

1263.

REAL ESTATE EXAMINING BOARD—MEMBERS NOT ENTITLED TO
BENEFITS OF WORKMEN'S COMPENSATION LAW.*SYLLABUS:*

The members of the State Board of Real Estate Examiners are officers of the State of Ohio and are not entitled to the benefits of the Workmen's Compensation Law.

COLUMBUS, OHIO, December 5, 1929.

The Industrial Commission of Ohio, Department of Industrial Relations, Columbus, Ohio.

GENTLEMEN:—This will acknowledge the receipt of your request for my opinion upon the question of whether or not a "claimant, as a member of the Board of Real Estate Examiners, an appointive officer, is covered by the Workmen's Compensation Law as an employe."

Your request refers to a claim filed by a member of the Board of Real Estate Examiners of the State of Ohio who was injured while on his way from the city of Columbus where he had been engaged in the duties of his position to his home in a nearby city.

Only employes are entitled to participate in the state insurance fund, and the term "employe" is defined in Section 1465-61, General Code, and insofar as that term relates to those in the service of the state, said section reads as follows:

"The terms 'employe', 'workmen' and 'operatives' as used in this act, shall be construed to mean:

1. Every person in the service of the state, * * * under any appointment or contract of hire, express or implied, oral or written, except any official of the state, * * *".

There is no doubt that the claimant in this case was in the service of the state under an appointment of hire, as will hereinafter be pointed out. We must then determine whether or not he comes within the exception, viz: whether or not he is an official of the state; if so, he is excepted from the definition and not entitled to the benefits of the act.

An official is defined in Webster's New International Dictionary as

"One who holds or is vested with an office."

I believe that is the generally recognized meaning of that term, accepted by all authorities. It is therefore for us to determine whether or not the claimant holds an office. If so, it is a public office. In 46 *C. J.*, 922, it is stated:

"'Office', in the sense of public office, may be defined broadly as a public station or employment conferred by the appointment of government, or more precisely as the 'right, authority, and duty, created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with the power to perform a public function for the benefit of the public'."

A very extensive discussion of what constitutes public office is found in the case of *State ex rel. vs. Brennan*, 49 O. S., 33. After discussing the various authorities, Judge Spear in the opinion of the court, at page 38, states:

"It is not important to define with exactness all the characteristics of a public office, but it is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office."

In *Throop on Public Officers, Section 3*, it is stated:

"A public office is an agency for the state, and the person whose duty it is to perform this agency is a public officer. The oath, the salary or fees are mere incidents and constitute no part of the office."

In the case of *State ex rel. vs. Jennings, et al.*, 57 O. S., 415, we find another very thorough consideration of the question, in which cases are again reviewed. On page 424, Judge Minshall, in the opinion, states:

"But it is easier to conceive the general requirements of such an office, than to express them with precision in a definition that shall be entirely faultless. It will be found, however, by consulting the cases and the authorities, that the most general distinction of a public office is, that it embraces the performance by the incumbent of a public function delegated to him as a part of the sovereignty of the state."

Again referring to the authorities, the learned judge, on page 426, says:

"Here, and throughout the opinion, prominence is given to the fact, that a public officer is one who exercises, in an independent capacity, a public function in the interest of the people, by virtue of law, which is only saying in another form, that he exercises a portion of the sovereignty of the people delegated to him by law. "

I believe that these are the generally recognized tests used in determining whether or not a given position is an office. The universal rule is that one is a public officer who is appointed to a position created by law and is thereby vested with duties imposed by the law itself.

It is therefore necessary for us to examine the act creating the Board of Real Estate Examiners to determine the nature of the functions of the members thereof. We find this in Sections 6373-25 to 6373-51, both inclusive, of the General Code. Section 6373-27 provides in part as follows:

"There shall be a state board of real estate examiners consisting of three members who shall be appointed by the governor, with the advice and consent of the senate. * * * The term of office of each member shall be three years, excepting that, of the members first appointed, one shall be appointed for a term of one year, one for a term of two years, and one for a term of three years."

The section further provides that each member shall receive \$15.00 for each day of actual service attending the meetings of the board and his actual and necessary expenses incurred in the discharge of his official duties.

It will be noted that twice in said section the position is referred to as "an office".

This, however, is not controlling but must be given some weight in determining the legislative intent.

That law also requires all real estate dealers, etc., to be licensed and authorizes the board of real estate examiners to determine the fitness and qualifications of those applying for a license and to make rules and regulations in connection therewith. The board is also vested with power to revoke licenses for cause, to pass upon the sufficiency of the surety of the bonds which real estate dealers, etc., are required to give, and is vested generally with authority to enforce the act. It is quite apparent that this act attempts to regulate the business of those engaged in dealing in real estate for a commission. This is for the benefit of the public, and the Legislature created the board and clothed it with power to administer that portion of the state's sovereignty.

The duties of the board are defined by law and it is not controlled in the performance thereof by anything except the judgment of its members. The judgment of the board cannot be controlled by a superior officer. The members are appointed by the governor with the consent of the senate. The compensation of the members is fixed by the Legislature. For administrative purposes the board is made a part of the Department of Commerce but in the performance of its duties the board exercises an independent function and is controlled only by statute.

Therefore the members of this board are officers of the state. The fact that they are appointed is not material because Section 1465-61, *supra*, excepts from the operation of the Workmen's Compensation Law all officials of the state, and that includes appointive officials as well as officials who are elected.

The Legislature in excepting these executive officers evidently intended the same principle to apply to public employment as to private employment, which principle carried forth in the Ohio law is that an employer is not entitled to the benefits of the act. Even in private industry we have employers who are entities rather than persons, for instance corporations. Under the Ohio workmen's compensation act and workmen's compensation laws generally, those officers of the company who perform executive duties such as the duties connected with membership on a board of directors, or president or secretary thereof, are considered employers rather than employes, and such persons while acting in such capacity are not entitled to the benefits of the workmen's compensation law. So in public employment the executive officer, while performing his executive duties, acts in the capacity of the employer, that is the state itself, while carrying out that which the state has undertaken to do.

As above set forth, officer's duties are prescribed solely by statute, while all other persons working for the public are under the control of such officers. Such employes are assisting the officers in the performance of state functions but in doing so they are acting for and on behalf of those officers, and are controlled and directed in the performance of those duties by the officers themselves.

In such instance the well recognized relationship of master and servant exists. Such relationship, however, does not exist in so far as the members of the State Board of Real Estate Examiners are concerned. They are in fact the masters rather than the servants. While they are performing functions for the state of Ohio they are acting as the state.

It is therefore my opinion that the members of the State Board of Real Estate Examiners are officers of the state of Ohio and are not entitled to the benefits of the Workmen's Compensation Law.

Respectfully,
GILBERT BETTMAN,
Attorney General.