

3. Is he required by law to attend meetings?" The claim is for expenses of Mr. Markham's attendance at a meeting in Minneapolis of the National Boxing Association. The fund referred to is the Veterans' Memorial Fund.

In reply to question 1, "there are three principal tests for determining whether one performing duties of a public nature is a public officer; \* \* \* First, whether sovereignty \* \* \* is the source of authority; second, whether the duties pertaining to the position are of a public character, that is, due to the community in its political capacity; and, third, whether the tenure is fixed and permanent for a definite period fixed by law." (*Montgomery v. State*, 18 So. 159. See also: *Mechem on Public Officers*, Sections 1, 4, 5 and 8; *State of Montana v. Hawkins*, 257 Pac. 411; *State v. Sheats*, 83 So. 508; *State v. Board of Examiners*, 52 Mont. 91.)

The members of the Athletic Commission are appointed by the Governor for fixed periods or terms of three years, and their duties are prescribed by statute and are of a public character and Mr. Markham, as a member of such commission, is therefore a public officer under the definition given above, but as "chairman" of the commission, he is not a public officer in that capacity. (*State v. Hall*, 53 Mont. 595). While the claim describes Mr. Markham as a chairman of the commission that is of no consequence in passing upon the claim. The validity of the claim must be based upon his membership as one of the commission.

The answer to question No. 2 is difficult to determine. The act creating the Athletic Commission, Sections 4551 to 4562, inclusive, as amended by Chapter 103, Laws of 1927, provides that all expenses incurred by the commission shall be paid out of the Veterans' Memorial Fund. This fund is derived from a tax of 5 per cent on the gross receipts from the sale of tickets of admission to boxing bouts. (Section 4559). It is a close question as to whether the fund derived from this 5 per cent tax is a public fund or not. (See opinion No. 89, this volume) The 1927 amendment to the Athletic Commission Act added Section 4562½ and this section directed that a balance of \$11,098.06 then in the Soldiers and

#### Opinion No. 394

##### Athletic Commission—Public Officers— Public Fund—Necessary Expenses —Veterans' Memorial Fund

HELD: The tests for determining whether one is a public officer are: first, whether sovereignty is the source of authority; second, whether the duties are of a public character; and, third, whether the tenure is fixed and permanent for a definite period fixed by law.

A member of the Athletic Commission is a public officer.

The Veterans' Memorial Fund is a public fund.

What are the necessary expenses of the commission is largely a matter within the judgment and discretion of the commission and of the State Board of Examiners.

November 22, 1933

The claim of Mr. Jos. L. Markham, Chairman of the Montana State Athletic Commission, for \$111.41 has been referred to this office. Attached to the claim is the following memorandum: "1. Is this man a state officer or employee? 2. Is the fund a public fund?"

Sailors Home Fund be transferred to the Veterans' Memorial Fund. The Soldiers and Sailors Home Fund was derived from the sale of bonds which were a general liability of the State, based upon the general taxing power of the State and, of course, such funds were public funds. It is therefore our opinion that if there was any question about the fund of the Athletic Commission being a public fund before the 1927 amendment, that amendment by mingling public funds with the fund produced by the 5 per cent of admissions provided for in the original Athletic Fund Act stamps the entire fund as a public fund.

In regard to question No. 3, there is no provision in the Athletic Commission Act specifying what expense the Commission may incur and be reimbursed for out of the Veterans' Memorial Fund. Section 4551 provides that the members of the Commission shall serve without compensation but shall be allowed necessary expenses. What the necessary expenses of the Commission are, we think, is largely a matter within the judgment and discretion of the Commission and the State Board of Examiners. Section 4551 empowers the Commission to make such rules and regulations as they may deem expedient for the administration of their office.

If the Commission has a rule or regulation authorizing a member to attend such meetings as that for which the bill of expense submitted was incurred, we believe the statute authorizes the expenditure, but the fund is a trust fund and should be dealt with in harmony with the principles governing a trust.