

**OFFICERS:** Employees of this State not prohibited by Article VII, Section 9 of the Constitution of 1945, from holding position of employment under the United States.

November 8, 1945

Opinion No. 46

Mrs. Lee Johnston  
Executive Director  
Missouri Commission for the Blind  
Jefferson City, Missouri



Dear Madam:

Receipt is acknowledged of your letter dated October 29, 1945, in which you requested an official opinion of this office and which reads as follows:

"Will you kindly give me an opinion on the following question:

"At the time the army was planning its rehabilitation service for blinded war veterans the Surgeon General felt it wise to ask the executives of several blind commissions and the superintendents of several schools for the blind to advise him with regard to the type of training to be given to the veteran which would prepare them for work in their various states. Accordingly, an Honorary Civilian Advisory Committee was formed of which I was asked to be a member.

"At a recent meeting of this committee I was elected as one of three consultants to the Surgeon General. I find that there must be a Civil Service appointment to be a consultant and in addition to expenses the appointment pays a salary of \$25.00 per day. I was not sure whether this would conflict with Article 7, Section 9 of the new constitution and would like your opinion.

"This appointment is, of course, of a very temporary nature and will probably entail only one or two days further service before the termination of the work of this committee. I hope I have made it clear that none of the members of the committee get paid except the three consultants.

"Another question I would like to ask would be, whether, if this does conflict with the new constitution it would be possible for me to serve and refuse to accept the pay."

Article VII, Section 9 of the Constitution of 1945, provides as follows:

"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."

(Emphasis ours.)

The above section prohibits only a person holding an office of profit under the United States who is presently holding an office of profit in this State. It does not prohibit an employee of this State from holding an office of profit under the United States, nor does it prohibit a person holding an office of profit in this State from being employed by the United States, and it does not prohibit an employee of this State from holding employment under the United States.

To determine if your being a consultant to the Surgeon General under civil service appointment conflicts with Article VII, Section 9, supra, we must first consider whether your present position of Executive Director for the Missouri Commission for the Blind is a public office and you, holding that position, are a public officer, or is such position employment and you, holding such position, are an employee of this State.

Chapter 53, Article 2, R.S.Mo. 1939, provides for the Missouri Commission for the Blind, the duties of the commission, etc. Section 9449 of this chapter provides as follows:

"Said commission may adopt bylaws or rules and regulations for its government; a majority of the commission shall constitute a quorum; it shall have power to appoint such agents and employees as it shall deem necessary and fix their compensation within the limits of the appropriation that shall be made by the general assembly; it shall hold regular monthly meetings, keep a full record of its proceedings and of its receipts and disbursements, and shall, on or before the first Monday in January of each biennial period, make a full report to the general assembly, presenting a concise review of the work of the commission for such period, with recommendations looking to the amelioration of the blind in this state."

(Emphasis ours.)

You will note that nowhere in this section, nor anywhere else in Chapter 53, is there created the office of Executive Director for the Missouri Commission for the Blind. Neither is there any section of the Constitution of 1945 creating such office. Section 9449, supra, only provides that the commission shall have the power to appoint such agents and employees as it shall deem necessary. In State ex rel. Pickett v. Truman, 64 S.W. (2d) 105, 1.c. 109, Judge Leedy said:

" \* \* \* \* It is perfectly apparent that 'employment' and 'agency' are distinguishable from public office; but the line of demarcation between them is sometimes difficult of perception. \* \* \* \*"

There is no hard and fast rule to apply in determining what constitutes a public office, but the facts in each case must be closely studied.

In Mechem, on Public Officers, page 1, the following definition appears:

"A public office is the right authority and duty, created and conferred by law, by which for a given

period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

This definition is in harmony with a great weight of authority and has been approved by the Supreme Court of this State in *State ex rel. Walker v. Bux*, 135 Mo. 325, 36 S.W. 636, 33 L.R.A. 616; *State ex rel. Zevely v. Hackmann*, 300 Mo. 59, 254 S.W. 53; *Hasting v. Jasper County*, 314 Mo. 144, 282 S.W. 700; *State ex rel. Pickett v. Truman*, 333 Mo. 1018, 64 S.W. (2d) 105; *State ex inf. McKittrick v. Whittle*, 333 Mo. 705, 63 S.W. (2d) 100.

The position of Executive Director of the Missouri Commission for the Blind is not created or conferred by law, as for example, the office of Director of Conservation is created in Article IV, Section 42 of the Constitution of 1945, or as the office of Probation Officer is created by Section 9681, R.S.No. 1939.

Another element of a public office is that the person holding such office is to perform some sovereign function of government. In the case of *State ex rel. Newman v. Skinner*, 93 A.L.R., 331, 1.c. 332, the distinction between "officer" and "employee" is treated in the following language:

"A public officer, as distinguished from an employee, must possess some sovereign functions of government to be exercised by him for the benefit of the public either of an executive, legislative, or judicial character. It is well stated in the *Landis Case*, supra, that 'the chief and most decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent political or governmental functions, then the position is a public office, and not an employment.' \* \* \* \*"

The duties which you perform in your present position are not conferred upon you by law. We believe that the members of the commission, having faith and confidence in your ability, have given you duties of a broad and general nature that allow you to exercise considerable discretion in their performance. However, we do not believe that their performance involves the exercise of continuing, independent political or governmental functions.

Again referring to the Truman case, supra, the court, in passing upon the question of what constitutes an employee or public officer, said at l.c. 106:

"Numerous criteria, such as (1) the giving of a bond for faithful performance of the service required, (2) definite duties imposed by law involving the exercise of some portion of the sovereign power, (3) continuing and permanent nature of the duties enjoined, and (4) right of successor to the powers, duties, and emoluments, have been resorted to in determining whether a person is an officer, although no single one is in every case conclusive. \* \* \* \*"

Other denotations are given in the case of Gracey v. St. Louis, 213 Mo. 384, l.c. 394, as follows:

" \* \* \* \* His oath, his bond, his liability to be called to account as a public offender for misfeasance or non-feasance, the tenure of his position, etc., have been said to be indicia of a public officer. \* \* \* \*"

We do not believe that any of the elements appearing in the above quotations attach to your present position of Executive Director of the Missouri Commission for the Blind. We believe that your present position is one of employment and not a public office of this State and you, holding such position, are an employee.

You state that the position to which you have been elected is consultant to the Surgeon General. The word "consultant" is not treated in the works of Corpus Juris or Words and Phrases,

two outstanding sources of information. However, Webster's New International Dictionary, Second Edition, defines the word "consultant" as follows:

"One who gives professional advice or services regarding matters in the field of his special knowledge or training, as a consulting physician or engineer."

Consequently, it appears that the position to which you have been elected, namely, consultant to the Surgeon General, is purely of an advisory nature and does not possess any of the elements herein discussed to qualify it as being a public office under the United States. Your holding such a position would not make you a public officer under the United States, but rather an employee of the United States.

We do not believe that your being elected as consultant to the Surgeon General under civil service appointment will conflict with the provisions of Article VII, Section 9 of the Constitution of 1945. Therefore, the question of your serving in that capacity and refusing to accept the pay will not be treated at this time.

Conclusion.

Therefore, it is the opinion of this office that: (1) Your present position as Executive Director for the Missouri Commission for the Blind is not a public office, but a position of employment in this State; (2) you, holding such position, are not a public officer, but an employee in this State; (3) the position of consultant to the Surgeon General is not a public office under the United States, and the one holding such position under civil service appointment is an employee of the United States and not a public officer; (4) you, as an employee of this State, are not prohibited by Article VII, Section 9 of the Constitution of 1945, from holding a position of employment with the United States under civil service appointment.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

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