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of *Aurora v. Peoples National Bank* (1909), 44 Ind. App. 573, 89 N. E. 904.

In view of the foregoing it is my opinion that your questions numbered 2 and 4 should be answered in the negative.

OFFICIAL OPINION NO. 58

July 20, 1953.

Hon. Frank T. Millis,
Auditor of State,
State House,
Indianapolis, Indiana.

Dear Mr. Millis:

I have your request for my opinion in regard to the legality of paying an attorney hired by the Indiana State Toll Bridge Commission when the employment of said attorney has not been approved by the Attorney General and when said attorney is a stockholder in a corporation which is the holder of an alcoholic beverage permit.

We have been furnished with various records and documents which show the following facts:

(1) The Indiana State Toll Bridge Commission has attempted to employ one Joseph B. Minor, as its attorney, at an annual retainer of \$6,000.00 per year.

(2) Mr. Minor also has a contract with the Toll Bridge Commission, which contract is set out in full below:

"AGREEMENT

"THIS AGREEMENT, made as of the 29th day of December, 1952, by and between the INDIANA STATE TOLL BRIDGE COMMISSION, hereinafter referred to as 'COMMISSION,' and JOSEPH B. MINOR, an Attorney in the city of Evansville, Indiana, hereinafter referred to as 'ATTORNEY': WITNESSETH:

"WHEREAS, the Commission is contemplating the construction of a vehicular traffic bridge across the Ohio River at Lawrenceburg, Indiana, pursuant to the

provisions of Chapter 79 of the Acts of the General Assembly of the State of Indiana for 1939 and all acts amendatory thereof or supplemental thereto, herein-after referred to as 'Bridge'; AND

"WHEREAS, the Commission desires to employ said Attorney to advise said Commission on legal matters in connection with the sale of bonds and the construction of said bridge, AND

"WHEREAS, it is now necessary for said Attorney to do legal work in connection with acquiring rights-of-way, condemnation of property, preparation of contracts and transcript of the proceedings of said Commission for submission to Bond Counsel for opinion in connection with the sale of bonds, the letting of contracts for the construction of said bridge, and other legal work, AND

"WHEREAS, said duties of said Attorney are highly technical and have consumed and will consume much of said attorney's time in the preparation of same in order to assure the sale of said bonds, and the construction of said bridge, AND

"WHEREAS, the Commission desires to retain the services of said Attorney for such purpose and said Attorney desires to be so retained;

"NOW THEREFORE,

"In consideration of the covenants, promises and agreements herein contained, the parties hereto agree as follows:

"1. The Commission, pursuant to Section 1, of Chapter 79, of the Acts of 1939 (Sec. 39-3001, Burns' 1933 Indiana Statutes), hereby retains the services of said Attorney as to all legal matters which may arise in connection with the acquisition of rights-of-way, condemnation of property, preparation of contracts and transcript of the proceedings of said Commission for submission to Bond Counsel for opinion in connection with the sale of bonds and letting contracts for the construction of said bridge.

"2. The Attorney hereby accepts said employment and agrees to do all legal work in connection therewith up to and until the construction of said bridge is completed and opened to traffic.

"3. Said Commission shall pay to the Attorney, as and for his compensation in this matter, a sum of money equal to one-fourth of one percent ($\frac{1}{4}$) of the total amount of bridge revenue bonds sold by said Commission for the financing of the construction of said bridge; provided, however, in the event that no bridge revenue bonds are sold for financing the construction of said bridge, then said attorney shall receive no fee whatsoever for the work done in connection therewith.

"4. Should bridge revenue bonds be sold to finance the construction of said bridge, then, in that event the fee to be paid said Attorney shall be due and payable as follows:—

"(a) One-half ($\frac{1}{2}$) of said fee is due and payable when the bonds are delivered to the purchasers and payment is received by the Commission for said bonds.

"(b) One-half ($\frac{1}{2}$) of the balance owing on said fee is due and payable one year from date of first payment on said fee.

"(c) The balance of said fee is due and payable when said bridge is completed and opened to traffic.

"5. Said Attorney shall have the right to employ such other attorneys as are required in order to complete all of the legal work in connection with the acquisition of right-of-way and said Commission shall be obligated to pay the fees of such additional attorneys, including the fee for Bond Counsel and the fees for legal work in connection with the prosecution and defense of any actions at law, including any Appellate Court work.

"6. The Attorney agrees to attend any and all meetings of the Commission when his presence is requested by such Commission.

"7. It is agreed and understood that funds necessary for the execution of this contract will be derived solely through the application of the Indiana State Toll Bridge Act of 1939 and all acts amendatory thereof and supplemental thereto.

"8. Said Attorney, it is agreed, is an independent contractor and not an employee of the Commission in completing this particular work.

"9. The Attorney has been in the employment of the Commission on an annual retainer fee basis payable in monthly installments and this agreement is in lieu of said retainer fee and it is understood and agreed between the parties that payment of said retainer fee shall terminate when said bonds are sold and the money for same is delivered to the Commission as set out in Paragraph 4 (a) of this agreement.

"IN WITNESS WHEREOF, said Commission has caused these presents to be executed for and on its behalf by its Chairman and Members, pursuant to Resolution, and said Attorney has caused these presents to be executed for and in his behalf by him, in duplicate, the day and year first above written.

"INDIANA STATE TOLL BRIDGE COMMISSION,

"By S/ *Walter G. Koch*
Walter G. Koch, Chairman
S/ *O. M. Keller*
O. M. Keller, Member
S/ *Carl Knapp*
Carl Knapp, Member

"ATTEST: S/ *Carl Knapp*
Carl Knapp, Secretary

"(Seal—Indiana State Toll
Bridge Commission)

"S/ *Joseph B. Minor*
Joseph B. Minor, Attorney."

(3) Said Joseph B. Minor is the Secretary, General Counsel, a director of, and the owner of 100 shares of stock in The Hoosier Liquors, Incorporated, a corporation organized under

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and pursuant to the laws of Indiana and having its principal place of business at 14-22 West Indiana, Evansville, Indiana.

(4) The Hoosier Liquors, Incorporated is also the holder of a Vinous Beverage Permit and of a Spirituous Beverage Permit, which permits were issued by the Indiana Alcoholic Beverage Commission.

Section 10 of Chapter 357 of the Acts of 1945, as amended, Burns' Indiana Statutes Annotated (1951 Pocket Supp.), Section 12-442 provides in part as follows:

"No beer wholesaler's permit, no liquor wholesaler's permit, and no wine wholesaler's permit shall be issued to any person, partnership or corporation in which there is any person interested as owner, partner, *stockholder*, *officer*, broker, representative, or agent who is also the holder of a public office, either appointive or elective, or *who is a public employee*, either national, state, county, city, town or township, or who holds any appointive or elective position in any political party except precinct committeemen, precinct vice-committeemen, ward chairmen and ward vice-chairmen."

Under this statute a question is presented as to whether said Joseph B. Minor is a public employee and at the same time an officer and stockholder of the Hoosier Liquors, Incorporated.

It has been held that:

"The words 'public' and 'private' are generally used in contradistinction to each other. 'Private' is defined by Webster as belonging to, or concerning an individual person, company, or interest; 'public' is defined as of or pertaining to the people; relating to, belonging to, or affecting a nation, state or community at large; opposed to 'private.'"

People v. Powell (1937), 280 Mich. 699, 274 N. W. 372, 373.

It has also been held that public employment means:

"* * * employment by some branch of government or body politic, as contrasted with private employment."

State *ex rel.* Cooper v. Roth (1942), 140 Ohio State
377, 44 N. E. (2d) 456, 458.

The Indiana State Toll Bridge Commission was created by Chapter 79, Acts 1939. Section 1 of this act provides in part:

“There is hereby created a body corporate under the name of Indiana State Toll Bridge Commission * * *.”

Said section provides the members shall be appointed by the Governor. They shall “qualify by taking and subscribing an oath to honestly and faithfully discharge the duties of *their office* as members of such commission.” (Our emphasis.)

Generally this statute is similar and analogous to the statute relating to toll road commission. The latter statute was before the Supreme Court in the case of Ennis v. State Highway Commission of Indiana *et al.* (1952), — Ind. —, 108 N. E. (2d) 687, and in that case the court said:

“The toll road commission here created is a commission of the state created for a public purpose.

“Application of Oklahoma Turnpike Authority (1950), 203 Okla. 335, 221 P. (2d) 795.

“It could not embark on an enterprise of a private character.

“State *ex rel.* v. Ferguson (1951), 155 Ohio St. 26, 97 N. E. (2d) 660.

“Despite the fact that the commission is given the characteristics of a corporation, it is still a commission of the State of Indiana. Section 36-3205, Burns’ 1949 Replacement (1951 Supp.).

“The commission is not a corporation within the meaning of Section 13, Article 11, of the Constitution of Indiana.”

Based upon the above authority, it is my opinion that the State Toll Bridge Commission is a commission of the State and an employee of said commission is a public employee within the prohibition of Section 10, Chapter 357, Acts 1945, as amended, above quoted.

The present Attorney General has never given "written consent" to the employment of said Minor to represent the commission or perform legal services in its behalf.

The appointment of a deputy Attorney General or written consent of an Attorney General would not extend beyond the term of the Attorney General making the appointment or giving the consent.

In 1945 Indiana O. A. G., No. 110, page 432 at 449, it is said :

"In the case of Board of Commissioners of Jay County v. Taylor *et al.* (1890), 123 Ind. 148, the Court had before it a contract employing a county attorney beyond the term of its membership. The Court conceded the power to employ an attorney but held the contract beyond the term of the membership against public policy and void. The Court said at page 152:

"If the contract in question is binding, the board of commissioners at one session may employ counsel to serve the board, as then organized, and at the same time employ counsel to serve it in advance, and at a time when it is known the membership of the board will be different.

"It is true that under the contract in question, the beginning of the term for which the appellees were employed, was only postponed three months from the date of the employment; but in the meantime the term of office of one member of the board expired, and that of another began, and if, under such circumstances, attorneys could be engaged three months ahead, why not for one, two or three years in advance?

"But the most obnoxious feature which we find in the contract is, the length of time for which the appellees were employed.

"We know as a matter of law, as we have already said, that the membership of the board will be changed as many as three times from the date of the employment to the expiration of the

term of service, unless some of its members are re-elected, and in that case the terms of office will be different; unless some of the members are re-elected there must be an entire change in the membership of the board between the date of the employment and the expiration of the time covered by the contract. This contract deprives the board as reorganized from year to year of the right to employ its attorneys for the next following year.

“If such contracts are binding, then no difference how distasteful an attorney may be to the members of the board, or how little confidence they may have in his ability, legal learning or honesty, so long as he performs the conditions of the contract on his part they are bound to recognize him, accept his services and assume the responsibility. And if the contract in question, extending as it does over a period of three years, is valid, why may not a like contract covering a period of six, nine or a dozen years be upheld?

“Our conclusion is, that the contract is against public policy and void.’

“This holding was approved in *Jessup v. Hinchman* (1921), 77 Ind. App. 460.

“In the case of *Hord v. State* (1907), 167 Ind. 622, at page 641 the court said:

“These authorities fully sustain the proposition that appellant’s appointment or employment as the assistant of Attorney General Michener terminated with the expiration of the latter’s official term. The fact that subsequent incumbents of the office knew of his appointment, or acquiesced therein, would not alone be sufficient to reinvest him with authority to continue to represent the State as the assistant of the Attorney General. He must be shown to have been reappointed or re-employed by the successive

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Attorneys-General as their assistant to continue the prosecution of the claims in controversy.
* * *

“In the case of *Millikin v. Edgar County* (1892), 142 Ill. 528, 32 N. E. 493, 18 L. R. A. 447, the Court held that a statute which authorizes the board of supervisors to ‘appoint a keeper of the poorhouse and all necessary agents for the management and control of the poorhouse and farm, and prescribe the compensation and duties,’ does not empower such board, the members of which are themselves elected annually, to contract to employ a person as keeper for a term of three years. The Court said:

“* * * If the board had the power to * * * contract * * * for 3 years, no reason is perceived why it might not make a contract for five or even ten years, and, if this could be done, the hands of succeeding boards would be tied,—their powers taken from them. If this important power—the supervision of a poor farm and the care of the unfortunate—may be so far delegated as was attempted in this case—the county might be deprived in a great measure of one of the most important affairs intrusted to its care and supervision. The statute should not receive a construction which might lead to such disastrous results, * * *’”

Section 3 of Chapter 70 of the Acts of 1943, Burns' Indiana Statutes Annotated (1951 Repl.), Section 49-1929 provides as follows:

“No agency, except as provided in this act, shall have any right to name, appoint, employ or hire any attorney, or special or general counsel to represent it or perform any legal service in behalf of such agency and the state without the written consent of the attorney-general.”

It is my opinion that the services of Mr. Joseph B. Minor are legal services within Chapter 70, Acts 1943, and that if

his employment by the Commission was without the written consent of the then Attorney General it was invalid. That if proper consent was given it terminated with the term of such Attorney General. That, therefore, it would not be proper to pay him salary or compensation for legal services for the Indiana State Toll Bridge Commission.

OFFICIAL OPINION NO. 59

July 21, 1953.

Hon. Crawford F. Parker,
Secretary of State,
201 State House,
Indianapolis, Indiana.

Dear Sir:

I have your request for an Official Opinion which reads as follows:

“We have reference to the Acts of 1947, Chapter 208, § 3324, a part of the Employment Security Act, same being found in Burns’ Indiana Statutes Annotated, 1951 Replacement, Vol. 10, Part 1, § 52-1557w, reading as follows:

“‘CERTIFICATES OF DISSOLUTION OR WITHDRAWAL WITHHELD UNTIL FILING OF CERTIFICATE OF FULL PAYMENT WITH THE SECRETARY OF STATE.—The Secretary of State of Indiana shall withhold the issuance of any certificate of dissolution of any corporation organized under the laws of this state, or any certificate of withdrawal of any corporation organized under the laws of another state and admitted to do business in this state, until the receipt of a certificate from the employment security division to the effect that all contributions due from such corporation as an employer have been paid or that such corporation is not subject to contribution hereunder.’