

on demand the amount of his accumulated deductions under the provisions of section 12 of the act.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

H. J. WOODWARD,  
*Deputy Attorney General.*

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OPINION No. 446

*Bureau of Mines—United States Department of the Interior—Federal Explosives Act—Right of State and county officials authorized to administer oaths to act as licensing agents for the Bureau. Act of May 15, 1874, P. L. 186; Constitution Article XII, sec. 2.*

State and county officials, authorized to administer oaths, may accept the appointment of the Director of the Bureau of Mines as licensing agents under the Federal Explosives Act, without violating the Constitution or the statutes of the Commonwealth of Pennsylvania.

Harrisburg, Pa., January 26, 1943.

Honorable Edward Martin, Governor of Pennsylvania, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request to be advised as to whether State and county officials, authorized by law to administer oaths, have authority to act as licensing agents for the Bureau of Mines of the United States Department of the Interior. This bureau is charged with the administration of the Act of October 6, 1917 (40 Stat. 385), as amended by the Act of December 26, 1941 (Pub. No. 381, 77th Cong.), known as the Federal Explosives Act.

This act is a wartime act, limited to the war or the emergency, and forbids the manufacture, sale, possession or use of explosives, or the ingredients of explosives, except under licenses issued by the Director of the Bureau of Mines.

The act does not supersede the Pennsylvania statutes and regulations relating to explosives.

Your question is exceedingly important, not only because within this Commonwealth far more persons use explosives than elsewhere in the United States, and because the gross quantities used here are in excess of those used in any other state in the Union, but also because the opportunity for sabotage is also exceedingly great in Pennsylvania by reason of the immense use of our industries in the war effort. It thereby becomes necessary to set up rapidly statewide agencies, acquainted with persons in the various local communities to determine who may safely be intrusted with the use of explosives.

Your question is urgent because a county officer of this Commonwealth has tendered his resignation, assigning as his reason the fear that his continuing service as licensing agent may be in conflict with Article XII, section 2 of the Constitution of Pennsylvania. This section reads as follows:

No member of Congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State to which a salary, fees or perquisites shall be attached. The General Assembly may by law declare what offices are incompatible.

The statute in force, pursuant to this constitutional authority, is the Act of May 15, 1874, P. L. 186, 65 P. S. § 1, which reads:

Every person who shall hold any office, or appointment of profit or trust, under the government of the United States, whether an officer, a subordinate officer or agent, who is or shall be employed under the legislative, executive or judiciary departments of the United States, and also every member of Congress, is hereby declared to be incapable of holding or exercising, at the same time, the office or appointment of justice of the peace, notary public, mayor, recorder, burgess or alderman of any city, corporate town or borough, resident physician of the lazaretto, constable, judge, inspector or clerk of election under this Commonwealth: Provided, however, That the provisions hereof shall not apply to any person who shall enlist, enroll or be called or drafted into the active military or naval service of the United States or any branch or unit thereof during any war or emergency as hereinafter defined.

The question immediately arises as to whether the appointment of a State or county officer as licensing agent is the holding or exercising of an office or appointment of trust or profit.

The terms "office" and "appointment" as used in Article XII, Section 2 of the Constitution, are synonymous. An "office" is an appointment with a commission; an "appointment" is an office without one. The distinction is immaterial. *Com. ex rel. v. Binns*, 17 S. & R. 219, 243.

The case of *Finley v. McNair*, 317 Pa. 278 (1935) is helpful in answering this question. The court, on page 281, said:

\* \* \* In determining whether a position is an office or an employment, it is generally said that the "question must be determined by a consideration of the nature of the service to be performed by the incumbent, and of the duties imposed upon him, and whenever it appears that those duties are of a grave and important character, involving in the proper performance of them some of the functions of government, the officer charged with them is clearly to be regarded as a public

one:" \* \* \* Other elements in the problem are whether the duties are designated by statute, whether the incumbent serves for a fixed period, acts under oath, gives a bond, and the source or character of the compensation received.

With these principles in mind, we examine the Federal Explosives Act and find that section 7 of that act reads in part:

The Director may designate as licensing agents persons authorized by law to administer oaths \* \* \*; and wherever possible the Director shall select as licensing agents qualified officers or employes of the several States or of political subdivisions or of public bodies thereof. \* \* \* Such agents may collect a fee of 25 cents for each license issued, and shall be entitled to no other compensation from the United States for their services.

Section 15 of the Federal Explosives Act contains the following provision:

\* \* \* The Director may cooperate with the officers and employes of the several States and of the municipalities and other political subdivisions thereof. When such officers and employes act under the direction of the Director, their acts done in the administration and enforcement of this Act shall be deemed to be fully authorized.

The bureau informs us that no bond or oath is required of licensing agents. A certificate of appointment is sent to them by the Director of the Bureau of Mines, and upon the receipt of this certificate they are entitled to issue licenses.

The intent of Congress with regard to your question is expressed in the Senate report on the bill (77th Cong. Report No. 511) in which it was said:

Since licensing agents are neither officers nor employes, the provision in the 1917 act permitting "removal for cause" has been replaced by a grant of power to revoke the authority of a licensing agent.

The tenure of the appointment of a licensing agent is indefinite, the act itself is of a temporary nature, and the appointment is for the emergency only. State and county officials are appointed because they hold State or county offices, by reason of which office they are authorized to administer oaths. In other words, it is an appointment of the office rather than the individual holding the office.

In view of the above, we conclude that licensing agents are neither the holders of an office or an employment under the Federal Government. We are strengthened in this belief because, under the Federal law, no one may enter the services of the United States as an officer or employe without taking the oath of office as prescribed in 23 Stat. 22,

5 USC, section 16; employment by the Federal Government on a voluntary basis without compensation by the Federal Government is prohibited, and officers of the Federal Government must be appointed as provided by Article II, section 2 of the Constitution of the United States, which reads:

\* \* \* [The President] shall nominate and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Furthermore, it seems to us that a State or county officer does not become a Federal officer by performing the duties of a licensing agent, but is merely given an additional duty as a State or county officer, in the exercise of the Federal power to commandeer the services of State and county officials in providing for the common defense in time of war.

It is therefore the opinion of this department that State and county officials, authorized to administer oaths, may accept the appointment of the Director of the Bureau of Mines as licensing agents under the Federal Explosives Act, without violating the Constitution or the statutes of the Commonwealth of Pennsylvania.

This department is mindful of the fact that this opinion neither binds nor protects county officers, but they are included herein in an effort to be helpful, with the sincere hope that county officers will willingly join with State officers and the citizens of this Commonwealth in collaborating with the Federal Government to do everything useful and necessary in the war effort.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

HARRINGTON ADAMS,  
*Deputy Attorney General.*

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OPINION No. 447

*Appropriation—Mentally defective persons—Cost of support pending acceptance in Polk State School—Liability of Commonwealth—Acts of July 11, 1923, P. L. 998; October 11, 1933, P. L. 63.*

When neither a mentally defective person nor his parent or parents are able to defray the expenses of his support in a private institution licensed by the Department of Welfare for the care of such mental patients, such support is to be provided for by annual appropriation of the General Assembly. The expenses of maintenance and operation necessary for the proper conduct of the work of such institutions during the current biennium are payable out of moneys appropriated to the Department of Welfare under Appropriation Act No. 12A of 1941 and the supplement thereto, Appropriation Act No. 74A of 1941.

Harrisburg, Pa., January 28, 1943.

Honorable S. M. R. O'Hara, Secretary of Welfare, Harrisburg, Pennsylvania.

Madam: The Department of Justice is in receipt of your request for advice concerning the liability for the costs of the support of the mentally defective persons in private institutions licensed by the Department of Welfare for the care of such mental patients.

In support of your request for advice, you state that you are advised that the city of Pittsburgh and the Allegheny County Institution District have refused to pay for the maintenance of mental defectives committed to licensed schools by the Allegheny County Juvenile Court pending their acceptance in Polk State School; and that the city and county both claim that under the amended Mental Health Act the Commonwealth is liable for the entire cost of maintenance whether or not these persons are actually in a State institution.

Specifically, your inquiry whether or not the Commonwealth is liable for maintenance of mental defectives after the commitment order is signed by the proper court and before the patient is admitted to a State school, and if the answer is affirmative, the appropriation from which such payments can be legally made.

Private institutions have the right to care for mental patients by virtue of the Mental Health Act of July 11, 1923, P. L. 998, Article II, section 201, as amended by the Act of October 11, 1938, Special Session, P. L. 63, section 1, 50 P. S. § 21, which provides in part as follows:

Mental patients in the Commonwealth shall be cared for—

\* \* \* \* \*

(c) In such semi-State or private institution or places as shall have procured from the department licenses as provided for in this act: \* \* \*.

Your question concerning the liability of the Commonwealth for the support of mentally defective persons arises under the provisions of the Mental Health Act of July 11, 1923, P. L. 998, Article III, section 309, supra, as last amended by the Act of October 11, 1938,