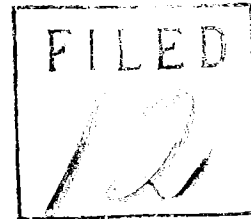


COUNTY SURVEYOR: Person may hold both office of county surveyor
ROAD OVERSEER: and road overseer at the same time.

January 24, 1941

Honorable Tom B. Brown
Prosecuting Attorney
Knox County
Edina, Missouri



Dear Sir:

We wish to acknowledge your request for an opinion under date of December 13, 1940, wherein you state as follows:

"The county surveyor elect for Knox County is now road overseer of a road district in this county.

"Knox County has dispensed with the highway engineer law as provided by Section 8019 R. S. 1929.

"Can the county surveyor elect qualify as such and retain his appointment and act as road overseer?"

You state that Knox County has pursuant to Section 8019, R. S. Mo. 1929 "dispensed with the highway engineer law." Said section is as follows:

"Whenever a petition, signed by at least ten per cent. of the taxpaying citizens and voters representing at least two-thirds of the townships of any county in this state, shall be presented to the county court thereof asking that a proposition be submitted to the qualified voters of the county, to determine whether or not the provisions of this article shall continue

to apply to such county, the court, after due consideration, may order that a proposition for the approval or rejection of the provisions of this article be submitted to the qualified voters of the county at any general election held for the purpose of electing county officers, or upon a petition, signed by at least fifteen per cent. of the tax-paying citizens and the voters representing at least two-thirds of the townships of any county in this state asking that such proposition be submitted, at a special election, the county court shall call the special election for the submission of such proposition within ninety days from the filing of such petition: Provided, such special election shall not be held within ninety days of any general election. The county court shall give notice of such election by publishing the same in some newspaper published in the county. Such notice shall be published for at least two consecutive weeks, the last insertion to be within ten days next before such election, and such other notice may be given as the court may deem proper. The proposition so submitted shall be printed on the ballots in the following form: 'For county highway engineer law,' 'Against county highway engineer law,' with the direction 'Mark out the clause you do not favor.' If a majority of those voting at such election upon the proposition vote for the county highway engineer law, then this article shall remain in full force and effect in such county, but if a majority of those voting at such election upon the proposition vote against the county highway engineer law, then this article and

the provisions of the law relating to the appointment and duties of a county highway engineer shall not be enforced in such county."

Therefore, Article 8 (Sections 8006 to 8023, inclusive), Chapter 42, R. S. Mo. 1929 "and the provisions of the law" relating to the appointment and duties of the county highway engineer are not to be enforced in your county.

Section 8020, R. S. Mo. 1929, provides how the matters relating to roads and overseers are to be handled where the counties have voted against the county highway engineer law:

"In all counties in this state that may vote against the county highway engineer law in the manner prescribed in section 8019 of this article, all matters relating to roads and highways and the expenditures of the public funds thereon shall be governed by the laws then in force in such counties, except that part of the law pertaining to the appointment of the county highway engineer. In all counties wherein the services of a county highway engineer are dispensed with, as provided by section 8019 of this article, the county surveyor shall be ex officio county highway engineer, and, as such, shall perform such services pertaining to the working, improvement, repairing and maintenance of the roads and highways, and the building of bridges and culverts as provided by this article to be done and performed by the county highway engineer, or as may be ordered by the county court; and for his services as ex officio county highway engineer he shall receive such compensation as may be allowed by the county court, of not less than three dollars nor more than

five dollars for each day he may be actually employed or engaged as such county highway engineer. The county court may empower the county highway engineer, or the county surveyor when acting as county highway engineer, to employ such assistants as may be deemed necessary to carry out the court's orders and at such compensation as may be fixed by the court, not to exceed the sum of four dollars per day for deputy county highway engineer nor more than three dollars per day for each other assistant for each day they may be actually employed."

Under the above section it appears that since the county highway engineer law has been abolished that the duties relating to the county highway engineer devolve upon the county surveyor.

Section 8013, R. S. Mo. 1929, provides that the county highway engineer shall have direct supervision over the road overseer and of the expenditures of all county and district funds made by the road overseers of the county. Furthermore, the county court must not issue warrants to road overseers in payment for work until the claim is examined and approved by the county highway engineer. Said section provides as follows:

"The county highway engineer shall have direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds made by the road overseers of the county. He shall also have the supervision over the construction and maintenance of all roads, culverts and bridges. No county court shall order a road established or changed until said proposed road or proposed change has been examined and approved by the county highway engineer. No county court shall issue warrants in payment for road work or for any

other expenditure by road overseers, or in payment for work done under contract, until the claim therefor shall have been examined and approved by the county highway engineer."

Section 8016, R. S. Mo. 1929, provides that road overseers must attend the annual meeting called by the county highway engineer and upon failure to attend the county highway engineer may request the county court or the township board to remove the road overseer:

"It shall be the duty of the county highway engineer to call a meeting at the county seat each year of all road overseers of the county, for consultation and conference touching the conditions and needs of the roads and bridges of the county and methods of improving same. Such meeting shall be held at a time designated by the highway engineer, between the first and fifteenth day of March. At such meeting of road overseers the county highway engineer shall instruct the overseers in the best and most economical plans for the working and improving roads, collecting and expending the district road funds, and, if practicable, adopt a uniform system of road work for the county. Any overseer failing to attend any such annual meeting without reasonable excuse shall, upon complaint of the county highway engineer, be removed from office by the county court or by the township board, as the case may be."

Section 8017, R. S. Mo. 1929, provides that the county highway engineer may suspend a road overseer for failure to follow his plans and instructions concerning the expenditure of funds and the improving of roads:

"All overseers shall follow the plans and instructions of the county highway engineer in all matters concerning the expenditure of the funds and

improving the roads, and should any road overseer fail or refuse, without sufficient cause, to follow the plans and instructions of the county highway engineer, the county highway engineer may suspend such overseer, and shall at once report the matter to the county court, and said court, upon hearing, may remove such overseer from office."

We must determine whether from a consideration of the above statutes the duties of the office of county surveyor and those of road overseer are so inconsistent and incompatible as to render it improper that both offices should be held at the same time by one person.

In the case of State ex rel. v. Bus, 135 Mo. 325, 1. c. 338, the court said:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

In view of the supervisory powers granted by statute to county highway engineers over road overseers there can be no doubt that the duties of the two offices are so inconsistent and incompatible as to make it improper that both offices should be held at the same time by one

person. Assuming then that the county surveyor inherits all of the duties of the county highway engineer, the same conclusion would be reached as to one person holding at the same time the offices of county surveyor and road overseer.

In the case of *Spurlock v. Wallace*, 204 Mo. App. 677, 218 S. W. 890, 1. c. 891, 892, Spurlock filed a petition for an injunction to restrain the judges of the county court from auditing and issuing warrants to overseers for various services on roads which had been done without any examination by the appellant as county surveyor and ex officio county highway engineer. More specifically Spurlock claimed that by virtue of his office the county court had no authority to draw warrants to road overseers until the claims therefor had been examined and approved by him as provided under Section 10558, R. S. 1909 (now Section 8013, R. S. Mo. 1929, supra).

The court held that under Sections 10558, supra, 10571, R. S. Mo. 1909 (now Section 8019 R. S. Mo. 1929, supra), and Section 10572, R. S. Mo. 1909 (now Section 8020, supra), where a county votes not to have a county highway engineer the duties of such office are abolished and the county court may order warrants drawn to road overseers without having them approved by the county surveyor acting as ex officio engineer. The court said:

"If the contention made by appellant should be upheld, then we must necessarily hold that, to vote under section 10571, and to thereunder abolish the highway engineer act meant simply a change of the manner and amount of compensation to be paid to the party acting as highway engineer, as the appellant is contending that he is duty bound to perform exactly the same service that the highway engineer would have performed, even though the people have voted out this law. We cannot lend sanction to this narrow construction, as it would appear that the purpose of sections 10571 and

10572, R. S. 1909, was to permit the people of a county to abolish the office of highway engineer, yet to leave it possible for the surveyor to perform the duties that the highway engineer would have performed had the law not been voted out, provided he acted under the orders and direction of the county court. The general intent of section 10571 was to permit the people of a county to vote out a highway engineer and to abolish the duties of such engineer, and that more was intended by said section than to merely give them the right to change the form and amount of compensation.

* * * * *

"The duties required of a highway engineer by section 10558, R. S. 1909, are by the very terms of section 10571, when the people have voted against the highway engineer act, abolished, and the county court may, under section 10481, R. S. 1909, order warrants drawn to road overseers. The provision in the last section, that the construction of bridges and culverts shall be under the direction and supervision of the county highway engineer, is by the terms of section 10571 dispensed with when the people vote against the act."

Under the above construction, when the county highway engineer law is dispensed with, the duties of the county highway engineer are abolished. Therefore, when he acts in said capacity, under Section 8020, supra, he does so "under the orders and direction of the county court," and not as an independent statutory agent. This being true, he does not have supervisory control over road overseers by virtue of his office.

Article 3, Chapter 42 of the Revised Statutes of Missouri, 1929, contains Sections 7868 to 7897, inclusive.

Section 7870 provides how road overseers are to be appointed by the Knox County Court:

"All road overseers shall be appointed by the county court of the county at the February term of said court. No person shall be eligible to the office of road overseer, except he be a citizen of the road district for which he may be appointed, or of an incorporated town or village within the bounds of such district and be a practical road builder, or possessed of technical or scientific knowledge of such work (shall be over twenty-one and under sixty years of age and moreover be able to read and write). Such officers shall receive a compensation of not less than two nor more than three dollars per day for each day actually and necessarily employed as such overseer, to be fixed by the county court annually in the month of March, by order of record."

Section 7872 provides that the road overseer shall give bond approved by the county court:

"Before entering upon his duties each road overseer shall execute to the county a bond in such sum as may be fixed by the county court, with good and sufficient security to be approved by the court, the condition of such bond to be that he will faithfully discharge his duties as such road overseer, and that he will account for all sums of money received by him as such overseer, and that he will account to the county highway engineer, at the expiration of his term of office, for all tools, machinery, books, papers and

other property belonging to the county or district, and such bond may be sued upon by the county to the use of the road district or any person injured by a breach thereof."

Said section provides that one of the conditions of the bond is that the road overseer account to the county highway engineer. Section 7874 provides that the road overseers shall conform to the instructions of the county highway engineer. The question then arises whether the duties of the county highway engineer that are abolished relate only to Article 8, supra. We have previously pointed out that they are not so restricted but are applicable to " * * * this article (8) and the provisions of the law relating to the appointment and duties of the county highway engineer * * *."

The duties of road overseers are set out substantially in subsection (a) of Section 7876:

"It shall be the duty of the road overseer to keep the roads in his district in as good repair as the funds at his command will permit, to have all brush and weeds found growing along the roadside of the public highway cut and removed during the month of August of each year, and whenever there is a square corner or sharp turn in the road that in any way hinders progress or obstructs the view and by such obstruction endangers the life and limb of those traveling thereon, to have such corners rounded, and if necessity demands it shall have such land as may be required to round corners condemned in accordance with section 7840, and he shall have the road drag or harrow used upon the public highway when the road would be improved thereby."

And the duties of county surveyors are set out substantially in Sections 11579 and 11580, R. S. Mo. 1929, respectively, as follows:

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"The county surveyor shall execute all orders to him directly by any court of record, for surveying or resurveying any tract of land, the title of which is in dispute before such court, and all orders of survey for the partition of real estate."

"The county surveyor shall, within ten days, when called upon, survey any tract of land or town lot lying in his county, at the expense of the person demanding the same; Provided, that his legal fees are first tendered, or that he and his deputies are not engaged in executing previous orders of survey."

There is nothing in the general duties of the county surveyors and road overseers that is so inconsistent and incompatible as to render it improper that one person should hold both offices at the same time.

We are, therefore, of the opinion that a county surveyor may also hold the office of road overseer.

Respectfully submitted,

MAX WASSERMAN

Assistant Attorney-General

MM:EG

APPROVED:

(Acting) COVELL R. HEWITT
Attorney-General