

## Opinion No. 314.

**Offices and Officers—State Highway  
Commission—Commissioners, Per  
Diem Of—Employees—State  
Board of Examiners—  
Claims, Approval Of.**

HELD: 1. All of the duties of a member of the State Highway Commission must be performed in valid commission meetings and members of the commission are entitled to compensation only as an incident to said meetings.

2. A member of the State Highway Commission may not act as a salaried employee of the commission.

July 6, 1936.

Hon. Elmer Holt  
Governor of Montana  
The Capitol

Your letter of June 1 to us is as follows:

"Some time ago, when the Board of Examiners was considering the claim of Commissioner Croonenberghs, you had rendered a tentative opinion to the effect that members of the Highway Commission could collect per diem only when attending sessions as provided by law. The records appear to reveal the fact that members of the Highway Commission have, from time to time, turned in accounts for time and expenses when occupied in making trips over various parts of the State.

"May I have your opinion as to whether or not we may legally approve payment of claims for per diem and expenses when the records of the commission show that mem-

bers of the commission were not in actual session?"

We are also in receipt of a letter from the State Examiner in which we are asked to advise him if a member of a commission can also act as an employee "thereby receiving a salary for per diem and at the same time draw a salary as an employee." The State Examiner has also called our attention to the following extract from the minutes of a special meeting of the Highway Commission held on April 5, 1935: "Upon motion regularly made by Mr. Brown, seconded by Dr. McGregor, and regularly adopted the commission requested and authorized member L. J. Croonenberghs to act as the traveling representative for the Highway Commission, and to spend as much time as he may be able to devote to actively looking after equipment and other business matters throughout the state."

Section 1783, R. C. M. 1935, provides for the appointment of a State Highway Commission consisting of three members, each of whom are allowed "a compensation to be paid out of the Highway Fund, the sum of \$10.00 per diem for each day actually engaged in the duties of his office, including his time of travel between his home and place of employment of such duties, together with his traveling expenses while away from his home in the performance of duties of his office." This section also gives the commission the power to appoint an engineer and other necessary employees.

The next Section (1784, R. C. M. 1935), then provides *inter alia* "Said commission shall meet at least once each month for the purpose of transacting its business, including the consideration of claims and the letting of contracts; two members of the commission shall constitute a quorum for the transaction of business."

Under said Section 1784, we think it is clear that the members of the State Highway Commission can act officially only when in attendance at a regularly or specially convened meeting with all of the members, or a quorum thereof present. (29 C. J. 562; 22 R. C. L. 456.) This would be true even in the absence of statute:

"In the absence of a statutory provision to the contrary, where official authority is conferred upon a board or commission composed of three or more persons, such authority may \* \* \* not be exercised by a single member of such body, or by a minority \* \* \*. Such a board can as a rule act officially only as such in a convened session with the members, or a quorum thereof, present \* \* \*." (46 C. J. 1034.)

It follows, therefore, that all of the duties of a member of the State Highway Commission must be performed in valid meetings, and that under Section 1783 said members are entitled to compensation only as an incident to said meetings. *State v. Story*, 53 Mont. 573, 165 Pac. 748; *State ex rel. Payne v. District Court*, 53 Mont. 350; 29 C. J. 572; 46 C. J. 940, 1014 and 1019.

May this conclusion be circumvented by resort to the subterfuge of employing members of the commission in inferior or representative positions? The courts have held otherwise. *Holcombe v. Kennedy*, 251 S. W. 7; *Bradley County Road Improvement District No. 1 v. Wilson*, 269 S. W. 583; *Davidson v. Guilford County*, 67 S. E. 918; *King v. Guilford County*, 67 S. E. 919; *Johnson v. Black*, 68 L. R. A. 264; *Boyd County v. Arthur*, 82 S. W. 613; *Vaughn v. Hulett*, 84 S. W. 309; *State v. Fidelity & Deposit Company of Maryland*, 58 S. W. (2d) 696; *State v. Borstad*, 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916B 1014; *Sprinkle v. County of Cass*, 254 Ill. App. 331; *County of Cass v. Kloker*, 239 Ill. App. 301; *Ehlinger v. Clark*, 117 Tex. 547, 8 S. W. (2d) 666, 22 R. C. L. 414.

"It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that, even in the absence of a statutory inhibition, all officers, who have the appointing power are disqualified for appointment to the offices to which they may appoint; nor can an appointing board appoint one of its members to an office, even though his vote is not essential to a majority in favor of his appointment, and although he was not present when the appointment was made, and not-

withstanding his term in the appointing body was about to expire. \* \* \*." (46 C. J. 940.)

Two fundamental reasons are behind the rule. The first is that the positions of an employer and employee are incompatible (*Gaw v. Ashley*, 195 Mass. 173, 80 N. E. 790, 122 A. S. R. and note L. R. A. 1917A 217.) The second reason for the rule is powerfully stated in *Davidson v. Guilford County*, supra: "Independently of any statute or precedent, upon the general principles of law and morality, a member of an official board cannot contract with the body of which he is a member. To permit it would open the door wide to fraud and corruption. The other members of the board in allowing compensation thus to one of their members would be aware that each, of them in turn might receive contracts and good compensation, and thus public offices, instead of being a public trust, would become, in the language of the day, 'a private snap'."

It is, therefore, our opinion that both your question and the question propounded by the State Examiner must be answered in the negative.