

STATE GEOLOGIST : Section 14892, R.S. Mo. 1939, not mandatory
POWER TO APPOINT AN : in requiring appointment of competent engi-
ENGINEER & ASSISTANTS.: neer and assistants. Such appointees when
: appointed are employees, not officers.
: District Engineer of the United States
: Geological Survey is eligible for such ap-
: pointment.

June 29, 1945

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Honorable Edward L. Clark
State Geologist
Rolla, Missouri

Dear Mr. Clark:

Your letter of May 31, requesting an opinion respecting the effect of the provisions of Section 14892, Chapter 112, R. S. Mo. 1939, and respecting your power as State Geologist to appoint as an engineer in your work, a person who now holds an office of profit under the United States, has been received.

Your letter states:

"Chapter 112, Section 14892, Revised Statutes Missouri 1939, states, 'The state geologist, by and with the approval of the board of managers, shall appoint a competent engineer and such assistants as may be necessary to carry out the provisions of sections 14891 to 14893, inclusive.'

"I will appreciate an opinion from your office concerning whether or not this sentence directs the State Geologist to appoint a competent engineer, or whether it simply authorizes the State Geologist to appoint an engineer if such should be necessary.

"Will it be possible for me to designate Mr. Henry C. Beckman, District Engineer, Surface Water Brance of the U.S. Geological Survey as a competent engineer? The Missouri Geological Survey cooperates with the U. S. Geological Survey on a fifty-fifty basis for the collection of stream-flow data.

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"Actually one-half of Mr. Beckman's salary is being paid by the State of Missouri, although he receives his pay from the Federal Government.

"I do not desire to employ an additional engineer if such policy is permissible and not in conflict with Section 14892."

The answer to your letter requires consideration of three propositions, to-wit: First, whether, under the terms of Section 14892, Chapter 112, R. S. Mo. 1939, the duty is mandatory or merely permissive and directory for the appointment of an engineer and assistants to carry out the provisions of Sections 14891, 14892 and 14893 of said Chapter by the State Geologist; and,

Second, whether, if the State Geologist, by and with the approval of the Board of Managers of the Bureau of Geology and Mines, does appoint an engineer, would the State Geologist, under the law, be empowered to appoint Honorable Henry C. Beckman, District Engineer, Surface Water Branch of the United States Geological Survey, as the competent engineer named in said Section 14892.

Third, whether, if and when such competent engineer and assistants named in said Section 14892, are appointed, they become officers or, are merely employees.

Said Section 14892, is as follows:

"The state geologist, by and with the approval of the board of managers, shall appoint a competent engineer and such assistants as may be necessary to carry out the provisions of sections 14891 to 14893, inclusive. The compensation of said engineer and assistants shall be determined by the board of managers upon recommendation of the state geologist who shall also have the power to remove appointees when deemed necessary for the good of the work."

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Said Section 14892, along with the use of the word "shall" in directing the State Geologist, by and with the approval of the Board of Managers to appoint a competent engineer, further states that such engineer and assistants shall be appointed as "may" be necessary. The apparent legislative intent in enacting this Section along with the other Sections of said Chapter under consideration, was that the engineer and assistants should be appointed only if, as and when it may be necessary. The further language of said Section 14892, in providing that the State Geologist shall have the power to remove appointees when deemed necessary for the good of the work implies, at least, that if the work at hand did not require the appointees to remain in office they should be removed, and no appointments at all made if the work should be discontinued. We believe the word "shall" is directed to the appointment of a competent engineer, if one should be appointed at all, and is not to be construed as imposing a mandatory duty upon the State Geologist to make such appointment at all events. We do not believe the Section requires that the State Geologist must appoint an engineer unless the work would require it.

Sections 14891, 14892 and 14893 must all be read together to arrive at the intention of the Legislature in enacting this legislation on the subject named in Section 14891. Sections 14891 and 14893 are as follows:

"The board of managers of the bureau of geology and mines is hereby directed to make a survey of the water resources of the state, including the determination of water power, flood prevention, area of watersheds, underground water supply, chemical composition of waters, and to show locations where power can be generated, and the amount and character of lands that would be inundated by the erection of dams to secure water power. To do this, gauging stations shall be established and such surveying and other field work shall be done as may be deemed necessary. The chemist of the bureau shall make all necessary analyses to determine the character of the waters of streams and underground water supplies."

Section 14893:

"The work so far as possible shall be done in cooperation with the United

States geological survey and other government and state bureaus, and the progress attained shall be printed and reported to the 52nd general assembly; and if the work be continued, to succeeding general assemblies, in the biennial report of the state geologist."

Said Section 14891, it will be observed, states that the survey itself for which work an engineer and such assistants as would be necessary to carry out the work is to be determined as the necessity of the case would require.

Said Section 14893, provides, that the work "so far as possible" shall be done in cooperation with the United States Geological Survey, "and if the work be continued" it shall be reported to succeeding general assemblies.

Thus it will be seen that each of these Sections contains language and provisions which are addressed to the discretionary judgment and powers of the Board of Managers of the Bureau of Geology and Mines in relation to the activities and work proposed in the three sections as to what work may be necessary, who may do such work, and how long it may be continued in order to gather the information and facts desired as set forth in said Section 14891.

It would thus appear to have been the intention of the Legislature in enacting this legislation, to make the terms and provisions of these Sections, including the appointment of an engineer under said Section 14892, directory rather than mandatory.

Whether a statute is mandatory or directory is governed by the intention of the Legislature in passing such legislation. 59 C. J., page 1072, states this rule as follows:

"There is no universal rule or absolute test by which directory provisions in a statute may in all circumstances be distinguished from those which are mandatory, but in the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intent, * * * "

59 C.J. on page 1086, further treats of the rule of construction of statutes distinguishing mandatory and permissive language and discussing the meaning of such language, states:

"* * * Where a statute makes that legal and possible which otherwise there would be no authority to do, it will be construed as permissive only, although using the word 'shall'.
* * * So provisions regulating the duties of public officers, and specifying the time and mode of performing such duties, are generally construed as permissive, notwithstanding the use of the word 'shall', * * * "

The same work, 59 C. J., page 1074, further states the rule on the subject, as follows:

"* * * Accordingly, when a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally regarded as directory,
* * * "

Our Supreme Court in the case of State ex rel. Ellis vs. Brown, 33 S. W. (2d) 104, on the question whether a statute is to be construed as mandatory or directory, l.c. 107, uses the following language:

"* * * There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the

legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished.
* * * "

The Supreme Court of Missouri in the case of State vs. Bird, et al., 295 Mo. Rep. 344, again expressing its views on the construction of a statute as either mandatory or directory, l.c. 351, 352, said:

"Under a more general rule this construction may be sustained in that if a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory. The rule thus stated is in harmony with that other well-recognized canon that statutes directing the mode of proceedings by public officers are to be held to be directory and are not to be regarded as essential to the validity of a proceeding unless it be so declared by the law. (State v. Cook, 14 Barb. 259.) By this we mean that if a fair consideration of the statute shows that unless the Legislature intended compliance with the proviso to be essential to the validity of the proceeding, which nowhere appears, then it is to be regarded as merely directory. * * * "

The evident intention of the Legislature in passing such legislation appears to have been that a competent engineer and such assistants as might be necessary to carry forward the work proposed under the terms of said Section 14892, should be employees rather than public officers.

Neither Section 14892 nor any other Section of Chapter

112, requires such competent engineer or assistants to take and subscribe to an oath, nor are such appointees required to give a bond.

The text writers and the Courts make a clear distinction between employees and officers in determining when a person is an "officer".

46 C. J. on this question, page 931, states:

"* * * On the other hand, that a person elected or appointed is not required to subscribe to an oath, or to give a bond, although not determinative of the question of the existence of an office, may be considered as indicating that it was not intended to create an office."

Our Supreme Court in the case of State ex rel. Cameron vs. Shannon, 133 Mo. 139, quoting a Michigan case, l.c. 164, distinguishes between an employee and an officer in the following language, to-wit:

"* * * 'An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be connected with it, the performance of which will be the consideration for its being conferred upon a particular individual, who for the time will be the officer. The officer is distinguished from the employee in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily, in the tenure of his position.'
* * *"

The Court, on the same page of the same volume, further said:

"The fact that it is provided by ordinance that the superintendent of water-works shall hold his office for one year, give bond for the faithful performance of his duties, clearly shows that he is an officer, and because he may be removed at the pleasure of the board, and that he is paid as other city employees, does not show to the contrary, as such things are not inconsistent with his position as such officer."

In Volume 29, Words and Phrases, page 317, two New York cases are digested which hold that an engineer is merely an employee and not an officer. The digest of these cases indicated above, is as follows:

"A city engineer is an 'employee,' and not an 'officer,' of municipality, where no mandatory statute affecting municipality requires the appointment of a city engineer. *Wipfler v. Klebes*, 298 N.Y.S. 353, 357, 164 Misc. 220.

"An assistant engineer in the department of bridges of the city of New York is an 'employee' whose relation to the city is contractual and not an 'officer.' *La Chicotte v. City of New York*, 151 N.Y.S. 566, 569, 166 App. Div. 279."

We believe from a fair and reasonable consideration of the terms of said Section 14892, as read and construed with the terms and provisions of Sections 14891 and 14893, supra, the power given the State Geologist by and with the approval of the Board of Managers of the Bureau of Geology and Mines to appoint a competent engineer and assistants is directory rather than mandatory, and that when so appointed they become employees rather than officers.

The next matter to be considered grows out of your question whether it will be possible for you to designate

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Mr. Henry C. Beckman, District Engineer, Surface Water Branch of the U. S. Geological Survey as a competent engineer.

We think you may so appoint this person as the competent engineer provided for in said Section 14892. Having heretofore in this opinion come to the conclusion that such competent engineer and assistants as may be appointed under the terms of said Section 14892, are merely employees and not officers, the person whom you mentioned, Mr. Henry C. Beckman, would be eligible for such employment or "appointment" as an engineer in performing such services in making surveys and the performance of such acts as might be required in carrying out the provisions of said Sections 14891, 14892 and 14893, for the Bureau of Geology and Mines of the State of Missouri.

Section 9, Article VII, of the New Constitution of Missouri, recently adopted, states:

"No person holding an office of profit under the United States shall hold any office of profit in this state, members of the organized militia or of the reserve corps excepted."

The fact that Mr. Henry C. Beckman may hold an office of profit under the United States would not render him ineligible to become an employee of the Bureau of Geology and Mines of the State of Missouri, by appointment by the State Geologist as a competent engineer to carry forward the work of said Bureau, under the terms of said Section 14892. He would not become an officer of profit in the State of Missouri by such appointment, and therefore, his appointment or employment would not violate the provisions of said Section 9, Article VII, supra, of the Constitution of Missouri.

CONCLUSION.

It is, therefore, the opinion of this Department that that part of Section 14892, supra, quoted in your letter is not mandatory in requiring the State Geologist to appoint a competent engineer, but merely vest in him permissive authority to appoint such engineer and assistants if and when such may be necessary, and,

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Second, that if and when such competent engineer and his assistants may be appointed by the State Geologist under the terms of said Section 14892, they would become employees and are not officers. Such appointment would not create an office of profit in this State, and

Third, the fact that Mr. Henry C. Beckman may be holding the office of District Engineer, Surface Water Branch of the United States Geological Survey, and receives a part of his salary from the United States Government would not prevent his appointment as a competent engineer, under the terms of said Section 14892. He would thereby become only an employee of the Bureau of Geology and Mines of the State of Missouri, and as such, his appointment would not conflict with the Constitution or Laws of the State of Missouri.

Respectfully submitted,

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APPROVED:

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