committee and house, to work a forfeiture of his right to a seat in the house, under the constitution of the United States. Colonels of volunteers, although commissioned by the state authorities, are officers of the United States, in the sense of the constitutional provision that no person, holding any office, under the United States, shall be a member of either house during his continuance in office. The acceptance and exercise of the office of colonel of volunteers vacates the seat of a member of the house of representatives. And a representative elect, who accepted a commission as colonel of volunteers, under the act of July 22, 1861, and was mustered and actually served as such, was divested of his title to a seat in the house by virtue of the constitutional provision, although he was commissioned by the governor of the state, in accordance with the provisions of that act, and was in the commission, inaccurately styled colonel of militia. * * *

It is my opinion, therefore, that a vacancy exists in the office of State Senator in the case referred to in your letter and that this vacancy should be filled by election at the general election to be held in November, 1942.

INDIANA MILK CONTROL BOARD: Right of Milk Control Board to fix prices to producers on its own motion; whether the Section granting an appeal applies to cases where no complaint has been filed.

April 8, 1942.

Indiana Milk Control Board,
State House Annex,
Indianapolis, Indiana.

Gentlemen:

I have before me your letter requesting an official opinion with reference to the authority of the board to fix minimum prices to producers of fluid milk, outlining the procedure as respects the necessity of hearings and investigations, and as to whether such provisions violate either the Fourteenth
Amendment to the Federal Constitution or Section 21 of Article I of the State Constitution.

In your letter submitting the question you call attention to subdivisions (1) and (2) of Section 15-1716 of the December, 1941, Cumulative Pocket Supplement of Burns' Indiana Statutes Annotated 1933, in connection with which you point out that the above subdivisions provide ways whereby prices to producers may be fixed. The first of these proceeds upon the fact of a previous agreement between producers and distributors, which is submitted to the board for investigation and hearing and ultimate approval or disapproval thereof. The second subdivision is predicated upon action by local milk committees composed, as required by statute, of an equal number of both classes. Under this subdivision the local milk committee acts as a recommending body and ultimately in much the same way as provided in subdivision (1), the question comes before the board for hearing and investigation and final determination. If, however, the producer representatives and the distributor representatives upon the local milk committee cannot agree because of diversity of interest represented no recommendation can be made to the board, and subdivision (2) is unavailing. In other words, in order to make a recommendation under subdivision (2) a majority of a committee, which upon the basis of interest represented is tied, must be secured. This, of course, is not impossible since some member of the committee representing, for instance, distributors may vote with those representing producers; but, it is easily conceivable that cases might arise in which a majority could not be secured which gives rise to your question as to whether the board has any power of its own motion to fix minimum prices to producers other than the method prescribed in subdivisions (1) and (2) of Section 15-1716, Supra.

(NOTE: Hereafter where section numbers of a statute are given, the same refers to the December, 1941, Cumulative Pocket Supplement of Burns' Indiana Statutes Annotated 1933.)

In the discussion of this question, I think it is desirable to note briefly some of the applicable provisions of Section 15-1705. It will be noted first that the board is declared to be the instrumentality of the State for the purpose of attaining the ends recited in the legislative finding and statement of
policy. By the express terms of this section this board is vested with the power “to supervise and regulate the entire milk industry in this State, exclusive of the manufacture of milk products not sold or intended to be offered for sale as milk” * * *. This general power is said to extend “to the supervision and regulation of the production, processing, furnishing distribution, classification, and sale of the entire product of dairy animals in this State, to the extent that the same is produced for sale or is available in the form of milk as defined by this act.”

The board is given the further power “to investigate all matters pertaining to the production, transportation, storage, distribution and sale of milk in this state”. Authority is also given to the board “to determine and designate any area of the state as a natural marketing area for the sale of milk” * * *.

The board, is further expressly empowered “to adopt and enforce all rules, regulations or orders necessary to carry out the provisions of this act, including rules and regulations governing the following:” * * * “(e) Schedules of prices to be paid producers of milk in each of the several market areas.”

Subdivisions (12) and (13) of Section 15-1705 are as follows:

“The board shall have the power, either by general or special order, from time to time, to fix and determine the minimum price or prices to be paid by all licensed milk dealers for such classification of milk to producers for milk produced and furnished for consumption in any market area. All prices to be paid producers fixed and determined by the board shall be just and reasonable: Provided, however, That the lowest price per one hundred (100) pounds that can be fixed for milk coming under the jurisdiction of the board for any classification shall not be less than four (4) times the price of 92-score butter as reported by the United States Department of Agriculture and marketing service for the Chicago butter market, plus thirty (30) per cent.”

“The board may adopt general rules or orders which shall be posted for public inspection in the main office of the board and a copy filed in the office of the secre-
tary of state. The board may also provide for such news release or advertisements as it may deem advisable in each instance. The posting and filing shall be deemed sufficient notice of such general rules and orders as to each licensee and when properly posted and filed shall have the force and effect of law.”

I desire now to call your attention to the provisions of Section 15-1710, which provides as follows:

“In determining the reasonableness of prices to be paid to producers for milk furnished to any licensee in any marketing area, the board shall be guided by the cost of production including compliance with all sanitary regulations in force in such market or markets, the value of milk in terms of its basic products, butter, cheese and evaporated milk, the supply of milk in such market or markets and the welfare of the general public; but any prices fixed pursuant to this act and approved by the board as herein required shall be deemed to be prima facie reasonable. In approving, disapproving or amending schedule of prices to producers, the board shall require that the same shall be uniform as among the several licensees in any market for each grade, quantity and class of milk.”

It appears to me that the above quoted provisions of the statute make it very clear that it was intended that the board, upon its own motion, was authorized to fix minimum prices to producers. In fact, subdivision (12) of Section 15-1705 expressly so provides, as does also subdivision (8) on the subject of the adoption of rules and regulations, setting out specifically that the board is empowered to adopt and enforce rules and regulations governing “schedules of prices to be paid producers of milk in each of the several marketing areas.” The important question, it seems to me, is not as to whether the board has been given authority in the particular named, but rather as to whether such authority may be constitutionally exercised.

It surely must be true that since the decision of the case of Nebbia v. New York, 291 U. S. 502, no question can arise upon the basis of price fixing. If the power to regulate exists,
the fact that the regulation involves a fixing of minimum prices would not make it invalid. This is very clear from the decision in the above case, which has been followed consistently since the opinion was rendered.

See also Albert et al v. Milk Control Board of Indiana, 210 Ind. 283. The question of the violation of the Fourteenth Amendment of the Federal Constitution and Section 21 of Article I of the State Constitution was presented in this case, and it was there held that the Act did not violate either of these constitutional provisions. The question was also raised in this case as to whether Section 5 of the Act, which is Section 15-1705, was unconstitutional as an invalid delegation of legislative power. The Court, however, held that there was no illegal delegation of legislative power.

You seem to have some question in your mind as to whether in the passage of one of these general orders it would be necessary to have a hearing, giving notice to all parties conceivably having an interest in the question. I do not think that the power to adopt rules and regulations for fixing minimum prices, as provided in the provisions heretofore quoted, requires that interested parties receive prior notice in order to give the board jurisdiction, but no action of the board would be valid which could not be sustained by relevant facts so as to show that the action of the board was reasonable and based upon relevant facts as described in the Act itself. It would follow, from what I have said, that in making such a general order the board would be obliged to investigate the facts upon which such an order would be based, which would doubtless involve hearings. It should be remembered, however, that, in my opinion, the necessity for investigations and hearings is not jurisdictional but is in order that the board may act intelligently within the provisions of the Act.

You also desire an opinion as to whether subdivision (21) of Section 15-1705 applies to official orders generally, or whether it applies only to those on which complaints are filed against a certain individual or individuals and against whom decisions are made under subdivisions (14) to (20), inclusive, of Section 15-1705. Subdivision (21) referred to is as follows:
Within thirty (30) days after service of any order or decision of the board, but not thereafter, any person affected by such rule, regulation, order or decision, may appeal to the circuit or superior court of any county in which the subject-matter of the hearing is situated. A circuit or superior court, to which any such appeal is taken, shall have the power, and it shall be its duty in term time or vacation, to hear and determine such appeal with all convenient speed. Such court shall have jurisdiction to reverse, vacate or modify the order complained of, if, upon consideration of the record before the board, the court is of the opinion that the order was unlawful or unreasonable. Upon notice of appeal, the board shall forthwith certify to the clerk of the court a transcript of the records of the board, the original papers or copies thereof, a certified transcript of the evidence adduced upon the hearing before the board, which shall be filed in and constitute the record of the court. No new or additional evidence shall be heard by the court, but judgment shall be rendered on the record filed by the board. If new or additional evidence is discovered by any party after the hearing by the board, the same may be made the grounds for a motion for a new hearing before the board under the rules applicable to similar motion for a new trial in circuit or superior courts of Indiana."

The provisions of this subdivision are somewhat ambiguous but I do not see how its terms can be made to apply to rules and regulations made under the authority of subdivisions (12) and (13). It will be noted that rules and regulations made under the above subdivisions require only the posting in the office of the board and the filing of a copy in the office of the Secretary of State in order to constitute notice.

Beginning with subdivision (14) of Section 15-1705, formal hearings upon complaints apparently are contemplated, and subdivision (20) requires that:

"Every order of the board shall be served upon every person to be affected thereby, either by personal delivery of a certified copy thereof, or by mailing a
certified copy thereof, in a sealed package, with postage prepaid, to the person to be affected * * *.

This seems to conform with the thirty (30) day period within which to take an appeal after the service of such an order or decision of the board. Apparently, that could not refer to general orders made pursuant to authority provided in Section (12) because, as I understand the provision of subdivision (13), general orders which may be used in fixing and determining minimum prices require only posting in the main office of the board and a copy filed in the office of the Secretary of State.

STATE BOARD OF ACCOUNTS: Whether a member of the Board of Trustees of a Sanitary District holds a lucrative office; whether a mayor of a city or member of a town board may also be a member of the board of trustees of the sanitary district in which their city or town is located.

April 9, 1942.

Mr. Otto K. Jensen,
State Examiner,
Indianapolis, Indiana.

Dear Sir:

I have your letter wherein you refer to sanitary districts created pursuant to Section 48-4101, et seq., Burns' Ind. St. Ann., 1933 (Acts 1913, Chap. 307, as amended by Acts 1919, Chap. 11 and Acts 1931, Chap. 100.) The statute provides for the appointment by the Judge of the Circuit Court of the county in which the district, or a major portion thereof, is located of five trustees to constitute a board of trustees for the district, which shall manage and control all of the affairs and property of the sanitary district. The trustees shall receive not to exceed $10 per day for each day's services performed, which aggregate payment shall not exceed $250 per year.

You have asked whether a person may be a member of the board of trustees of such sanitary district and at the same time be a mayor of a city or member of a town board within such district.