

care outside an institution as determined by the rules of the bureau. If thus approved by the state, care in a home offering approved care to less than four old age assistance recipients would qualify the clients to receive \$140.00 per month for each month during any portion of which such care was given, as provided by Act 202, P.A. 1964.

I call your attention to the fact that it is the care rather than the home which is approved in this case.

It is therefore my opinion that a home offering care for less than four elderly persons, if such care is approved by the State Department of Social Welfare, is a proper facility for old age assistance recipients, and that such recipients, if otherwise eligible, may receive \$140.00 per month while being cared for in such homes as provided by Act 202, P.A. 1964.

FRANK J. KELLEY,
Attorney General.

641008.1

SOCIAL SECURITY: Court commissioner as officer.

Court commissioners appointed under Act 352, P.A. 1925, to appraise damages to be paid in certain condemnations, cannot be classified as public officers and are thus ineligible for social security coverage.

No. 4370

October 8, 1964.

Mr. Lawrence L. Farrell
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Social Security Contribution Fund
State Employees' Retirement Board
330 Lewis Cass Building
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Act 205, P.A. 1951, as amended, being C.L.S. 1961 § 38.851 et seq.; M.S.A. 1960 Rev. Vol. § 17.801 et seq., provides for the coverage of certain officers and employees of the State of Michigan and local governments under the old-age and survivors insurance provisions of Title II of the Federal Social Security Act as amended. You have asked whether court commissioners appointed under Act 352, P.A. 1925, to appraise damages to be paid in certain condemnations are public officers and, thus, entitled to social security coverage.

Act 352, P.A. 1925, authorizing the appointment of court commissioners for appraisal purposes is found at C.L. 1948 § 213.171 et seq.; M.S.A. 1958 Rev. Vol. § 8.171 et seq. Section 13 specifies that the court shall appoint three disinterested persons as commissioners when there is to be a hearing on damages. Their duty is to appraise the damages to be paid as compensation for the taking. They shall not be residents of the township where the property is situated. The court shall fix the time of their first meeting and may authorize adjournments. It shall also fix the time for the commissioners to file their report.

Section 14 provides that the commissioners shall be sworn to faithfully discharge their duties. They are, in turn, empowered to administer oaths to witnesses. Section 15 commands the commissioners to view the premises and to hear the proofs and allegations of the parties. By Section 19, the court can remove a commissioner at any time and fill vacancies. Compensation not to exceed \$50 per day is to be fixed by the court pursuant to Section 21.

The commissioners have been held to have the powers and duties of a jury. They are, in addition, judges of both law and fact. (*State Highway Commissioner v. Schultz*, 370 Mich. 78.)

The Michigan Supreme Court has enumerated the characteristics of public office on many occasions. It has found the five following elements essential to the status:

- (1) Creation by the Constitution, legislature, municipality, or other body through authority conferred by the legislature;
- (2) Delegation of a portion of the sovereign power of government to be exercised for the benefit of the public;
- (3) Definition of powers conferred and duties to be discharged directly or impliedly, by the legislature or through legislative authority;
- (4) Performance of duties independently and without control of a superior power other than the law unless so placed by the legislature; and
- (5) Existence of permanency and continuity and not a temporary or occasional position.

(*Meiland v. Wayne Probate Judge*,
359 Mich. 79;

*Kent County Register of Deeds v. Kent County
Pension Board*, 342 Mich. 548;

People v. Leve, 309 Mich. 557; and
People v. Freedland, 308 Mich. 449.)

It can thus be seen that court commissioners possess some of the attributes associated with public officers. Their position is created by the legislature and they are delegated a portion of the government's sovereign power for the benefit of the public. Their powers and duties are defined directly by the legislature and that same body establishes the commissioners only superior, the appointing court.

The position, however, does not possess the characteristics of permanency and continuity typical of public office. It is merely a temporary or occasional position. When the report is filed, no duties remain to be performed unless the report is referred back. The provisions of Act 352, P.A. 1925, cited above, seem clearly to require separate appointment of commissioners for each situation. There is no assurance that a commissioner appointed for one case will ever be appointed for another. A court commissioner under Act 352 is, therefore, not a public officer.

This conclusion finds support in the early case of *Underwood v. McDuffee*, 15 Mich. 361, where appellants contested a decision of a referee on the grounds that he was a public officer and did not take an oath of office.

The referee was responsible for examining the facts and submitting his conclusions to the court. The Supreme Court held that the referee was not a public officer because there was no continuity or tenure to the position. The following displays the thinking of the Court:

“ . . . The oath required is the oath of allegiance to the United States and to the state, and an oath to perform faithfully the duties of the office. The term ‘officer’ as there used, can only be taken to refer to such offices as have some degree of permanence, and are not created by a temporary nomination for a single and transient purpose. A designation of a person to do some one act of duty, with no official tenure except as incident to that transitory function cannot make him a public officer, without involving a great absurdity. Every public office includes duties which are to be performed constantly, or as occasion arises, during some continuous tenure” (pp. 365-366)

(See also *Shurbun v. Hooper*, 40 Mich. 503)

It has been said that such commissioners are officers of the court which appointed them. (*Brackett v. Commonwealth*, 223 Mass. 199, 111 N.E. 1036 (1916)). An officer of the court is not necessarily a public officer however. Attorneys, for instance, are officers of the court but the Michigan Supreme Court has made it clear that this does not constitute them public officers (*Sloman v. Bender*, 189 Mich. 258).

It is thus my opinion that court commissioners appointed for condemnation appraisal purposes under Act 352, P.A. 1925, are not public officers and are therefore not eligible for social security coverage as a public employee under the State-Federal agreement.

FRANK J. KELLEY,
Attorney General.

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**CONSTITUTIONAL LAW: Free public elementary and secondary schools.
SCHOOLS: Districts—Authority to charge registration or course fees.**

Article VIII, Sec. 2 of the Michigan Constitution of 1963, in providing for free public elementary and secondary schools, bars boards of education from imposing registration fees as a condition to registration of pupils in elementary and secondary schools of the school district.

A board of education may not lawfully charge fees for participation in courses such as band or for participation in athletic programs.

No. 4376

October 16, 1964.

Dr. Lynn M. Bartlett
Superintendent of Public Instruction
Lansing, Michigan

In your recent letter you state:

“My office is in receipt of a number of communications which indicate that some public school districts are charging fees to be paid