

Opinion No. 176.

**Athletic Commission—Veterans' Memorial Fund—Wrestling Matches
—Taxation—Refunds.**

HELD: Taxes voluntarily paid on wrestling matches, into the Veterans' Memorial Fund, under mistake of law may only be recovered by a legislative appropriation after claim filed pursuant to Sections 242-245, R. C. M. 1921.

September 27, 1935.

Mr. W. L. Fitzsimmons
Clerk, Board of Examiners
The Capitol

Your letter to us of recent date is as follows:

"We are handing you herewith the letter of Mr. J. A. Livingston, secretary of the Montana Athletic Commission, together with a claim for \$40.38 against the Athletic Commission for a refund of taxes erroneously paid upon wrestling matches.

"We are unable to determine whether this claim can be paid from the Veterans' Memorial Fund except upon a special appropriation made for that purpose and, consequently, are writing your department for advice as to whether the claim shall be sent through in the regular channels or held for legislative action."

It appears from the claim filed by Kalispell Lodge No. 725, Benevolent and Protective Order of Elks, with the State Board of Examiners that that organization conducted eight wrestling matches between the early part of May, 1931, and the early part of May, 1932, and paid to the county treasurer of Flathead county over that period, on account thereof, taxes aggregating \$40.38. The records of the State Treasurer show that this money has been received by him and credited to the "Veterans' Memorial Fund."

It is admitted the taxes were voluntarily paid, but under a mistake of law. Assuming, as well we may, that under the provisions of Chapter 103, Laws of 1927, the Kalispell Lodge of Elks was not required to pay taxes upon its receipts from wrestling matches, still we do not see how a refund of the amount claimed can be made short of an appropriation by the legislature.

It is well settled that in the absence of statute a person from whom a license fee or tax was erroneously exacted, or who has paid a license fee or tax which is illegal, cannot recover back the amount thereof, if payment was made voluntarily and because of a mistake of law. (37 C. J. 256; 61 C. J. 985; 3 Cooley on Taxation, Sec. 1282; First Nat. Bank v. Sanders County, 85 Mont. 450; First Nat. Bank v. Beaverhead County, 88 Mont. 577.)

Section 1 of Chapter 103 provides that the State Athletic Commission, thereby created, "shall maintain general offices for the transaction of its

business at a place to be by it designated," and further provides that the members thereof "shall serve without compensation but shall be allowed necessary expenses." Section 2 provides for the appointment of a secretary to the commission "whose duty it shall be to keep a full and true record of all its proceedings, preserve at its general office all its books, documents and papers, and prepare for service such notices and other papers as may be required of him by the Commission," and who shall receive a salary of not to exceed twenty-five dollars per month for his services and his necessary traveling and other expenses. Section 8 provides that any licensed club, corporation or association which holds or conducts a boxing or sparring match or exhibition shall within twenty-four hours thereafter:

"Pay to the County Treasurer a tax of five per centum (5%) of its total gross receipts from the sale of the tickets of admission to such boxing or sparring match or exhibition, which shall be transmitted to the State Treasurer by the County Treasurer within a period of ten days after its collection and be applied to the payment of the expenses of the Commission, and the salary of the Secretary of the Commission, as herein provided. And the money so collected shall be paid to the State Treasurer to be kept and held in a separate and special fund to be designated the 'Veterans' Memorial Fund,' and used exclusively for the purposes herein provided. The monies so received and held by the State treasurer in such special fund shall be used and devoted for the expenses above specified (in Sections 1 and 2) and the balance to be held and retained exclusively for the erection and maintenance of a suitable Veterans' Memorial Building. Such funds to be drawn upon and expended only upon proper and legal claims made against the fund first presented and approved by the State Board of Examiners. * * *"

It thus appears, then, that only claims for office rent and stationery, salary and necessary expenses of the Secretary, and necessary expenses of the members of the Commission may

properly be approved by the State Board of Examiners and paid out of the "Veterans' Memorial Fund."

It is a well-established principle that state officers, boards, commissions and departments have such powers as are conferred on them by express constitutional and statutory provisions and such additional powers as are necessarily implied from those which are expressly granted. But executive and administrative officers, boards, departments and commissions have no powers beyond those granted by express provision or necessary implication. (59 C. J. 111; State v. Erickson, 75 Mont. 429.)

It is our conclusion, therefore, that the only relief which the Kalispell Lodge of Elks can claim under the circumstances is afforded by Sections 242-245, Revised Codes 1921. These sections relate to the filing of claims against the state, the payment of which is not provided for by law, and the action of the State Board of Examiners thereon, including its recommendation to the legislative assembly.