

134.

GENERAL ASSEMBLY—PERSON CHOSEN BY COMMISSION TO EXECUTE POLICIES AND PLANS—EMPLOYEE, NOT PUBLIC OFFICER—NEW YORK WORLD'S FAIR COMMISSION—DIRECTOR—OFFICES COMPATIBLE AND INCOMPATIBLE—MEMBER OF GENERAL ASSEMBLY—ONE YEAR AFTER EXPIRATION OF TERM—SALARY—EXPENSES—AMENDED HOUSE BILL 822.

SYLLABUS:

1. *A person chosen by a commission created by the General Assembly to carry into execution the policies and plans of such commission is an employee and not a public officer.*

2. *A member of the 92nd General Assembly, which body enacted Amended House Bill No. 822, providing for the creation of the New York World's Fair commission and for the choosing of a director therefor may, within one year after the expiration of his term as a member of the 92nd General Assembly, be chosen as director of said New York World's Fair commission and the salary and expenses of such director so chosen may be legally paid by the Auditor of State.*

COLUMBUS, OHIO, February 11, 1939.

HON. JOSEPH T. FERGUSON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of the recent communication from Norman E. Beck, Deputy Auditor of State, which reads as follows:

"Mr. 'X' was recently appointed as Director of the New York World's Fair Commission by the Governor of Ohio.

Mr. 'X' was member of the 92nd General Assembly which body created said Commission. Vouchers for salary and expenses of Mr. 'X' in this position will soon be in our hands.

Under the circumstances, I respectfully request an opinion as to whether or not these vouchers may be legally paid by the Auditor of State, specifically directing your attention to Article 2, Section 19 of the Constitution of the State of Ohio."

The act authorizing the appointment of a "World's Fair" commission and a director thereof is Amended House Bill No. 822 of the 92nd General Assembly.

Said Act, in so far as the same is pertinent to your inquiry, reads as follows:

"Section 1. The commission to be known as the New York 'world's fair' commission is hereby created, which shall consist of the governor of Ohio, who shall be chairman of the commission, the state architect, lieutenant governor, speaker of the House of Representatives, and three other persons to be appointed by the governor, not more than two of whom shall be members of the same political party, two members of the Senate to be appointed by the president of the Senate, and two members of the House of Representatives to be appointed by the speaker of the House, not more than one of whom from each house shall be members of the same political party.

This commission shall have charge of all plans for the participation by the state of Ohio and its citizens in the 'world's fair' to be held in the city of New York in the year 1939.

Section 2. The members of such commission shall serve

without compensation but they shall be allowed their actual expenses incurred in carrying out their duties.

They shall choose from among their number or otherwise, a director, who shall have charge of carrying into execution the plans of the commission, and who shall receive such compensation as the commission shall fix.

Section 3. The commission is hereby authorized to provide on the grounds of the exposition, suitable quarters for housing the Ohio exhibition.

Section 4. The commission is hereby authorized to arrange with a director for participation by Ohio citizens in the various historical, educational, commercial, industrial, agricultural and other exhibits at the 'world's fair' to be held in New York city.

Section 5. However, if after due consideration, it appears to a majority of the members of such commission, that it is inadvisable to proceed with the preparation of the Ohio exhibit at the New York 'world's fair', the state of Ohio shall not participate therein."

Section 19, of Article II, of the Constitution of the State of Ohio, reads as follows:

"Exclusion from Office.

No Senator or Representative shall, during the term for which he shall have been elected, or for one year thereafter, be appointed to any civil office under this State, which shall be created or the emoluments of which, shall have been increased, during the term, for which he shall have been elected."

You state in your letter that the appointment was made by the Governor of Ohio. In regard thereto, you will note that the bill provides for the choosing of a director by the members of a commission and I, therefore, assume that the director was chosen by the members of the commission and not appointed by the governor.

The answer to your question depends entirely upon whether or not the position of director, as provided for in the above Act, is a civil office within the meaning of such term as used in Section 19, Article II, of the Constitution of the State of Ohio. The word "civil", as used in said section, seems to be used to limit the application of the section to civil officers of the State of Ohio as distinguished from military officers. A civil office is defined as a "term used in contra-distinction to a military office". See 22 Ruling Case Law, Page 274, 11 Corpus Juris, Page 797. It is, therefore, apparent that the words "civil office", as used in the above section, mean a public office held under the State of Ohio.

It seems to be no longer an open question in this state that to consti-

tute a public office the individual holding such office must be invested with some independent public duties which are a part of the sovereignty of the state. In the case of the State, ex rel. Bricker, Attorney General, v. Gessner, 129 Ohio State, Page 290, it was stated by Zimmerman, J.:

“Definitions of public office, and as to who are public officers, as enunciated by the courts and text-writers, are numerous. 23 American and English Encyclopaedia of Law (2d Ed.), 322, gives the following definitions: ‘In the most general and comprehensive sense, a public office is an agency of the state, and a person whose duty it is to perform this agency is a public officer. Stated more definitely, a public office is a charge or trust conferred by public authority for a public purpose, the duties of which involve in their performance the exercise of some portion of the sovereign power, whether great or small. A public officer is an individual who has been appointed or elected in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law.’

Similarly, Mechem on Public Offices and Officers, Section 1, page 1, has this to say: ‘A public office is the right, authority and duty, created and conferred by law, by which for a given period either fixed by law or enduring at the pleasure of the creating power an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.’”

To the same effect is the statement contained in the opinion of the court in the case of State, ex rel. Armstrong vs. Halliday, Auditor, 61 Ohio State, Page 171, which statement is as follows:

“The distinguishing characteristic of a public officer is, that the incumbent, in an independent capacity, is clothed with some part of the sovereignty of the State, to be exercised in the interest of the public as required by law.” * * *

In the case of State, ex rel. Landis vs. Commissioners, 95 Ohio State, Page 157, it was held by the Supreme Court of Ohio that the Clerk of the Board of County Commissioners was not a county officer. The second branch of the syllabus of said case reads as follows:

“2. An appointee, though his duties are specifically fixed by law, if such duties do not require the exercise of political or governmental functions as a part of the sovereignty of the state, but simply involve the exercise of clerical acts in recording the

transactions of officers who are invested with such functions, is not such a public or county officer as contemplated by the State Constitution."

In said case it was stated:

"* * * If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state."

In the case presented by your inquiry, it would appear that the indicia of a public office are lacking. The duties of the director are not of the character above stated. You will note that the director is chosen by the members of the commission either from among their number or otherwise and his duties, under the express terms of the act itself, consist merely of carrying into execution the plans of the commission. In other words, the duties of the director are entirely incidental to those conferred by the Act upon the commission and involve the exercise of no function that could be construed as governmental. He has no right to exercise the police powers of the state, is not invested with independent power in the disposition of public property and is without power to incur financial obligations on the part of the state and does not in any way represent the public. It, therefore, follows that the position of director of the New York World's Fair Commission provided for in Amended House Bill No. 822 of the 92nd General Assembly is an employment and not a civil office.

I am, therefore, of the opinion that a member of the 92nd General Assembly, which body enacted Amended House Bill No. 822, providing for the creation of the New York World's Fair commission and for the choosing of a director therefor may, within one year after the expiration of his term as a member of the 92nd General Assembly, be chosen director of said New York World's Fair commission and the salary and expenses of such director so chosen may be legally paid by the Auditor of State.

Respectfully submitted,

THOMAS J. HERBERT,
Attorney General.