

No. 481

**BOARD OF EXAMINERS—SOLDIERS HOME—
SALARIES**

Held: Board of Examiners has a controlling supervisory power over the Board of Managers of the Soldiers Home, in determining the amount of salaries and compensation to be paid the employees of said home.

September 11, 1942.

E. P. Cockrell, M. D.
Chairman, Board of Managers
Montana Soldiers' Home
Kalispell, Montana

Dear Dr. Cockrell:

You have requested an opinion of this office as to the authority of the Board of Managers of the Montana Soldiers' Home to fix the compensation of various employees. Your request is occasioned by reason of the

fact the pay roll of the month of March was held up by the Board of Examiners until the approval of the Board was obtained to some salary increases, which your Board had approved at its regular March meeting.

Section 1533, Revised Codes of Montana, 1935, providing the powers of the Board of Managers of the Soldiers' Home states:

"Salaries of the commandant and all subordinate officials and such other employees as may be necessary shall be fixed by said Board of Managers; provided, that the compensation so paid shall in no case exceed such reasonable and necessary compensation as is paid for like services in similar institutions."

In the absence of constitutional or other statutory provisions this section would give authority to the Board of Managers to fix compensation of the commandant, subordinate officers, and other employees. The authority, however, must be viewed in the light of constitutional and other statutory provisions.

Article 7, Section 20, of the Constitution of Montana creates a Board of Examiners "with power to examine all claims against the State, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law."

Acting under that portion of the constitutional provision quoted above, empowering the Board of Examiners to perform such other duties as may be prescribed by law, the legislature, by its enactment now appearing in Section 273, Revised Codes of Montana, 1935, provided the Board of Examiners shall by resolution fix and designate the compensation of all assistants, clerks and stenographers for all civil, executive state officers, boards, commissions or departments.

Referring to the constitutional enactment above quoted it is to be noted the only claims excepted from the examination of the Board of Examiners are those, "salaries or compensation of officers fixed by law." The question presents itself as to what salaries or compensation comes within the exception, because if they do not come within the exception they are subject to examination by reason of the constitution.

A similar provision appears in the Constitution of the State of Utah. In the case of *State ex rel. Davis v. Edwards*, 33 Utah, 243, 93 Pac. 720, the Supreme Court of that state had occasion to consider the meaning thereof. In that case, a district judge entered into a contract with a court stenographer covering mileage necessarily traveled by the stenographer in the performance of his duty. The contract was one that the judge was authorized to enter into under the laws of the state. The contention of the petitioner was that, by reason of the law permitting the district judge to enter into the contract, he was entitled to payment of mileage upon filing with the State Auditor a statement of the district judge certifying the amount due. In reference to the contention, the court stated:

"In his contention we at first blush were inclined to agree with the petitioner, and, if it were not for a constitutional provision, which we think stands in the way, we would be inclined to hold that the petitioner should prevail in this proceeding."

The Court then quoted the provision of the Utah Constitution, which is identical with the Montana provision, and stated:

"The powers conferred upon the board of examiners, with regard to claims against the state, by the constitutional provisions quoted above, are general and sweeping. The power would include all claims against the state, were it not for the exception which excludes salaries or compensation of officers fixed by law. An exception of this character may not be enlarged nor extended by implication. An exception which specifies the things that are excepted from a general provision strengthens the force of the general provisions of the law. (2 Lewis' Sutherland, Stat. Const. section 494.) It is an elementary doctrine that, if there are any provisions in a statute which in any way conflict

with a constitutional provision, the Constitution controls. . . . Is the claim presented by the petitioner a claim for salary or compensation of an officer fixed by law? It certainly is not for an official salary. It seems equally clear that it is not for official compensation which is fixed by law. . . . It must not be overlooked that the exception in the Constitution does not apply to every claim for official compensation, but applies only to those that are fixed by law. If we assume that the amount claimed by the petitioner is ascertained and fixed by the court's certificate, this still does not meet the objection that it is not fixed by law. How does the claim arise? As stated by the petitioner, it arises out of a contract entered into by him with the district judge, who by law is made the agent of the state for that purpose. The amount that the petitioner is to receive from the state, both for services and for mileage, is a matter that he and the judge agreed upon and fixed. . . . While the compensation of stenographers, to some extent, is regulated by law, it nevertheless is not a compensation within the constitutional provision fixed by law. It is a compensation fixed by the contract made between the stenographer and the judge. If this should be held to constitute compensation fixed by law, then any compensation authorized by law which was agreed to in an authorized contract would also be fixed by law. The authority conferred by the state upon certain officials to enter into contracts with other persons, and to agree upon the compensation to be paid for public services contemplated by the contract, not exceeding a specified sum, as we view it, falls far short of fixing such compensation by law as contemplated by the Constitution. . . . We have not been able to find any case where the compensation was fixed by contract, or where the amount is subject to change at the pleasure of the person authorized to agree upon and fix it, wherein it was held that such compensation is one fixed by law. The mere fact that the Legislature has, in effect, made the certificate of the judge the only evidence that is required to fix the amount due cannot effect the conclusion that it is not fixed by law. It is the judge, and not the law, that determines and fixes the amount to be allowed under the particular contract under which the stenographer claims. The attempt by the Legislature to require the Auditor to allow a claim which by the Constitution must first be approved by the board of examiners can avail nothing. The auditor is bound by the constitutional provision. The Legislature may make certain evidence conclusive with regard to a specific matter, but it may not interfere with powers conferred or duties imposed by the Constitution. This in effect, is what is attempted to be done in Section 2, c. 72, p. 112, aforesaid. To the extent that the provisions of that section are in conflict with the constitutional provision governing salaries and compensations of officers fixed by law, the Constitution must prevail. The conclusion is, therefore, forced upon us that the petitioner's claim is not within the constitutional exception, and therefore, comes within the general class of claims which must be submitted to the board of examiners."

The Supreme Court of Massachusetts, in *McCarthy v. Malden*, 303 Mass. 563, also had under consideration a statute of the state which specified that a city budget should include an amount sufficient to pay the salaries of officers fixed by law or ordinance. The court pointed out that employment by the Board of Park Commissioners of the defendant city, under authority of the board to appoint necessary employees, and to define the duty and fix the compensation, did not bring the plaintiff's employment within the term "fixed by law," but that, in effect, her employment amounted to a "contract of a sort." The Massachusetts court cited with approval the Utah case above quoted.

The Supreme Court of this state, in the case of *State v. Cook*, 17 Mont. 529, 43 Pac. 928, had under consideration the statute creating the State Capitol Commission, in which the duties of the Commission were set forth

and provision made for the payment of specific compensation to each commissioner for the time actually engaged in the performance of his official duties. In this case it was held, that by reason of the particular wording of the statute which provided tenure, duration, emolument, powers and duties, the commissioners were officers with compensation fixed by law, and that by reason of Section 20, Article 7 of the State Constitution, supra, the Board of Examiners had nothing to do with the compensation of such commissioners as they were fixed by the statute creating the commission.

Applying the rule of these decisions to the question under examination, it becomes apparent the salaries and compensation which go to make up the pay roll of the Soldiers' Home are not within the exception set forth in the Constitution, and it is the constitutional duty of the Board of Examiners to examine and pass upon these claims. Further, by the enactment of Section 273, Revised Codes of Montana, 1935, above quoted, which enactment was at a later date than the enactment of section 1553 above quoted, the Board of Examiners is empowered by resolution to fix the salaries and compensation of the employees of your board. In other words, it has a controlling supervisory power over the Board of Managers of the Soldiers' Home in determining the amount of salaries and compensation to be paid the employees of the home.

Sincerely yours,

R. V. BOTTOMLY
Attorney General