

Opinion No. 108.**Fish and Game Commission—Employees and Appointees, Discharge of—State Game Warden.**

HELD: 1. The fish and game commission has, and the state game warden does not have, the power to remove appointees and employees, including those serving in the game warden's office, and may exercise this power only after notice and hearing.

2. An attempt by the state game warden to discharge a bookkeeper is ineffective and such bookkeeper is entitled to receive compensation where he keeps himself ready, able and willing to perform his duties.

May 22, 1935.

The Board of Examiners
The Capitol

It appears that on April 3, 1933, Charles Marrs, then State Fish and

Game Warden, employed Ed Weber as a bookkeeper in his office, and that on May 13, 1933, he informed the State Fish and Game Commission, at a meeting thereof, of what he had done. The commission approved the act and fixed Weber's salary at \$135.00 per month, with the understanding that if his services proved satisfactory his salary would later be raised to \$150.00 per month. Some time thereafter Weber's compensation was by the commission increased to \$150.00 per month. On May 15, 1934, John W. Carney, as successor to Charles Marrs, assumed to remove Weber from his position of bookkeeper. The commission itself never took official cognizance of the matter. Weber continued to report regularly for work from May 15, 1934, to March 31, 1935, but was prevented from rendering any service to the State of Montana. During the months of September, October and November, 1934, he was employed by the firm of Rowland, Thomas & Company as a junior accountant and was paid at the rate of \$35.00 per week. In January he earned \$30.00, in February \$120.00, and in March, 1935, \$120.00 as a Federal Emergency Relief Administration worker. Weber has filed a claim with the board of examiners against the State of Montana, covering the period from May 15, 1934, to March 31, 1935, for \$855.00 being the amount which he claims is due him after deducting the sums he received from others than the State of Montana for services rendered. The legality of the claim is questioned.

The State Fish and Game Commission appoints the state fish and game warden who holds his office at its pleasure. (Sec. 3655, R. C. M. 1921, and Section 2, Chapter 59, Laws of 1927.) The warden has "the right, subject to the approval of the commission, to employ such clerical and stenographic assistance as may be necessary for him to properly maintain his office and perform his official duties in his office, and the person or persons performing the same shall be paid monthly out of the fish and game funds of the state upon proper voucher." (Sec. 3671, R. C. M. 1921; *Industrial Commission v. Price*, 292 Pac. 1099). There can be little, if any doubt that a bookkeeper serves in a clerical capacity. (*Chambers v. Bridge Manu-*

factory, 16 Kan. 270; *In re Baumblatt*, 156 Fed. 422; *Appeal of Walker*, 144 Atl. 288).

It is well settled that the power to appoint to a clerical position carries with it, as an incident, the power to remove unless there be some constitutional or statutory restraint. (*State v. Sullivan*, 98 Mont. 425, 40 Pac. (2d) 995; *State v. Boyington*, 188 Pac. 777; *Sheriff of Salt Lake County v. Board of Com'rs*, 268 Pac. 783; 2 *McQuillin on Municipal Corporations*, sec. 583; 15 C. J. 494; 59 C. J. 138). The principal question to be determined, then, is this: did Carney as game warden have authority to discharge Weber as bookkeeper?

Section 3652, Revised Codes 1921, provided, among other things, that "it (referring to the fish and game commission) shall have power to discharge any appointee or employee of such commission, for or without cause at any time." The section was amended by section 1 of Chapter 192, Laws of 1925, by omitting therefrom the quoted language. Section 3653, Revised Codes 1921, which relates particularly to the powers and duties of the fish and game commission, was amended in several respects by section 2 of Chapter 77, Laws of 1923, but notably by the insertion therein of the exact words which two years later were omitted from section 3652. Section 3653 was again amended by section 2 of Chapter 192, Laws of 1925. Besides other changes the words "or without" were dropped from the clause therein identical with that above quoted, so that it now reads: "It shall have power to discharge any appointee or employee of such commission for cause at any time."

In view of the language and the history of the last quoted provision we think it was the intention of the legislature to confer on the commission rather than on the warden the power to remove appointees or employees, including those serving in the latter's office, and then only after notice and hearing. (*State v. Sullivan*, supra; *Gardner v. Board of Park Directors*, 170 Pac. 672; *Bassler v. Gordon*, 237 Pac. 907; *Welch v. Ware*, 119 Pac. 1080; *Abrams v. Daugherty*, 212 Pac. 942; *People v. Henderson*, 133 N. Y. S. 304; *Morgan v. City of Denver*, 59 Pac. 619; *Sheriff of Salt Lake*

County v. Board of Com'rs., supra; *Lee v. Morley*, 247 Pac. 178; *State v. Fassett*, 125 Pac. 963; *Carr v. State*, 12 N. E. 107; 2 *McQuillin on Municipal Corporations*, sec. 583; 59 C. J. 138).

As Weber was at all times between May 14, 1934, and April 1, 1935, ready, able and willing to perform the duties of bookkeeper, and as the attempt to dismiss him from the position was ineffective, he is, according to the authorities, entitled to the compensation claimed. (*Board of Capitol Managers v. Rusan*, 210 Pac. 328; *Morgan v. City of Denver*, supra; *Flower v. Casey*, 181 Pac. 193; *French v. City of Lawrence*, 76 N. E. 730; *Butler v. Carter*, 209 Pac. 965; 59 C. J. 158. See, also, *State v. Russell*, 84 Mont. 61; *Sweeney v. City of Butte*, 64 Mont. 230; *Wynne v. City of Butte*, 45 Mont. 417; 46 C. J. 1017).

It may be proper to add that an official board cannot delegate to others a power which can be exercised only by itself. (*State v. Apalachicola Northern R. Co.*, 88 South. 310; 46 C. J. 1034).