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OFFICIAL OPINION NO. 6

May 21, 1969

Hon. Edgar D. Whitcomb
Governor of Indiana
206 State House
Indianapolis, Indiana 46204

Dear Governor Whitcomb:

This is in response to your written request for my opinion as to the legal effect of certain executive orders made and issued by your predecessors in the office of Governor.

Your questions were as follows:

"1. Are the executive orders cited above (7-62, 8-62, 10-62, 11-62, 1-63, 2-63, 7-63, 10-63, 1-64, 2-64, 7-64, 8-64 and 13-63), which were issued by a previous Governor, binding upon this administration?

"2. Are the executive orders cited above valid which attempt to place certain positions under the terms of the State Personnel Act of 1941, as amended, which positions are not in agencies specified in said Act?

"3. Do the State Highway Commission and the Governor have the unrestricted power to determine what employees are 'professional employees' under the terms of Chapter 324 of Acts of the General Assembly of 1951, or are those positions limited by the terms of the statute itself?

"4. Are the terms of Chapter 177 of the Acts of the General Assembly of 1941 restricted to registered professional engineers or may they be extended by administrative rules and regulations to other persons serving in engineering functions?

"5. If prior executive orders are binding, do I, as the present Governor, have a power to rescind executive orders of a previous Governor?"

In essence, all of the executive power of the State of Indiana is vested in the Governor by virtue of the Indiana Constitution, Art. 3, Sec. 1. He is, in effect, instructed by

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Article 5, Sec. 16, of the Constitution of Indiana to “take care that the laws be faithfully executed.”

The Supreme Court of Indiana in *Tucker v. State* (1941), 218 Ind. 614, 35 N. E. (2d) 270, also pointed out that the executive power is the power to execute the laws—the power to carry them into effect, as distinguished from the power to make the laws, and the power to judge them. Included in the executive power is the power over the administrative department, as so stated in the Indiana Constitution, Art. 3, Sec. 1.

The change in the identity of the person who lawfully assumes the power and responsibility of the office of Governor of the State of Indiana does not affect the office itself. None of the orders issued by the Governor can lawfully be considered personal. Accordingly, the lawful appointment of a Deputy by an officer authorized to appoint will expire with the death, resignation, or expiration of the term of the appointing officer. There is, however, no element in a lawful administrative order, unlimited in its terms, which by operation of law would automatically cancel the order on the change in identity of the person occupying the office.

Now as to your specific questions, in answer to your first and fifth questions, it is my opinion that all valid executive orders are binding upon the administration of the State of Indiana until they are modified or rescinded by subsequent executive order of the Governor, or modified or rendered moot by subsequent statutes enacted by the General Assembly of Indiana.

In answer to your second question, I note that you refer to certain positions placed by executive order “under the terms of the State Personnel Act of 1941, as amended”; however, these positions are not in agencies specified in said Act. The Governor, in the exercise of his executive power, cannot legislate or judge, and, therefore, cannot create property rights. As a result, one Governor of the State of Indiana cannot by executive order restrict his successor to permit certain state employees who are not covered by the State Personnel Act of 1941 the right to continue to work at a particular wage or salary.

However, the executive department itself, which is the

Governor in the last analysis, can determine its own will and pleasure concerning tenure and salary, where not restricted by lawful enactments of the legislative department or lawful orders and judgments of the judicial branch. Such a legislative restriction is the State Personnel Act of 1941 to which you refer. (Acts of 1941, Ch. 139, as found in Burns' [1961 Repl.], Sections 60-1301, *et seq.*)

Those persons within the defined "state service" category cannot be promoted, demoted, transferred, laid off, removed or disciplined by the executive department except by the procedure and only by reason of the causes outlined in that statute.

But, I find no specific prohibition in that or any other statute which would generally prevent the Governor from directing that other employees of the State of Indiana, not included within the defined "state service," shall be treated in the same way and shall be afforded the same protection. And such an order only binds the administrative department so long as it is in effect. Therefore, the employees affected do not have a right to employment apart from the employer's will and pleasure, and that will and pleasure have thus been procedurally standardized and concentrated for the time being in the Governor himself.

In answer to your third question it is necessary to refer to another restrictive statute, Acts of 1951, Ch. 324, as found in Burns' (1968 Supp.), Section 36-163a, which provides, in part, as follows:

"* * * All professional employees of the state highway commission as defined below, shall be employed by the commission regardless of any political affiliation of such employees, and they shall not be appointed, promoted, reduced or removed or in any way favored or discriminated against because of their political, religious, racial or fraternal affiliations; however, the appointment, demotion or dismissal of chief engineer, superintendent of maintenance and district engineers shall be at the discretion of the highway commission. The following persons shall be considered as professional employees:

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“Any employee, whose particular duties are such that, in order to perform them, specialized knowledge acquired by professional education, training and practical experience is necessary. Registered engineers, graduate engineers, chemists, physicists, geologists, draftsmen, computers and accountants are included in the classification of professional employee * * *”

Your question in respect to this statute concerns the classification of “professional employees” under the terms of the statute itself, rather than the additional executive power of the Governor apart from the statute. *It is my opinion that the rights created by this statute are limited in application to those who are “professional employees” as defined by the statute.*

No one is a “professional employee” unless the duties of his position require that he have specialized knowledge acquired by professional education, training and practical experience. The use of the word “professional” is itself indicative of the intent of the General Assembly in this regard, and the further specific listing in this statute of registered engineers, graduate engineers, chemists, physicists, geologists, draftsmen, computers and accountants further spells out this intent.

The determination as to the application of the classification of “professional employee” is also restricted, and is limited by the terms of the statute. For example, practical experience alone, even coupled with a course of training, does not qualify an employee as a “professional employee” without the requisite professional education.

In answer to your fourth question relating to professional engineers, I note that the statute contains the following words as to the application of the provisions of the Act:

“The provisions herein shall govern the qualification, classification and remuneration of all registered professional engineers in the engineering service of all departments, commissions, bureaus, boards and divisions of the State of Indiana * * *” Acts of 1941, Ch. 177, Sec. 6, as amended by Ch. 147, Acts of 1945, Sec. 5, and as found in Burns’ (1961 Repl.), Sec. 60-1356.

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It is to be particularly noted that the words, "and other engineering employees," following the words, "all registered professional engineers," in the original statute were deleted by amendment in 1945. It is my opinion, therefore, that such deletion signifies a legislative intent to exempt other engineering personnel from the application of the Acts of 1941, Chapter 177.