

"Where applicants check is returned unpaid, and license has been issued, what procedure should Commission take for revocation of license?"

This question is covered by Section 10, of the Missouri Real Estate Commission Act, which partially reads as follows:

"The commission may upon its own motion, and shall upon written complaint filed by any person, investigate the business transactions of any real estate broker or real estate salesman and shall have the power to suspend or revoke any license obtained by false or fraudulent representation or if the licensee is performing or attempting to perform any of the following acts or is deemed to be guilty of: * * * "

Mr. John W. Hobbs

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Under the above partial statement, it is specifically stated that a license obtained by fraud or fraudulent reputation can be revoked, which revocation shall follow the procedure as set out in Section 11 of the Missouri Real Estate Commission Act.

Since the check mentioned in your letter has been returned unpaid the license has been obtained by fraud and can be revoked by the Missouri Real Estate Commission, and if the licensee continues to use said license he may be prosecuted under Section 17 of the Missouri Real Estate Commission Act.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

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