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OFFICIAL OPINION NO. 24

March 26, 1954

Mr. R. R. Wickersham  
State Examiner  
State Board of Accounts  
304 State House  
Indianapolis, Indiana

Dear Mr. Wickersham:

This is in reply to your letter in which you inquire as to the following:

"1. Can an officer, appointee or employee of the state, who is paid a salary from funds appropriated therefor, act for, instead or in behalf of the Governor or Secretary of State in comparing and estimating the votes cast at a general election as required by Section 321, Chapter 208, Acts of 1945 and legally receive additional compensation for representing the Governor or Secretary of State in the performance of such duty?

"2. In the event such representatives are entitled to additional compensation, is it proper to pay claims therefor from an appropriation of the biennial budget 'For Election Expense' from which are paid all expenses of the State Board of Elections?"

Your question necessitates a determination as to whether the Governor and the Secretary of State, in performing the before-mentioned duties, are exercising sovereign functions of their respective offices.

The Supreme Court of Indiana, in *Wells v. State ex rel. Peden* (1911), 175 Ind. 380, 384, 94 N. E. 321, Ann. Cas. 1913C, 86 has defined an office as follows:

"\* \* \* An office is a public charge of employment in which the duties are continuing and prescribed by law and not by contract invested with some of the functions pertinent to sovereignty, or having some of the powers and duties which inhere within the legislative, judicial or executive departments of the government, and emolument is a usual but not a necessary element thereof."

The Indiana Election Code is Acts of 1945, Ch. 208, Sec. 1, as found in Burns' Indiana Statutes (1949 Repl.), Section 29-2801 *et seq.*

The Acts of 1945, Ch. 208, Sec. 321, as found in Burns' Indiana Statutes (1949 Repl.), Section 29-5308, provides as follows:

"The secretary of state shall, *in the presence of the governor*, compare and estimate the number of votes cast for presidential electors, for judges of the Supreme and Appellate Courts, reporter of the Supreme and Appellate Courts, clerk of the Supreme Court, attorney-general, secretary, auditor and treasurer of state, and superintendent of public instruction, and certify to the governor the persons receiving the highest number of votes for such offices, and also compare and estimate the number of votes given for judges of the circuit court and prosecuting attorneys, and certify to the governor the persons having received the highest number of votes in their respective districts; and, at the expiration of the ten (10) day period allowed for the discovery and correction of errors, if none be found, the governor shall transmit, by mail, to such persons their commissions." (Our emphasis)

Section 8 of said Act, as found in Burns' Indiana Statutes (1949 Repl.), Section 29-3001, creates a state board, to be known as the "State Election Board."

Section 9 of said Act, as found in Burns' Indiana Statutes (1949 Repl.), Section 29-3002, provides, in part, as follows:

"The governor of the state *who shall be ex officio chairman* and two (2) qualified electors by him appointed, one (1) from each of the two (2) political parties that cast the largest number of votes for secretary of state at the last preceding general election, shall constitute the state election board, and such board members shall serve for a period of two (2) years or until their successors are appointed and qualified.  
\* \* \*" (Our emphasis)

If the actual physical handling, sorting, counting and tabu-

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lation of the votes under the above-quoted section of the statute requires the exercise of discretion in the officer, it would, under said statute, constitute a function involving the exercise of the sovereign power of the state and in that case would be required to be performed by the person charged with its performance and such function could not be delegated, as the performance of a sovereign function cannot be delegated. See 67 C. J. S. Officers § 104. A ministerial function is one which in its nature is more mechanical and does not require the exercise of discretion and such ministerial functions may be performed by aides so long as the sovereign function itself is to be performed by the designated officers. When tested by the above rule, it is clear the actual physical handling, sorting, counting and tabulation of votes is a mechanical process requiring and admitting of no exercise of official discretion, and are ministerial functions. The Act says that tabulation shall be merely "in the presence" of the Governor. He performs no sovereign act until the Secretary of State certifies the count to him. The Governor, then at the end of the ten (10) day period allowed for the discovery and correction of errors, makes the certification of election to the duly elected officeholders. Apparently, the purpose of having the tabulation in the presence of the Governor is so he will be in a better position to know if errors are committed in order that they may be promptly corrected within the ten (10) day period. I do not believe the Governor exercises his sovereign power until after the certification to him by the Secretary of State, and, therefore, he could have an aide present at the tabulation of votes who could advise him in performing his duties during such ten (10) day period.

Having determined that the Governor could delegate the duty to be present at the tabulation of such votes to an aide, two things remain to be determined: (1) What persons may be appointed; and (2) from what source may they be paid for their services?

The words "officer, appointee or employee" of the State, used in your question, is of such a general nature that the same can only be answered generally. I do not believe the word "appointee" adds anything as it would refer to either an officer or employee.

The duties imposed upon the Governor under said Act are clearly *ex officio* in nature, since said duties are not necessarily inherent in those of the office of the Governor and are performed by the Governor as a result of his being an *ex officio* member and chairman of the State Election Board.

The same might be said for the Secretary of State insofar as the actual handling and counting of such votes are concerned, in that such duties are not necessarily germane to the office of Secretary of State. Under the case of *Tucker v. State* (1941), 218 Ind. 614, at page 670, 35 N. E. (2d) 270, the Court, in discussing the division of powers of State Government, says the administrative officers "shall perform such duties as may be enjoined by law"; and in discussing the office of Secretary of State, page 672 of the opinion says: "never has it been thought that secretarial duties involved the execution of laws." The duties of the Secretary of State, under this statute, appear to me to be in the nature of making a record rather than in the nature of keeping records and therefore would be more closely related to assisting in the execution of the election laws than in the keeping of records under the duties normally enjoined upon the Secretary of State by virtue of his office.

In considering the persons who might be delegated to perform such tabulation duties for and on behalf of the Governor and Secretary of State, it is clear that only two constitutional provisions are involved, one being Art. 2, Sec. 9 of the Constitution of Indiana regarding the holding of two lucrative offices, which would clearly not apply as the counting of such votes being of a ministerial nature would not constitute an office, but a mere employment; the second being Art. 3, Sec. 1 of the Constitution of Indiana distributing the powers of government in three separate departments: the Legislative, the Executive, including the Administrative, and the Judicial, and prohibiting any person charged with official duties under one of these departments from exercising the function of another, except as expressly permitted in the Constitution. It is, therefore, clear that an officer, appointee or employee of the State of Indiana in the Executive or Administrative branch of Government would not violate the above constitutional provision. Under the interpretation of said constitutional provision as fully discussed in the case of *State ex rel. Black et al. v. Burch*,

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State Auditor (1948), 226 Ind. 445, 80 N. E. (2d) 294, an officer or employee of the Judicial or Legislative branches of Government would be prohibited from taking employment in the counting and tabulation of such votes as the same would constitute a "function" of the Executive or Administrative branch of Government. A person may have more than one employment within the Executive, including the Administrative department of Government and be paid by each such division.

This leaves for consideration, from what funds payment for such services could be made. Under the Acts of 1949, Ch. 257, Sec. 2 (a), p. 885, appropriation for election expense is made as follows: "For Division of Public Works and Supply—Printing Board \* \* \* Election Expense, for the year 1949-1950, \$11,300.00, for the year 1950-1951, \$27,550.00 \* \* \*"; and the Acts of 1951, Ch. 217, Sec. 2, p. 582 provides for Election Expense, as follows: "For Election Expense, for the year 1951-52, \$9,340.00 and for the year 1952-1953, \$43,500.00 \* \* \*."

While the foregoing appropriations are not very clearly earmarked as to the manner in which they shall be used and by whom, it is clear that they are for Election Expense on a state level and the larger amounts are indicative of the years in which elections on a state level are held. The duties to be performed and paid for as outlined in your letter are clearly an election expense. That such appropriations would be sufficient is supported by the case of *Campbell v. Board of Commissioners of the State Soldiers' and Sailors' Monument* (1888), 115 Ind. 591, 18 N. E. 33. There the Court held the Legislature had enjoined upon the Board of Commissioners of the State Soldiers' and Sailors' Monument, the duty of "erecting" a monument and specifically appropriated a certain amount of money for that purpose. Incidental to such duties was the necessary one of removing the then present structures on that particular site, for which no appropriation had been made. The Court on page 594 of the opinion said:

"It is true, as claimed, that no money can be rightfully drawn from the treasury except in pursuance of an appropriation made by law, but such an appropriation may be made impliedly, as well as expressly, and

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in general, as well as specific, terms. It may also be a continuing or fixed appropriation, as well as one for a temporary purpose or a limited period. \* \* \*

The above case is also authority for the further proposition that any of such persons above-mentioned legally employed for such propositions, could be paid from such election fund on the basis that said statute, at least by implication, necessitates the employing of persons to perform such services.

In addition to the foregoing, it is, in my opinion, equally true that the Governor could pay any such person legally employed by him from his contingency fund. 1945 O. A. G., page 241, No. 53.

The foregoing answers each of your questions. In making such answers, it is thought advisable to point out that such questions are submitted to this office solely on the question of law and not on the question of administrative policy and such answers are accordingly so limited.

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OFFICIAL OPINION NO. 25

March 29, 1954

Mr. C. V. Ogborn, Administrator  
Store License Division  
Indiana Department of State Revenue  
141 South Meridian Street  
Indianapolis, Indiana

Dear Mr. Ogborn:

Your letter of February 16, 1954 has been received and reads as follows:

"The Store License Division has been requesting and demanding evidence of the payment of Store License applicants personal or poll tax to be submitted with the application. Some attorneys have held that Chapter 124, Acts of 1931, as amended, Burns 42-102 is not applicable to Store License.

"Will you please give this Division an opinion on the application of the above Act to the issuance of Store License?"