

Opinion No. 133.**Fairs—County Fair Commissioners,
Abolishing Office of—County
Commissioners.**

HELD: The Board of County Commissioners has power to abolish the County Fair Commission but the Board may not use this power merely as a device for the purpose of removing the officers who, for the time being, may not be in accord with the policies of the board and at the same time have in mind the appointment of others who may agree.

July 1, 1935.

Board of County Commissioners
Glasgow, Montana

You have submitted the following question:

"Please render your opinion to us on the following question: Can the County Commissioners, when they, in their discretion, determine that a county fair commission is no longer necessary, abolish the fair commission and incidentally remove the commissioners from their office and duties for the reason that the board is abolished?

"The Board of County Commissioners have already determined that the holding of a county fair in the year 1935 was not financially advisable."

In a previous opinion to you dated June 14, 1935, we held that since members of the fair commission are appointed for a fixed term, they can be removed only for cause. Your question now, as we understand it, is whether the county commissioners have the power to abolish the fair commission entirely, that is, abolish the office on the ground that the office of fair commission is no longer necessary. This presents a different question.

Section 4545, R. C. M. 1921, enacted in 1917, provided that the Board of County Commissioners of each county "may" appoint five responsible persons to constitute a fair commission. This section was amended by Chapter 30, Laws of 1927, and by Chapter 52, Laws of 1935, but the word "may"

was retained in each amendment. Evidently the legislature intended to leave the appointment of a fair commission optional with the Board of County Commissioners of each county, if the board should deem it necessary. Obviously, in counties where no fairs are held there is no necessity for a fair commission and it would have no duties to discharge.

It is the general rule that the authority to create an office has the implied power to abolish the office it has created in the absence of some higher authority such as a statute or constitutional provision. This rule is stated in 46 C. J. 934, Section 30, where the textwriter said: "The authority in the government which possesses the power to create an office has, in the absence of some provision of law passed by a higher authority (that is, in the case of a municipal authority, some statutory or constitutional provision; in the case of the legislature, some constitutional provision), the implied power to abolish the office it has created."

This rule is well recognized as appears from the numerous decisions supporting it cited in the footnote.

The principle is well stated in *Ford v. Board of State Harbor Commissioners*, (Cal.) 22 Pac. 278, 281: "In a narrow, technical, and restricted sense it may be true that the legislature created the office, and fixed its term, but not in the broad sense that gives the legislature any control over the existence of the office. It has not appointed the officer, or said that there shall be such an office or officer. It has simply authorized a subordinate body (the defendant here) to make certain appointments, at its discretion, as 'it may deem necessary,' and provided that, if such appointments were made, the appointees should be officers, holding for a term of four years, and during that term protected from the perils caused by the pressure of others for the places held by them, by a provision that they may be removed by the board only after due investigation, for causes affecting their official character or competency. This certainly does not protect them against the abolition of the office. And who is to abolish it? The legislature did

not establish it, or determine the question of the expediency or necessity of establishing it. It delegated to another the power to establish it when that other should deem it necessary,—*ex necessitati*,—that carried with it the power to abolish, whenever there was no longer a necessity to maintain that which had been so established."

In *Hatfield v. Mingo County Court*, 92 S. E. 245, it was held that where the legislature conferred upon the county court authority to create the office in question such authority impliedly delegated power to that body to abolish it.

It should be borne in mind, however, that the power to abolish an office which has been created, must be exercised in good faith. The board of county commissioners cannot use its power to abolish the fair commission merely as a device for the purpose of removing the officers who, for the time being, may not be in accord with the policies of the board, and at the same time have in mind the appointment of others who may agree. It must be clear that there is no necessity for the existence of a fair commission, not only at the present time but in the reasonably near future. It may be doubtful if a determination by the board not to hold a fair in the year 1935 is of itself a reasonable ground for immediately abolishing the fair commission, provided there be a reasonable prospect of holding a fair in the not distant future. The action of the board should not be a mere subterfuge to get rid of the present officers. By Section 2 of Chapter 52, Laws 1933, the fair commission are not only given control and operation of the fair, but are given the supervision, management and leasing of the buildings. While the board may determine the question of the necessity of having a fair commission, the discretion of the board should not be abused. It was well said in *State v. Board, Etc.*, (N. J.) 22 Atl. 56: "It is a matter of course that the exertion of power to disestablish must be bona fide, for it is manifest that, if it should appear that a formal act purporting to abolish such an office or position is only a device for the purpose of removing an officer or

employee while the office or position practically still remains in existence, such a subterfuge would be of no avail."

This office, of course, does not attempt to pass upon the question of the bona fides of the Board of County Commissioners as that is a question of fact to be determined from all the circumstances.