

STATE EMPLOYEE-  
RIGHT TO ENGAGE  
IN SAME WORK HE  
DOES FOR THE  
STATE FOR PRIVATE  
GAIN - WHEN:  
USE OF STATE PROPERTY  
TO TRANSPORT WORKING  
EQUIPMENT IN PRIVATE  
BUSINESS:

1. An individual employee of the state may engage in the same kind of work he is performing for the state, for his own profit, if he is not required by statute to give his time exclusively to the state and if his private work does not interfere with the performance of his work for the state and such work is not detrimental to the state's interest. 2. The use of state property by an individual employee of the state to transport working equipment to and from the place of private business of the employee is unlawful.

FILED  
35

October 17, 1955

Honorable Thomas D. Graham  
Member, Missouri House of Representatives  
512 Central Trust Building  
Jefferson City, Missouri

Dear Mr. Graham:

This will be the opinion you request from the office on the question of whether or not an individual employed by the State of Missouri in a certain capacity may engage in private business for gain in the same capacity.

Your request is based upon a letter which you had received from the Master Plumbers Association of Jefferson City, Missouri, which letter you transmit with the request. The request and the letter read, respectively, as follows:

"I enclose the letter I received from the Jefferson City Masters Plumbers Association which, I believe, is self-explanatory. I will appreciate it very much if you will give me an opinion concerning the matters listed therein."

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"I am writing to you as President of the Jefferson City Plumbing Contractors Association in accordance with the instructions of the membership to determine whether or not an individual employed by the State of Missouri in a certain capacity may engage in private business in the same capacity. Specifically, if an individual is employed by the State of Missouri to perform plumbing

Honorable Thomas D. Graham

maintenance and installation may he, at the same time, engage in the business of plumbing maintenance and installation for private gain?

"The members of the Association expressed an interest in the methods of material use and purchase that are in use to prevent a 'mixing' of state inventory and private inventory.

"Certain members are desirous of knowing what tool and equipment controls are exercised at state institutions. Further questions were raised regarding the use of transportation equipment belonging to the State."

We have read and carefully considered the statements as they are given in the request and in such letter to determine if in said question and letter, or in either of them, there are contained legal principles involving public interest upon which this office is authorized to give an opinion. We shall answer these questions as they are above set forth. With respect to the other matters noted, the interest indicated in such letter is that the writer thereof desires to be informed as to what methods of material use and purchase are followed to prevent "mixing" of state inventories and private inventories, and also the expressed desire to be informed as to what tool and equipment controls are exercised in state institutions. We feel that we must say that we do not believe those matters are of such public interest as to permit this office to give an opinion upon them. These conditions would be, and are, if they exist and are the subjects of controversy, matters for the heads of state departments involved to supervise and adjust. This office, therefore, respectfully declines to express any views herein on such matters.

It does not appear from the request, nor does said letter make any statement, that any of the acts assumed to be true in the two supposed questions, are actually being done or that the acts of the state departments claimed to be carried on, are

Honorable Thomas D. Graham

actually being performed in any department. We believe, nevertheless, that the two questions submitting as they do impersonal legal principles that might affect the public interest, and assumed to be true, should therefore be answered.

The first question is: If an individual is employed by the state in a certain capacity may he engage in private business for gain in the same capacity. The individual assumed in the request to be a state employee is, apparently, not a state officer. The courts and text writers hold that there is a definite distinction between a public "employee" and a public "officer," according to the facts and conditions involved. A public employee may at the same time be a public officer, but not necessarily so designated. Employment is generally understood as a performance of temporary services or duties. The Text of 46 C.J., 929, discussing the criteria by which an employment may be designated from an office, states that text as follows:

"The term 'public office' embraces the ideas of tenure and of duration or continuance; hence, an important distinguishing characteristic of an officer is that the duties to be performed by him are of a permanent character as opposed to duties which are occasional, transient, and incidental. \* \* \*"

Unless an individual is required by statute to give his entire time exclusively to the state we know of no reason nor rule of law, civil or statutory, that would prevent such employee from doing the same kind of labor and work for himself for profit, if it does not conflict with his duty to the state or business the state is engaged in.

We have inquired of the Division of Public Buildings if there is any department, to its knowledge, where any practice such as is described in the request, is prevalent or is in existence in any public work, particularly public buildings. We are advised by that division that there are no such conditions existing in that department.

Honorable Thomas D. Graham

Answering the first question, it is the opinion of this office that if such assumed facts were the actual facts an individual employed by the state in plumbing maintenance and installation work would have the lawful right, if not required by statute to give the whole of his time exclusively to the state, to engage in the same kind of work for himself, for private gain, that he is performing for the state.

The second question is whether, as it is also assumed in the request to be the fact, the use of transportation equipment belonging to the state may be indulged in by said individual in transporting tools and equipment used and to be used in such private and personal business, for private gain, to and from its private place of business.

The answer to this question is that such use of property of the state by an individual employee of the state for private gain in any character of business is unlawful. It would be in conflict with Section 38(a) of Article III, of the present Constitution of this state, which prohibits the enactment of a legislative act for the grant of public money or public property to an individual or a corporation. Said Section 38(a), of Article III, of the present Constitution regarding those matters reads, in part, as follows:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation,  
\* \* \*."

The legislature of this state, implementing the above quoted section of the constitution, has enacted Section 301.260, RSMo 1949, requiring the issuing by the Director of Revenue of certificates for state and municipally owned motor vehicles. This section providing for such certificates and prohibiting their use by individuals for private purposes, in section 1 of said section, states in part the following:

"1. \* \* \* No officer or employee or other person shall use such motor vehicle for other than official use."

Honorable Thomas D. Graham

CONCLUSION

Considering the premises, it is the opinion of this office that (1): An individual employed by the state would have the lawful right, if not required by statute to give the whole of his time exclusively to the state and if it does not interfere with the performance of his duty to the state and is not detrimental to the state's interest, to engage in the same kind of work for himself for private gain that he is performing for the state; (2) The use of property of the state by an individual employee of the state, to transport tools and equipment used and to be used in the employee's personal business for private gain, would be unlawful because in conflict with the provisions of Section 38(a) of Article III of the Constitution of this State and the provisions of Section 301.260, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Crowley.

Very truly yours

John M. Dalton  
Attorney General

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