GERALD C. MANN
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

Hon. Tom L. Beauchamp
Secretary of State
Austin, Texas

Dear Sir: Opinion No. O-1435
Re: (a) Authority of Secretary of State to employ two auditors working at the same time and pay them out of the appropriation for "Auditor, Franchise Tax Reports (seasonal) $1,000.00."

(b) Authority of department head to control hours and time of work done by porter, under the Departmental Appropriation Bill, 46th Legislature.

By your letter of September 11, 1939 you ask the opinion of this department upon the following questions:

1. Under the item appearing in the Departmental Appropriation Bill, Secretary of State's appropriation, "Auditor, Franchise Tax Reports (seasonal) $1,000.00," may more than one auditor, working at the same time, be employed and paid?

2. There appearing in the appropriation for the Secretary of State an item for "porter... $720.00" per annum, must the porter be required by the department head to work eight hours a day, or may he be paid this salary for work done largely after hours, if he works less than eight hours per day?

In response to your first question, you are advised that our opinion is that you are not authorized to employ two auditors for seasonal work on franchise tax reports at the same time and pay them both out of the item "Auditor, Franchise Tax Reports (seasonl)...$1,000.00." In our opinion, this item, as much so as those immediately preceding it in your appropriation, contemplates and authorizes the employment of only one person out of this appropriation to perform such seasonal work. Your attention is directed, however, to item No. 34, which reads as follows:

"Extra help, part seasonal, franchise tax department, including duties transferred from State Tax Commissioner ... $5,080.00."

This appropriation, in our opinion ,may if necessary be resorted to for the employment and compensation of additional

auditors in your franchise tax department, in time of a seasonal distress, over and above those for whose employment specific provision has been made.

With regard to your observation that no salary is named to be paid this auditor, your attention is directed to the fact that by the provisions of the rider to the Departmental Appropriation Bill, he may not be paid a salary in excess of that provided for employees performing similar services for whom specific salary provision has been made. Specific provision has been made for two auditors of franchise tax reports in your appropriation, at an annual salary of $2,400.00 per year, which the Departmental Appropriation Bill requires to be divided into twelve equal installments on a monthly basis. Therefore, your seasonal franchise tax auditor cannot be paid a salary in excess of $200.00 per month.

With reference to your second question, your attention is directed to the following provisions of the Departmental Appropriation Bill, appearing in the rider at the end of the Act:

> "Office hours of State Departments. Excepting therefrom Sundays and State legal holidays, office hours of State departments shall be from 8 o'clock A.M. to 5 o'clock P.M., with one hour off at noon; provided, however, that all departments shall be allowed to close at 4 o'clock P.M. on Saturdays; and provided further that the head of any department shall be authorized to excuse a part of the employees of such department at noon on Saturdays, and that such Saturday afternoon shall not be construed to be a part of the twelve days vacation provided for below."
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> "Salary Payments. No salary for which an appropriation is made herein shall be paid to any person unless such person actually discharges assigned duties. Every month the head of each department shall attach to the payroll for his department an affidavit, under oath, stating that the persons listed in said payroll actually performed the duties for which they were being paid."
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> "Salaries and Other Provisions. (a) All annual salaries shall be paid in twelve (12) equal monthly installments, unless otherwise provided herein."
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> "Porters. It is specifically provided that all appropriations for porters as provided in this Act are made with the distinct understanding that it is the will of the Legislature that the

> said porters are to be under the direct supervision of the State Board of Control, irrespective of the fact that the items covering appropriations for the several porters in this Act may be carried as items under the appropriations of the various departments."

It is to be noted that there appears no provision in the Departmental Appropriation Bill requiring that any employee work any specific number of hours per day. It is to be noted that compensation for services is provided not upon a daily or hourly basis, but upon a monthly basis, and that no authority is given for the making of any deductions from a particular salary for the failure of such employee to work a certain number of hours per day. It is further to be observed, in this connection, that the department head is not required to attach to the payroll for his department an affidavit, under oath, stating that the persons listed in said payroll worked eight hours or more per day, but is only required to certify under oath that the persons listed in the payroll actually performed the duties for which they were being paid.

It is, however, to be noted that there is an express legislative mandate that the "department" shall maintain office hours from eight o'clock A.M. to five o'clock P.M., with one hour off at noon.

In the opinion of this department, it was not intended by the Legislature that all employees of all State Departments should work from eight o'clock A.M. to five o'clock P.M., with one hour off at noon, or to require that the employees of the department work any specific number of hours. The language used, if given such interpretation, would necessarily place a maximum as well as minimum upon the number of hours which employees of State Departments would be required to work, so that, by such interpretation, the department head would be deprived of the authority to require certain employees to work after hours in the event of pressing necessity.

The legislative intent, it seems apparent, was to require that all State departments, as such, remain open from eight o'clock A.M. to five o'clock P.M., with the exceptions therein provided, but to leave to the executive discretion of the department head the purely administrative detail of determining what hours of work should be required of particular employees performing services for the department. It means that the Legislature did not attempt to concern itself with the number of hours a particular employee devoted to a certain service, but only was concerned with requiring that an employee actually perform "the duties" for which "he is being paid."

departments, as such, shall remain open at least from eight to five, with an hour off for lunch, that all employees of such department actually perform the duties for which they are being paid, and that an affidavit be made to such effect before payment for such services is made, but has left with the department head, in accordance with accepted business practice, the discretion to determine, by arranging the hours of service of particular employees, how the affairs of his department may be most efficiently administered. Further, we conceive that the expressions "part time" and "half time," as used frequently in the departmental appropriation bill, do not mean "part of eight hours" or "half of eight hours," but, on the other hand, mean, "part of the time required for the performance of the service for which the employee is being paid" and "half of the time required for the performance of the service for which the employee is being paid."

In the case of a porter, it is manifestly not contemplated by the Legislature that he shall start work at eight and quit work at five in the afternoon, with an hour off for lunch, for the type of work that he is required to do of necessity must be done, for the most part, either before the department has opened or after it has closed for the day. To permit or require such work to be done during office hours would be, in most cases, to impair the efficiency of the personnel and prevent, to some extent at least, the efficient functioning of the department.

It is the duty of the department head, therefore, to see that the particular employee actually performs the duties for which he is being paid, and, therefore, to see that he devotes the time to those duties necessary to properly perform them. The time that such employee shall begin work and the time that he shall quit work, and whether duties other than those for which he is being paid shall be performed by such employee, are all matters to be dealt with by the department head in the exercise of his administrative discretion, in such manner as will enable his department to function most efficiently.

Your attention is called, however, to the fact that porters, by the express terms of the rider to the departmental appropriation bill, are to be under the direct supervision of the State Board of Control, and, therefore, as to porters, the discretion to determine the hours of labor is to be exercised by that body, and not by your Department.

Yours very truly
ATTORNEY GENERAL OF TEXAS

By /s/ R. W. Fairchild
R. W. Fairchild

APPROVED SEPT. 14, 1939
/s/ Gerald C. Mann
ATTORNEY GENERAL OF TEXAS

APPROVED OPINION COMMITTEE

RWF:bp:jrb