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OFFICIAL OPINION NO. 131

December 14, 1945.

Hon. Ralph F. Gates, Governor,
State of Indiana,
State House,
Indianapolis, Indiana.

My dear Governor:

I have your letter of November 30 as follows:

“A question has arisen as to the commissioner of weights and measures of the state. I would like to have your official opinion as to whether, under the present laws, there is such an office as commissioner of weights and measures of the state, and, if so, how such an office is filled. If such an office is filled by appointment, by whom is the appointment made?”

In an effort to determine what the present situation is, I have reviewed the various statutes in an effort to trace the origin and present status of the office of Commissioner of Weights and Measures. The Legislature of 1905 passed an Act establishing a state laboratory of hygiene as a department of the State Board of Health. This laboratory was to be devoted to the analysis of foods and drugs for the public benefit. Section 3 of this Act, which is Chapter 38 of the Acts of 1905 (Burns' Indiana Statutes 35-303) reads in part as follows:

“For the conduct of the state laboratory of hygiene, the state board of health shall employ and appoint a

superintendent other than the secretary of such board of health, and such superintendent shall have charge of and superintend and manage such state laboratory of hygiene, and he shall receive a salary not to exceed two thousand dollars (\$2,000) per annum. Such superintendent shall be learned and skilled in bacteriology and pathology. *The state board of health shall also employ a skilled chemist, whose salary shall not exceed fifteen hundred dollars (\$1,500) per annum,* and both appointees shall be temperate, healthy, well recommended and of good moral character. * * *”
(Emphasis supplied.)

The next legislation which is pertinent to the inquiry is Chapter 104 of the Acts of 1907 (which was the Food and Drug Law of Indiana for many years), Section 7 of which (Burns' Indiana Statutes 35-1207) reads in part as follows:

“It shall be the duty of the state board of health to enforce the laws of the state governing food and drug adulteration, and the chemist of the state board of health appointed by said board shall be the state food and drug commissioner. * * *”

In 1925 a law which is commonly known as the Weights and Measures Law of Indiana and which is still in effect, reads in part as follows: (Section 2, Chapter 86, Acts of 1925, Burns' Indiana Statutes 69-103.)

“The state food and drug commissioner shall be the state commissioner of weights and measures. The state commissioner of weights and measures shall take charge of the standards adopted by this act as the standards of the state; * * * The state commissioner of weights and measures is also authorized to adopt rules, specifications and tolerances necessary for the enforcement of the provisions of this act, * * *”

By this latest legislation the chemist of the State Board of Health who is also the state food and drug commissioner becomes the state commissioner of weights and measures.

The next legislation which bears on the situation is Chapter 38, Acts of 1939 (Burns' Indiana Statutes, 1943 Supplement

35-1228 to 35-1260). This is the present Food and Drug Law of Indiana which provides in Section 33 (Burns' 35-1260) for the repeal of all laws or parts of laws in conflict with the act. The Compiler's Note in the 1943 Supplement (Burns' 35-1201 to 35-1211) omits the 1907 Act as superseded by the 1939 Act.

In view of the conclusion I have reached it is not necessary to consider whether the above Act of 1939 repeals that section of the Act of 1907 which provides that the chemist of the State Board of Health should be the State Food and Drug Commissioner.

Next, a consideration of the effect of the decision of the Indiana Supreme Court in the case of Tucker, *et al.* v. State (1941), 218 Ind. 614, requires that we come to certain conclusions in connection with the appointment of the Commissioner of Weights and Measures. Under that decision it was established that while the creation of offices was a legislative function the appointment of the officers was an executive function; that with certain exceptions not pertinent here the Legislature had no power to provide that such offices be filled by the appointment of the officer by any official or board other than the Governor. For example, the court said at page 673, "The creation of the offices is a legislative function. The appointment of officers is an executive function." On page 653 the court, referring to the Governor, said, "he has been vested with the general executive power of the state which carries with it the general power to appoint to office, not as an incident to some other power, but as a principal power in itself." Under date of January 24, 1945, the Attorney General had occasion to give a rather lengthy official opinion to your Honor upon the question of the power to appoint state officials which opinion discusses this question rather fully. Applying these rules to the present question we find that the Act of 1925, Chapter 86, provides in part by Section 2 thereof as follows:

"The state food and drug commissioner shall be the state commissioner of weights and measures. *The state commissioner of weights and measures shall take charge of the standards adopted by this act as the standards of the state; cause them to be kept in a fire-proof building belonging to the state, from which they*

shall not be removed except for repairs or for certification, and take all other necessary precautions for their safekeeping. He shall maintain the state standards in good order and shall submit them once in ten (10) years to the national bureau of standards for certification. He, or his deputies or inspectors by his direction, shall correct the standards of the several cities and counties, and as often as once in two (2) years compare the same with those in his possession, and where not otherwise provided by law he shall have the general supervision of the weights, measures and measuring and weighing devices of the state, and in use in the state. *The state commissioner of weights and measures is also authorized to adopt rules, specifications and tolerances necessary for the enforcement of the provisions of this act, and the violation of such rules, specifications and tolerances shall be punished, upon conviction, as set forth in section fifteen (§ 69-116) of this act. * * ** (Our emphasis.)

Section 69-103 B. R. S. 1943 Replacement.

It is my opinion that under this Act the office of the State Commissioner of Weights and Measures is created, that the Act by giving him authority to adopt rules, specifications, etc., makes him a public officer of the State and that therefore under the decision in the Tucker case such officer is required to be appointed by the Governor.

In view of this conclusion it is not necessary to consider further the questions involved in the statutory provisions providing that the chemist of the State Board of Health should be the State Food and Drug Commissioner and that the State Food and Drug Commissioner should be the Commissioner of Weights and Measures for the reason that while the person employed by the State Board of Health as its chemist may be only an employee the attempt of the Legislature to make such person the Commissioner of Weights and Measures and then giving him as such Commissioner of Weights and Measures such sovereign power as to make him a public officer would in effect make such person a public officer and thereby bring him within the rule announced in the Tucker case and therefore require that the office of Commissioner of Weights and Measures be filled by an appointment by the Governor.

In this connection we refer you to page 508 of Chapter 186 of the Acts of 1945, the same being the Appropriation Act. This Act makes a separate appropriation for the Division of Weights and Measures under operating expenses for personal service for the fiscal year of ten thousand dollars (\$10,000.00) and for other operating expenses for the fiscal year of five thousand dollars (\$5,000.00). It is therefore our conclusion that it will be necessary for the Governor to appoint some one to the office of Commissioner of Weights and Measures and that this person when so appointed and qualified is the officer who should adopt and promulgate the rules and regulations provided for in said Act. In this connection we call your attention to the fact that under the Constitution the person so appointed cannot be the holder of any other public office under the State.

OFFICIAL OPINION NO. 132

December 20, 1945.

Hon. Harold F. Brigham, Director,
Indiana State Library,
140 North Senate Avenue,
Indianapolis, Indiana.

Dear Sir:

Your letter of November 10, 1945, received in which you request an opinion on the question as to whether or not a public library may act independently to join the State Retirement Fund in accordance with the provisions of the State Retirement Act of 1945.

The Public Employes' Retirement Fund is created by Chapter 340 of the Acts of 1945. The pertinent provisions of said statute on the question presented are as follows:

Section 4 of said Act in part reads as follows:

"The following words and phrases as used in this act, unless a different meaning is plainly required by the context, shall have the following meanings:

“* * *