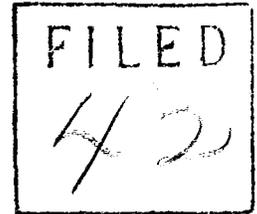


STATE GEOLOGISTS: Compensation of state geologist cannot be increased during present term of office.
PUBLIC OFFICERS: That of his chief assistant may be increased not to exceed \$5,000.00.

August 14, 1947

8/28



Department of Revenue
State of Missouri
Jefferson City, Missouri

Attention: Mr. B. H. Howard, Comptroller

Gentlemen:

This will acknowledge receipt of your request for an opinion which reads:

"Section 14887 provides that the Governor shall fix the salary of the State Geologist, not to exceed \$7,000.00 per annum, and for his chief assistant, not to exceed \$5,000.00 per annum.

"We will appreciate an opinion as to the effective date that these salaries may be fixed with respect to the present holders of the offices."

The sole question to be determined is whether the present persons holding office referred to in your request are public officers or merely employees. If they come within the classification of officers, then their compensation cannot be increased during their term of office; otherwise, the Governor may increase said compensation not to exceed \$7,000.00 per annum for the state geologist and \$5,000.00 per annum for the chief assistant to the state geologist.

Section 14875, R. S. Mo. 1939, authorizes the Governor to appoint by and with the consent of the Senate a state geologist who shall serve for a term of four years unless sooner removed for cause. Said section reads:

"The governor is hereby authorized to appoint, by and with the consent of the senate, one state geologist, who shall be a person of competent scientific and practical knowledge of the sciences of geology and mineralogy, and whose headquarters shall be located at the state school of mines at Rolla, who shall be the director of the survey, and said state geologist may appoint such assistants and subordinate

assistants and laborers as may be deemed necessary in order to make a thorough scientific, geological and mineralogical survey of the state. The state geologist shall serve for a term of four years unless sooner removed for cause by the governor. The bureau of geology and mines and the board of managers thereof, as heretofore constituted are hereby abolished, and all the rights, duties and powers heretofore vested by law in said bureau of geology and mines, and the board of managers thereof, are hereby transferred to and vested in the governor. Where any law refers in any way to or imposes any right, duty or power upon the bureau of geology and mines, or upon the board of managers thereof, such law shall be construed as referring to and imposing such rights, duties and powers upon the governor. The words 'board,' 'board of managers,' 'bureau' and 'bureau of geology and mines' as used in this chapter shall be construed to mean the governor."

Prior to the enactment of Senate Bill No. 136, supra, the maximum salary allowed the state geologist was \$5,000.00 and his chief assistant, \$4,000.00, under Section 14887, R. S. Mo. 1939. Senate Bill No. 136, supra, repealed that provision and enacted a new Section 14887, which provides that the Governor shall fix the salary of the state geologist, not to exceed \$7,000.00 per annum and of his chief assistant, not to exceed \$5,000.00 per annum, and reads:

"The Governor shall fix the salary of the state geologist, not to exceed seven thousand dollars (\$7,000) per annum, and for his chief assistant, not to exceed five thousand dollars (\$5,000) per annum. The state geologist shall fix the compensation of other assistants, clerks, stenographers, and laborers, commensurate with the qualifications and responsibilities of the individual. Such compensation of any clerk, stenographer, or laborer shall not exceed that of similar clerks, stenographers, and laborers of other departments of the state performing similar duties. All salaries shall be paid in equal monthly installments.

The state geologist shall certify to the State Comptroller the sums of money required to pay the salaries of the state geologist and his assistants, clerks, stenographers, and laborers, and other expenses of the division."

Likewise under Section 14894, R. S. Mo. 1939, it provides the state geologist and his principal assistant should take the usual oath of office to faithfully perform all services required of them before entering upon the discharge of their duties. However, that provision was repealed by Senate Bill No. 136, supra, and a new statute enacted in lieu thereof, known as Section 14894, which only requires the state geologist to take the usual oath of office prior to entering upon the duties of his office. This section reads:

"Before entering upon the duties of his office the state geologist shall take the usual oath to faithfully demean himself in office and perform all the duties required of him by law. The state geologist and all employees of the division shall abstain from all private or personal consulting activities for themselves or others within the state while employed in the division of Geological Survey and Water Resources."

While the principal assistant to the state geologist under Senate Bill No. 136, supra, is not required any longer to take an oath, the mere fact that he did take the oath when appointed and is now acting under said oath does not of itself make him a public officer. See State ex rel. vs. Meriwether, 200 S.W. (2d) 340, wherein the circuit court reporter required to be a sworn officer of the court was held by the court to not be a public officer but an employee.

We shall briefly refer to some of the statutory duties placed upon the state geologist. Under Section 14877, R. S. Mo. 1939, he is required to make a thorough geological survey of the state, discover and examine all beds or deposits of mineral contents and fossils, to discover the various positions, formations, arrangements, composition, and utilization of the many different ores, clays, rocks, coals, mineral oils, natural gas, surface and waters, and other mineral substances as may be useful or valuable. Also he shall assemble and cause to be published annual statistics of mineral production in this state and prepare topographic relief maps of various areas.

Under Section 14888, R. S. Mo. 1939, the state geologist with the approval of the Governor shall negotiate for such technical work as may be necessary beyond the facilities of the division. He shall also purchase equipment, apparatus and supplies with funds appropriated therefor.

Under Section 14882, R. S. Mo. 1939, he is authorized to furnish the press and radio with new discoveries.

Under Section 14887, R. S. Mo. 1939, he shall fix the compensation of other assistants, clerks, stenographers and laborers employed by him.

In *State vs. Truman*, 64 S.W. (2d) 105, 1.c. 106, the court laid down the general principal for determining what constitutes public officers and employees, and said:

"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. 46 C. J. p. 928, Section 19, n. 1; 53 A. L. R. p. 595. It is the duty of his office and the nature of the duty that makes one an officer and not the extent of the authority (Mechem on Public Officers, p. 7, Section 9; Throop on Public Officers, pp. 2, 3, Section 2), although designation by law has some significance. 46 C. J. p. 931, Section 24; *State ex rel. v. Gray*, 91 Mo. App. 438, 445; *State ex rel. Cannon v. May*, 106 Mo. 488, 505, 17 S.W. 660; *State ex rel. v. Shannon*, 133 Mo. 139, 164, 33 S.W. 1137; *Gracey v. St. Louis*, 213 Mo. 384, 393, 394, 111 S.W. 1159.

"In Mechem on Public Officers, pp. 1 and 2, Section 1, it is said: '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.' We have approved this definition in State ex rel. Walker v. Bus, 135 Mo. 325, 331, 332, 36 S.W. 636, 33 L. R. A. 616, State ex rel. vs. Hackmann, 300 Mo. 59, 254 S.W. 53, 55, and Hasting v. Jasper County, 314 Mo. 144, 282 S.W. 700, 701; and it appears to be in harmony with the great weight of authority. State ex rel. Key v. Bond, 94 W. Va. 255, 118 S.W. 276, 278, 279; State ex rel. Landis v. Board of Commissioners, 95 Ohio St. 157, 115 N.E. 919, 920; Bunn et al. v. People ex rel., 45 Ill. 397, 409. The Ohio decision states that it is no longer an open question in that state that to constitute a public office 'it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law.' Illustrative of what is meant by 'sovereignty of the state,' in the same opinion it is said: 'If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.'

See also State vs. Bode, 113 S.W. (2d) 805, 1.c. 806, 807.

Section 13, Article VII of the Constitution of Missouri 1945, provides that the compensation of state, county and municipal officers shall not be increased during the term of office for which they were appointed or elected. Said section reads:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

In view of the foregoing statutory provisions relating to appointment, duties and compensation of the state geologist and his chief assistant and the decisions laying down the general rule for determining who are public officers and employees, it cannot be denied that the state geologist, being appointed for a term of four years, also requiring him to take an oath of office and perform many functions of sovereignty placed upon him by the Legislature, is a public officer and as such, his compensation cannot be increased during his present term of office. His chief assistant is not appointed for any specific term of office. At the time he was appointed, the law required him to take an oath of office; however, Senate Bill No. 136 repealed that provision and he is no longer required to take said oath. Furthermore, he is not in charge of any department and has very few, if any, functions of sovereignty to perform but acts under the directions of the state geologist.

CONCLUSION

Therefore, it is the opinion of this department that the present state geologist, appointed to that office for a term of four years prior to Senate Bill No. 136, passed by the 64th General Assembly, becoming effective, is not entitled to receive an increase in his compensation during said term of office for the reason he is a public officer and as such, there is a constitutional inhibition against increasing compensation of public officers during their term of office for which they are elected or appointed. This is not true with respect to the chief assistant to the state geologist. He is not a public officer but merely an employee, and there being no such inhibition against increasing the compensation of employees, the Governor, under Section 14887 of Senate Bill No. 136, passed by the 64th General Assembly, may fix his compensation in an amount not to exceed \$5,000.00 per annum.

Respectfully submitted,

APPROVED:

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ARH:VLM