

Public Officer, Compensation for Extra Duties; Salary, Increase of; Offices, Two May Be Held When.

The Superintendent of Public Instruction is not prohibited from receiving compensation for services performed as a member of the State Text-Book Commission, by reason of holding the office of Superintendent of Public Instruction.

Helena, Montana, January 7, 1909.

Hon. H. R. Cunningham, State Auditor, Helena, Montana.

Dear Sir:

I am in receipt of your inquiry of the 2nd inst., submitting for the decision of this office the question

“as to the liability of the state in the sum of \$48.00, to W. E. Harmon, Superintendent of Public Instruction, ‘for eight days services as Chairman of the State Text-Book Commission’ ”?

The office of State Superintendent of Public Instruction is one created by the state constitution, and the salary therein fixed.

Art. VII., Sec. 4, State Const.

By Chapter 132, Laws of 1907, providing for the appointment by the governor of a State Text-book Commission consisting of seven members, each member to receive six dollars per day “for each day necessarily engaged,” etc., W. E. Harmon, who was then, ever since has been, and is now, the duly elected, qualified and acting Superintendent of Public Instruction, was duly appointed by the governor, and acted as a member of this commission, and was “necessarily engaged in transacting business” therefor for eight days.

The labor and services required of him were no part of his official duty as Superintendent of Public Instruction, and such services had no relation to or connection with his duties as such officer, but the position as such commissioner was an independent and separate office, which he had the option to accept or reject when the appointment was tendered.

It is provided by Section 31, Article V., of the State Constitution, that the salary of a public officer shall not be increased or diminished after his election. But the office of State Text-Book Commissioner is an independent office, and the compensation therefor is not an increase of salary of some other office, nor is it extra pay for extra work as discussed in

State v. Granite County, 23 Mont. 250.

It has also been held that one person may hold two offices at the same time provided such offices are not incompatible.

Opinions of Atty. Genl. 1905-6, p. 67;

23 Am. & Eng. Enc. L. 335;

Mechem Public Offices, Sec. 425.

There is nothing incompatible in the office of Superintendent of Public Instruction and that of member of the State Text-Book Commission.

Section 4, Article VII., of the State Constitution, which creates the

office of Superintendent of Public Instruction and other offices and fixes the salary thereof, provides:

"The compensation enumerated shall be in full for all services by said officers, respectfully, rendered in any official capacity or employment whatever during their respective terms of office. * * *."

This provision of the Constitution can have reference only to offices named and created in and by the section. "Said officers," "in any official capacity," has reference to the duties required of Mr. Harmon as Superintendent of Public Instruction. But as the duties required of him as a member of the State Text-Book Commission were no part of the duties required of him as Superintendent of Public Instruction, this provision of the Constitution cannot apply.

The Constitution and laws of the State of California fixing the salary of the Attorney General provide that he shall receive no other salary or fees, etc. It was originally no part of the duty of the Attorney General to act as a member of the Board of Examiners, but the Legislature subsequently required him to act as a member of the State Board, and provided extra compensation therefor. The Supreme Court, in passing upon the question, reached this conclusion:

"The legislature has no power to compel the Attorney General to perform the duties of a member of the Board of Examiners, to examine and approve or reject claims against the State; but if such duties are imposed on him by law, and he voluntarily performs them, the Legislature may compensate him for his unofficial service, by paying him a salary in addition to that which he receives as Attorney-General, even if the law allowing him such salary is passed during his term of office."

Love v. Baehr, 47 Cal. 364.

The Supreme Court of Nebraska, in considering a similar question, reached the conclusion:

"One holding the office of Secretary of State is eligible to that of Adjutant General, and the allowance to him of a salary therefor, does not conflict with that section of the constitution, fixing the salary of the Secretary of State, and providing that he shall not receive to his own use any fees, costs, perquisites of office or other compensation. ' "

State ex rel. Tzschuck v. Weston, 4 Neb. 234;

See also: Green v. State, 51 Cal, 577;

Melone v. State, 51 Cal. 550;

Lewis v. Colgan, 115 Cal. 535;

State v. LaGrave, 23 Nev. 383;

Blair v. Marye, 80 Va. 495.

It appears that Mr. Harmon did act as a member of the State Text-Book Commission, at the request of the Governor of the State, and did perform the duties of a member of such Commission, and the Legislature, by the provisions of Section 14 of said Chapter 132, of the Laws of 1907, fixed the sum of six dollars per day as the quantum meruit for such ser-

vices, and this would apply to de facto as well as de jure incumbents of such office.

You are, therefore, advised that Mr. Harmon is not prohibited from receiving compensation for services performed as a member of the State Text-Book Commission by reason of holding the office of Superintendent of Public Instruction.

Very respectfully yours,

ALBERT J. GALEN,
Attorney General.