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OFFICIAL OPINION NO. 60

September 27, 1962

Hon. Matthew E. Welsh
Governor of Indiana
206 State House
Indianapolis, Indiana

Dear Governor Welsh:

This will acknowledge receipt of your letter dated September 21, 1962; wherein you request my opinion based upon the following statement of facts:

“1. Mr. Eugene Bainbridge resigned as Indiana State Senator from Lake County on 1 April 1961 to accept appointment as Director of Public Works and Supply.

“2. On 1 July 1961 the Department of Administration Act became effective and Mr. Bainbridge was appointed Deputy Commissioner of Administration in charge of Divisions of Supply, Public Works, General Services and Property Management, and served until 1 January 1962.

“3. On 1 January 1962 Mr. Bainbridge was appointed as Commissioner of Administration and is now serving in that capacity.”

Your specific question is stated as follows:

“In view of these facts please advise me whether any of these appointments were contrary to the provisions of Article IV Section 30 of the Constitution of Indiana.”

The facts set forth in the first two items of your inquiry make it evident that Mr. Bainbridge is no longer serving in the capacity of the Director of Public Works and Supply or Deputy Commissioner of Administration; therefore, the question of his right to hold these offices is moot and need not be considered. The only practical problem which remains is the question of salary received by Mr. Bainbridge while serving in these capacities. While this question was not specifically presented by you, it should be considered as a part of this opinion.

In reference to the third item of your inquiry, it is necessary to set forth the full text of Art. 4, Sec. 30 of the Indiana Constitution, which reads as follows:

“No Senator or Representative shall, during the term for which he may have been elected, be eligible to any office, the election to which is vested in the General Assembly; *nor shall he be appointed to any civil office of profit, which shall have been created, or the emoluments of which shall have been increased, during such term*; but this latter provision shall not be construed to apply to any office elective by the People.” (Our emphasis)

In my opinion, the language used in such constitutional provision is clear and free from ambiguity.

It is my further opinion the Office of Commissioner of the Department of Administration is a “civil office of profit,” as defined by decisions of the Indiana Supreme and Appellate Courts and by prior Opinions of the Attorney General of Indiana.

In the case of *Wells v. The State of Indiana ex rel. Peden* (1911), 175 Ind. 380, 384, 94 N. E. 371, the court held, in part, as follows:

“* * * 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 * * *”

See also: 1937 O. A. G., page 123.

The office of Commissioner of the Department of Administration was created by the Legislature during the period when Mr. Bainbridge was a member thereof, and, although he resigned from the Legislature, prior to his appointment as Commissioner of the Department of Administration, the appointment was made during the term for which he was elected.

The discussion in an Official Opinion of the Attorney General of Indiana, dated June 17, 1919, and reported in 1917-1920, O. A. G., page 199, substantially answers, not only the

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third item of your inquiry, but also the questions on the same general subject presented to me by Hon. Dorothy Gardner, Auditor of State, and Hon. Keith Bulen, State Representative.

The facts therein present a situation parallel to those in the instant case. A member of the Legislature in 1919 was appointed by the Governor to membership on the industrial board. After citing the provisions of the Indiana Constitution, Art. 4, Sec. 30, the Attorney General stated:

“I have no doubt that the office held by a member of the industrial board is a civil office of profit within the meaning of the above constitutional provision. Neither can there be any doubt but that the general assembly of 1919 of which Mr. VanAuken was a member created the industrial board and provided compensation for its members (Acts 1919, page 168). It follows that Mr. VanAuken was not eligible to membership on such board. His appointment as a member of the board, however, was made by the governor, in whom was lodged the power of making such appointment. He was not, therefore, a mere intruder in the office and in such a case I think coming into office in a regular manner and executing the duties of such office even though not entitled to hold it, still he is a de facto officer * * *

“It is, therefore, my opinion that the auditor of state will be justified in executing a warrant to Mr. VanAuken for his salary for the time served by him as a member of the industrial board under appointment by the governor.”

Accordingly, the above opinion and authorities cited answer the questions presented by you, Hon. Dorothy Gardner and Hon. Keith Bulen, and therefore, Mr. Bainbridge now holds the office of Commissioner of the Department of Administration in violation of Art. 4, Sec. 30 of the Indiana Constitution.