

I am, therefore, of the opinion that applicants for registration with the Board of Medical Registration and Examination of Indiana pursuant to the provisions of Chapter 254 are not required to present to said Board evidence of the payment of poll taxes or personal property taxes required by Chapter 124 of the Acts of 1943.

OFFICIAL OPINION NO. 30

April 23, 1947.

Hon. A. V. Burch,
Auditor of State,
State House,
Indianapolis, Indiana.

Dear Mr. Burch:

I have your letter of March 26, 1947 which reads as follows:

“There has been presented to our office for payment a voucher from Mr. Clyde R. Black, Secretary to the Indiana Flood Control and Water Resource Commission, in the amount of \$325.00 covering salary of March 11th to March 31st, 1947, for his service as secretary to this commission.

“Also, we received a salary voucher from Mr. Glenn R. Slenker, Public Councilor (B) for the Public Service Commission, in the amount of \$161.29 covering salary of March 22nd to March 31st, 1947, for his service as councilor to this commission.

“Senator Clyde R. Black, and Representative Glenn R. Slenker were both duly elected to the legislature and have received \$1,200.00 salary each which pays them to January 1, 1948. At that time they are to receive \$100.00 per month for the next calendar year.

“Can the Auditor of State legally pay the above mentioned salaries? Will you please give us your official opinion?”

Your inquiry raises the question of the application of Section 9 of Article 2 of the Indiana constitution which reads as follows:

“No person holding a lucrative office or appointment under the United States or under this State, shall be eligible to a seat in the General Assembly; nor shall any person holding more than one lucrative office at the same time, except as in this Constitution expressly permitted: Provided, that offices in the militia to which there is attached no annual salary, and the office of Deputy Postmaster where the compensation does not exceed ninety dollars per annum, shall not be deemed lucrative: And provided, also, that counties containing less than one thousand polls, may confer the office of Clerk, Recorder, and Auditor, or any two of said offices, upon the same person.”

The first provision in the above quoted section relates only to eligibility to a seat in the General Assembly and in connection with eligibility, it is necessary to refer to Section 10 of Article 4 of the Constitution which reads as follows:

“Each House, when assembled, shall choose its own officers, the President of the Senate excepted; judge the elections, qualifications, and returns of its own members; determine its rules of proceeding, and sit upon its own adjournment. But neither House shall, without the consent of the other, adjourn for more than three days, nor to any place other than that in which it may be sitting.”

Under this section the right to judge the qualifications of its own members is vested solely in the house to which they are elected.

Lucas v. McAfee, (1940), 217 Ind. 534.

This right to judge is not subject to interference or control by the executive or judicial branches of government. The application then of the first provision of Section 9 is not for us to determine.

That leaves for determination the application of the second provision dealing with dual lucrative offices and specifically whether the positions held by Senator Clyde R. Black and Representative Glenn R. Slenker are within the definition of the constitutional term "lucrative office". The courts of this state have defined this term on numerous occasions. The most common and generally accepted test in this State is whether the person in question is vested with some of the functions pertinent to sovereignty or has some of the power and duties which inhere within the legislative, judicial or executive department of the government.

In *Wells v. State* (1911), 175 Ind. 380, at page 384 the court said:

"* * * An office is a public charge or 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. * * *"

In *Shelmadine v. City of Elkhart* (1920), 75 Ind. App. 493 at page 495 it is said:

"A public officer may be defined as a position to which a portion of the sovereignty of the state attaches for the time being, and which is exercised for the benefit of the public. The most important characteristic which may be said to distinguish an office from an employment is, that the duties of the incumbent of an office must involve an exercise of some portion of the sovereign power. * * *"

See also:

Tucker v. State, (1941), 218 Ind. 615, 702;
Freyermuth v. State (1936), 210 Ind. 235, 244;
State ex rel. Wickens v. Clark (1935), 208 Ind. 402, 405;
Bishop v. State ex rel. Griner (1898), 149 Ind. 223;

Foltz v. Kerlin (1885), 105 Ind. 221;
 Chambers v. State *ex rel.* Barnard (1890), 127
 Ind. 365;
 Howard v. Shoemaker (1871), 35 Ind. 111;
 Kerr v. Jones (1861), 19 Ind. 351;
 Creighton v. Piper (1860), 14 Ind. 182;
 State v. Nattkemper (1927), 86 Ind. App. 8.

We will first consider Senator Clyde R. Black's position as Secretary of the Flood Control and Water Resource Commission. The Flood Control Commission was created by Chapter 318 of the Acts of 1945, page 1480. Section 6 of the Act provides in part as follows at page 1485:

“* * * The *Secretary* and the Chief Engineer of the Commission *shall be employees*, selected and their compensation fixed by the Commission with the approval of the Governor, to serve during the pleasure of the Commission. The Secretary shall prepare and keep the minutes of all meetings, and a record of all proceedings, orders and transactions of the Commission, and of the Executive Committee, have custody of all the records of the Commission and executive Committee, which shall be kept and maintained in the office of the Commission and perform such other duties as the Commission may direct. * * *” (Our emphasis).

From the above it is noted that the Secretary keeps the records. I find no place in the Act where any part of the sovereign authority of the state is placed in him. He is employed by the Commission, is subject to its control and may be discharged by it. It is my opinion he is an employee and not an officer.

State *ex rel.* Wickens v. Clark (1935), 208 Ind.
 402-408.

As an employee, the Auditor may legally pay his salary.

Representative Glenn R. Slenker's position as Public Counselor, Public Service Commission was created by the Acts of 1941 as amended in 1945 (Section 54-111 Burns' R. S. 1933 Pocket Supplement). Under the 1941 Act the Public Coun-

selor was appointed by an appointing board consisting of the Governor, Lieutenant Governor and Treasurer of State. The question of the validity of legislation which places the power to appoint state officials in an appointing board was before the Supreme Court in *Tucker v. State* (1941), 218 Ind. 614, and held invalid as the constitutional power to appoint a state officer was in the Governor. While the public counselor is not specifically mentioned in this opinion, it was thought to apply to the public counselor and he was appointed by the Governor. The amendment in 1945 was made by the legislature placing the appointing power in the Governor in what was thought to be a move to make the statute conform to the decision in the *Tucker* case. If the public counselor was not a public officer, then the appointing power would have been valid in the appointing board and the appointment from 1941 to 1945 would have been in the said board and not the Governor. Said Section 54-111 Burns', is as follows:

“The governor shall appoint a public counselor, for a term of four (4) years at a salary to be fixed by the Governor, not to exceed six thousand dollars (\$6,000.00) per annum, and said public counselor shall serve at the will and pleasure of the governor. Such counselor shall be a practicing attorney and qualified by knowledge and experience to practice in public utility proceedings. He shall be entitled to, and when requested by the commission he shall appear on behalf of ratepayers, patrons and the public in all hearings before the commission, in appeals from the orders of said commission and in all suits and actions in any court in which the commission is a party which may involve rates for service, services, extensions and contracts for service, valuations and utilities, applications of utilities for authority to issue securities, applications for mergers and sales and in all other proceedings and suits and actions in which the subject-matter of the action affects the patrons of any public utility or the public. Upon the institution of any proceeding before the commission in which the public counselor is authorized to appear, the commission shall immediately notify such public counselor thereof and transmit to him a copy of the petition or

complaint filed therein. The counselor shall have the right, with the consent of the petitioners or complainants, when said petition is filed on behalf of the ratepayers, patrons or the public, to make such amendments to such petition or complaint as he may deem advisable. The commission shall not proceed to hear any such petition, complaint or proceeding in which said public counselor is entitled to appear until he shall have had at least ten (10) days' notice thereof, unless he shall have waived the same. In all proceedings before the commission and in any court in which he shall appear the counselor shall have charge of the interests of the ratepayers and patrons of the utility and utilities involved and he shall give notice of such hearing to all municipalities, corporations, or organizations and persons parties to such proceedings, suit or action, other than such utility or utilities. In addition to such notice given by such public counselor, the commission shall give the notices otherwise required by law. Services of all engineers, experts and accountants of the commission may be availed of by such public counselor in the performance of his duties as such, and they shall make such appraisals and audits as the public counselor, with the approval of the commission, may request, and he shall have access to the records and file(s) of said commission. Provided, that with the advice and consent of the governor such counselor may employ stenographers, examiners, experts, engineers, assistant counselors and accountants, at such salaries and compensation and for such length of time as the governor may approve; the compensation together with cost of transportation, hotel, telegram and telephone bills of said employees and said counselors while traveling on such public business shall be paid by the treasurer of state out of the appropriation made for the commission on warrants drawn by the auditor of state, sworn to by the parties who incurred such expenses and after the same shall have been approved by such public counselor; Provided, further, That nothing in this section contained shall be construed to prevent

any party interested in such proceeding, suit or action from appearing in person or from being represented by counsel therein."

Under the above section the public counselor may employ stenographers, examiners, experts, engineers, assistant counselors and accountants and fix their salaries and compensation. The fact that the exercise of this power is subject to the approval of the Governor does not subtract from the fact that the power itself is vested in him. The Governor himself cannot make such employments, he can only advise, ratify or disapprove the act of the public counselor in whom is lodged the power by statute. To approve is to sanction the act of another in whom resides the authority to perform the act itself.

42 Am. Jur., p. 963, Sec. 111;
 Simpson v. City of Marlborough (1920), 127 N. E. (Mass.) 887;
 In Re: Rooney (1937), 11 N. E. (2d) (Mass.) 591;
 State *ex rel.* City of St. Louis v. Caulfield (1933), 67 S. W. (2d) (Mo.) 818.

The public counselor approves vouchers for the compensation and expenses of the persons so employed by him and in such expenditures is limited only by the appropriation from which they are paid.

He has full "charge of the interests of the ratepayers and patrons of the utility and utilities involved." His powers, duties and responsibilities would seem to raise him above the status of a mere employee.

While the fact that it was generally considered that the Governor and not the appointing board appointed the public counselor under the 1941 Act and the *Tucker* decision and the Governor did make the appointment, and that procedure was acquiesced in, is not controlling; it is entitled to weight. Although, such a determination would not change the result herein, it is my opinion that the public counselor exercises such sovereignty and his duties, powers and responsibilities are such that he holds a lucrative public office.

I have said that such determination is not essential because if Mr. Slenker were only an employee the reasoning

with respect to Mr. Black would apply, if my conclusion that he is an officer is correct, the result then depends upon the effect of holding or attempting to hold two lucrative offices. It is generally held that the acceptance, by a person holding a lucrative office, of a second lucrative office within the meaning of the constitutional provision, automatically operates as a vacation of the office first held.

Kerr v. Jones (1862), 19 Ind. 351;
 Foltz v. Kerlin (1885), 105 Ind. 222 at page
 225;
 Chambers v. State *ex rel.* (1890), 127 Ind. 365;
 Bishop v. State *ex rel.* (1897), 149 Ind. 223;
 1934 OAG 334;
 1938 OAG 270;

I am informed that Mr. Slenker, who was the previous Public Counselor, resigned prior to taking his seat in the last General Assembly and that he was reappointed March 22nd after the adjournment of the General Assembly. I am informed that he has accepted the appointment and qualified. Under those circumstances, I am of the opinion that the appointment as Public Counselor and his qualification for that office automatically vacated his office as representative to the General Assembly and that the Auditor may legally pay his salary from the time of his qualification.

I would also respectfully refer you to an opinion of the Attorney General found in 1934 Ind. O.A.G. page 334, wherein in a similar situation a member of the General Assembly was appointed upon the State Board of Tax Commissioners. This opinion was to the Auditor of State. The writer of the opinion concluded that pay as member of the State Board of Tax Commissioners could be made upon the theory that the appointee was at least a *de facto* officer and entitled to compensation.

There remains the question of the amount of payment of salary. The pertinent provisions on pay are found in Section 3 of Chapter 177 of the Acts of 1943 which provides that from and after the first day of January, 1947, the salary of members of the General Assembly "shall be twelve hundred dollars (\$1200) annually payable in monthly installments in the same manner as other salaries are paid, * * *". By

Chapter 2 of the Acts of 1947 the compensation as provided in the 1943 Act was payable in odd numbered years six hundred dollars (\$600) on January 15th and six hundred dollars (\$600) on February 15th. In even numbered years it is payable quarterly.

As to Mr. Black, legally there could be no question as to overpayment as a legislator since as an employee, he is still serving in both capacities and entitled to pay attached to both. As to Mr. Slenker, we do not have information concerning the exact method of computation of his salary except that he has filed a voucher for \$161.29. I have previously stated that he is now entitled to the salary of public counselor. Whether he has received overpayment as a legislator involves the question of the method of computation of his salary, what the legislative intent was in providing an annual salary payable in the first two months of the year, when a legislator officially takes office and becomes entitled to his compensation and incidental facts which require further information not set forth in your request. For that reason this opinion does not consider the question of overpayment as to Mr. Slenker nor is it intended as a construction of Chapter 177 of the Acts of 1943 and Chapter 2 of the Acts of 1947.

OFFICIAL OPINION NO. 31

June 4, 1947.

Hon. Robert Rossow,
Colonel, Cav. Res. (Ret.),
Supt., Indiana State Police,
State House,
Indianapolis 4, Indiana.

Dear Sir:

I am in receipt of your letter of April 17, 1947, requesting an official opinion concerning sections 10-4740, 10-4741 and 10-4742, Burns' Indiana Statutes, 1933, same being sections 2 and 3, chapter 158, Acts 1937 and section 8, chapter 63, Acts 1935, a part of which letter is quoted as follows: