

651013.1

**CONSTITUTION OF 1963:** Unclassified positions in state service. Excepted positions and exempt positions.

**CIVIL SERVICE COMMISSION:** Power to classify positions in the classified state civil service.

**APPROPRIATIONS:** Restrictions on.

**EXECUTIVE ORGANIZATION:** Transfer of appropriations.

**LEGISLATURE:** Power to fix salaries for unclassified positions.

The head of a principal department may request the Civil Service Commission to establish positions in the classified state civil service and to have unclassified personnel certified to such positions. Salaries for positions in the classified state civil service must be paid from appropriations for classified state civil service positions.

Line item appropriations for positions in the classified state civil service cannot be expended to pay salaries of persons appointed to positions in the unclassified state service.

Members of boards or commissions heading principal departments occupy positions excepted from the classified state civil service. Such positions need not be counted in the unclassified positions permitted in principal departments.

Members of boards or commissions transferred to principal departments but not as the head of the principal department occupy positions excepted from the classified state civil service. They need not be counted in determining the number of unclassified positions permitted in a principal department.

The term "commission" as used by the people in Article XI, Section 5 of the Michigan Constitution of 1963 does not include office of "commissioner." The office of "commissioner" is not an excepted position from the classified state civil service. If persons occupying the office of "commissioner" are to be retained in the department, they must be in the classified state civil service or placed in one of the exempt positions.

The legislature is empowered to fix the salaries of positions in the unclassified state service.

No. 4484

October 13, 1965.

The Honorable George Romney  
Governor  
State Capitol  
Lansing, Michigan

Act 380, P.A. 1965, effective July 23, 1965, is known as the Executive organization act of 1965. You have asked a number of questions in relation to Act 380, P.A. 1965, which will be answered seriatim.

"1. Where a new department has transferred into it more unclassified personnel than the constitutional limit of six (assuming Civil Service will grant six) and assuming that the department head would decide to make the unclassified a classified position, may he do so and pay the newly created classified position out of the former

unclassified appropriation? Does Sec. 505 of the bill permitting transfers permit this and override the prohibition in the general appropriation bills that unclassified may not be paid from classified appropriations?"

In Article XI, Section 5 of the Michigan Constitution of 1963, the people have provided:

"The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.

\* \* \*

"The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.

"No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.

\* \* \*"

Under the above-quoted provisions of Article XI, Section 5, people have first mandated that all positions in the state service shall be in the classified state civil service and they have carved out certain excepted positions and exempt positions that are not a part of the classified state civil service.

The people specified that positions filled by popular election, heads of principal departments, members of boards and commissions, the principal executive office of boards and commissions heading principal departments, employees of courts of record, employees of the Legislature, employees of the state institutions of higher education, and all persons in the armed forces of the state shall be *excepted* positions not in the classified state civil service.

In addition, the people have provided eight *exempt* positions in the office of Governor, and within each principal department when requested

by the department head, two other *exempt* positions one of which shall be policy-making. The people have empowered the Civil Service Commission to *exempt* three additional positions of a policy-making nature within each principal department. Thus, the people have provided for classified state civil service positions, excepted positions not in the classified state civil service, and exempt positions not in the classified state civil service.

Consideration must also be given to Article V, Section 3, which provides in pertinent part as follows:

"The head of each principal department shall be a single executive unless otherwise provided in this constitution or by law. The single executives heading principal departments shall include a secretary of state, a state treasurer and an attorney general. When a single executive is the head of a principal department, unless elected or appointed as otherwise provided in this constitution, he shall be appointed by the governor by and with the advice and consent of the senate and he shall serve at the pleasure of the governor.

"When a board or commission is at the head of a principal department, unless elected or appointed as otherwise provided in this constitution, the members thereof shall be appointed by the governor by and with the advice and consent of the senate. The term of office and procedure for removal of such members shall be as prescribed in this constitution or by law."

Whether the head of a principal department is a single executive or a board or commission, all such positions are *excepted* positions from the classified state civil service in accordance with Article XI, Section 5. It must also be observed that the people have provided that where a board or commission is the head of a principal department the principal executive officer of the board or commission heading the principal department is also *excepted* from classified state civil service.

The principal department is entitled to two other *exempt* positions one of which shall be policy making. Such positions are available upon request of the department head, but the clear language of the Constitution requires the conclusion that the principal department is entitled to such unclassified exempt positions upon request. In addition, the principal department may request the Civil Service Commission to exempt three additional positions of a policy-making nature within each principal department.

Thus, it must be concluded that where a principal department is headed by a board or commission the principal department is entitled to the excepted position of the principal executive officer of such board or commission and to two other exempt positions one of which shall be policy making. Upon request, the Civil Service Commission may grant three additional exempt positions of a policy-making nature. Where the principal department is headed by a single executive, the principal department is entitled to two other exempt positions one of which shall be policy making and may, with consent of the Civil Service Commission, have three additional exempt positions.

Your question is based upon the assumption that a principal department, whether it is headed by a single executive or by a board or commission, has transferred to it a number of other agencies, boards, or commissions with their own unclassified personnel so that in fact such principal department has presently transferred to it a total number of unclassified positions, for which line item appropriations have been made, in excess of the total number permitted by Article XI, Section 5. Based upon such an assumption, you, then, ask may the department head place such persons in the classified state civil service and use the line item appropriation for unclassified positions to pay salaries for such classified civil service positions.

The power to classify all positions in the classified state civil service is reposed in the State Civil Service Commission by Article XI, Section 5, and the people have required that such classification be made according to respective duties and responsibilities. In addition, the Commission is authorized to fix rates of compensation for all positions. Further, the people have provided that no person shall be appointed to or promoted in the classified service who has not been certified by the Commission as qualified for such appointment or promotion. Under the aforesaid constitutional language it is clear that if the head of a principal department wishes to establish a position in the classified service request must be made to the Civil Service Commission to classify such a position in the classified civil service, to fix rates of compensation and to certify persons qualified to appointment for such positions. If the head of the principal department wishes to take a person in the unclassified service and place him in the classified state civil service, the Civil Service Commission must approve classification of such position, fix its rate of compensation, and certify persons who can be appointed to such position as qualified therefor.

Once the aforesaid procedure is employed, the question arises what funds are available for the payment of such classified state civil service positions established by the Civil Service Commission at the request of the head of the principal department. Section 505 of the Executive organization act of 1965 provides:

“When duties, powers and functions have been transferred by this act to a principal department, so much of the records, property, personnel and unexpended balances of appropriations, allocations and other funds, used, held, employed, available, or to be made available in connection with such powers, duties and functions shall be transferred to the department as the governor shall determine to be required for the performance of the transferred functions. Appropriations not so required shall be returned to the fund from which appropriated. No transfer of funds is authorized under this section if such transfer would result in the termination of any federal aid program. This section remains effective until December 31, 1966.”

Contemporaneously, the legislature enacted a number of appropriation acts that bear on your question. Act 266, P.A. 1965, contains the appropriations for the operation of the general state government. Section 14 of this act states:

"The appropriations made under the provisions of this act for unclassified positions, as specified by line item appropriation, shall be used only for such positions. The appropriations made under the provisions of this act for salaries and wages shall be used only with respect to classified positions established by the civil service commission, and none of the money appropriated herein shall be used to pay back salaries or wages to any employee."

The same or comparable provision is found in Section 13 of Act 155, P.A. 1965, which contains appropriations for various state departments, commissions and boards related to the regulatory services; in Section 13 of Act 135, P.A. 1965, which contains appropriations for the Michigan State Police and various state departments; in Section 9 of Act 125, P.A. 1965, which contains appropriations for state agencies related to mental hygiene; in Section 9 of Act 123, P.A. 1965, which contains appropriations for state institutions, departments, commissions, boards and agencies related to the public health; in Section 11 of Act 117, P.A. 1965, which contains appropriations for state institutions, departments, commissions and boards related to education; in Section 8 of Act 197, P.A. 1965, which contains appropriations for state penal institutions and the department of corrections; in Section 21 of Act 195, P.A. 1965, which makes appropriations for various state departments from restricted funds; in Section 11 of Act 196, P.A. 1965, which makes appropriations for state departments, commissions and boards related to conservation, recreation, advertising and agriculture; and a comparable provision is found in Section 13 of Act 136, P.A. 1965, which makes appropriations for various state institutions, departments, commissions, boards and agencies related to public welfare services.

The various appropriation acts enumerated above were passed by the same legislature which enacted the Executive organization act of 1965. It must be assumed that the legislature had due knowledge of the contents of Section 505 of the Executive organization act and the pertinent provisions of the 1965 appropriation acts cited above, *Reichert v. Peoples State Bank for Savings*, 265 Mich. 668 (1934), and intended no conflict between them. See *Reed v. Secretary of State*, 327 Mich. 108 (1950).

Under Section 505 of the Executive organization act of 1965, the legislature empowered the governor to make transfers of appropriations to effect the transfer of duties, powers and functions under the act. However, Section 505 does not authorize him to transfer funds between unclassified and classified positions. In the absence of clear legislative mandate that he possess this power, the authority to make transfer of funds must be limited by the legislative prohibition found in the various appropriation acts previously cited that moneys appropriated for unclassified positions must be used only for such positions and cannot be transferred to pay the salaries for positions in the classified state civil service. Such construction of Section 505 of Act 380, P.A. 1965, gives effect to various enactments of the Legislature. *People v. Buckley*, 302 Mich. 12 (1942).

Therefore, it is the opinion of the Attorney General that the head of a principal department may request the Civil Service Commission to establish

positions in the classified state civil service and to have unclassified personnel certified to such positions. Salaries for such positions in classified state civil service cannot be paid from line item appropriations for unclassified positions.

"2. What about the reverse of the above? Seven of the 19 departments now have less than three unclassified positions. Suppose the new department head wishes to add unclassified positions and appoint someone who is now classified to the position. Could he do so and pay this person from classified salaries and wages? Does Sec. 505 override the prohibition against this in the budget bills?"

The reasoning employed to support the conclusion found in the answer to your first question is equally applicable here and need not be restated. Section 505 of the Executive organization act does not authorize the use of funds appropriated for the payment of salaries of persons occupying positions in the classified state civil service to pay the salaries of persons occupying positions in the unclassified state service either as excepted or exempt positions. The limitations found in the various appropriation acts for the fiscal year 1965-66 are controlling.

In the process of establishing an unclassified position, the head of the department cannot declassify a classified civil service position without prior approval of the civil service commission.

Therefore, it is the opinion of the Attorney General that funds appropriated for the payment of salaries for persons occupying positions in the classified state civil service cannot be expended to pay for the salaries of persons appointed to positions in the unclassified state service.

"3. How are 'unclassified' counted? The Constitution exempts (excepts) from Civil Service 'members of boards and commissions, the principal executive officer of boards and commissions heading principal departments,' and '2 other exempt positions' within each principal department:

"(a) In the six principal departments headed by a board or commission, does the principal department receive six exempt unclassified positions in addition to the board or commission itself? In other words, is the commission counted as one or more of the permissive six unclassified positions or is it counted as zero?

"(b) Where a principal department has transferred to it or includes a board or commission (as for example, the Workmen's Compensation Appeal Board, the Michigan Employment Security Commission, the Labor Mediation Board, the License Appeal Board, the Historical Commission, the Mackinac Island Park Commission), is the respective board or commission or its members included in the number of permissible unclassified positions or is it excluded? In other words, is each board counted as one of the permissive six exempt positions or is it counted as zero?

"(c) Are all commissions or commissioners treated as 'commissions' as that word is used in the new Constitution? Is the State Tax Commission, the Board of Tax Appeals, and the Public Service Com-

mission, a constitutional commission, or is it, in effect, three individuals who should fill unclassified positions? Likewise, are the State Insurance Commissioner and the Commissioner of Revenue to be considered 'commissions' or should they be included as one person within the six permissive unclassified positions?"

Article XI, Section 5 of the Michigan Constitution of 1963 provides in part as follows:

"The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments \* \* \* and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department."

By clear and unambiguous language the people have *excepted* members of boards and commissions from the classified state civil service.

It must follow that where a principal department is headed by a board or commission all of the members of the board or commission are *excepted* from the classified state civil service, as well as the principal executive officer of such board or commission.

Neither the members of the board or commission heading a principal department nor the principal executive officer or such board or commission need to be counted against the permissible *exempt* positions within a principal department since each of them occupy positions *excepted* from the classified state civil service.

Members of boards and commissions are *excepted* from the classified state civil service by the people. This is true whether the board or commission is the head of the principal department or merely transferred to a department as part of executive reorganization. A principal department is entitled to two other *exempt* positions upon request by the department head and may obtain three additional *exempt* positions of a policy-making nature on request to the Civil Service Commission. These five *exempt* positions are available to the principal department regardless of the number of boards or commissions that have been placed within the principal department by the legislature.

Therefore, it is the opinion of the Attorney General that members of boards and commissions placed within a principal department by the legislature but not as the head of the principal department occupy *excepted* positions not in the classified state civil service. Such positions are not counted in determining the number of *exempt* positions to which the principal department is entitled under Article XI, Section 5 of the Michigan Constitution of 1963.

The people in ratifying the Michigan Constitution of 1963 have in Article XI, Section 5, *excepted members* of boards and commissions from

the classified state civil service. They have not excepted the office of commissioner from the classified state civil service.

When you use the term "commissioner," you make reference to the public office of commissioner such as the office of commissioner of insurance created by the legislature pursuant to Section 202 of Act 218, P.A. 1956, being C.L.S. 1961 § 500.202; M.S.A. 1957 Rev. Vol. § 24.1202, and the public office of state commissioner of revenue<sup>1</sup> established by the legislature pursuant to Section 2 of Act 122, P.A. 1941, as amended, being C.L.S. 1961 § 205.2; M.S.A. 1960 Rev. Vol. § 7.657(2).

The aforesaid state officers are identified by the legislature as commissioners and do not serve as members of a commission. The term "commission" has been defined to mean a body composed of several persons acting under lawful authority to perform some public service. A single administrative officer or executive officer does not constitute a "commission." *Standard Securities Service Corporation v. King*, 341 S.W. 2d 423; *City of Louisville Municipal Housing Commission v. Public Housing Administration*, 261 S.W. 2d 286 (Ky. 1953).

When the people *excepted* from the classified state civil service members of boards and commissions they were *excepting* persons occupying the office of member of boards and commissions as a body composed of several persons acting under lawful authority to perform some public service. They did not *except* from the classified state civil service persons occupying the public office of commissioner as a single administrative or executive officer.

Therefore, it is the opinion of the Attorney General that persons occupying the office of "commissioner" cannot be included within the term "commission" and *excepted* thereby from the classified state civil service under Article XI, Section 5 of the Michigan Constitution of 1963. They may occupy positions *exempt* from the classified state civil service. If they are to be retained in the department, they must be in the classified state civil service or placed in one of the exempt positions.

"4. Under the new act who has the power to set salaries for unclassified personnel?"

The Constitution is a limitation upon the powers of the legislature. *Romano v. Auditor General*, 323 Mich. 533 (1949).

It is necessary to examine the provisions of the Constitution for any limitation upon the power of the legislature to fix salaries for unclassified personnel. Article XI, Section 5 is pertinent to this question, and reads in part:

"The civil service commission shall recommend to the Governor and to the legislature rates of compensation for all appointed positions within the executive department not a part of the classified service."

<sup>1</sup> Section 83 of the Executive Organization Act of 1965 expressly provides that the head of the department of revenue shall be a member of the classified civil service.



The intent of the framers of the Constitution and the people adopting it may be determined by examining the debates of the Constitutional Convention and the Address to the People. *Burdick v. Secretary of State*, 373 Mich. 578 (1964).

The quoted portion of the Michigan Constitution of 1963 was first presented to the framers of the Constitution as part of Committee Proposal No. 22 and as originally introduced it read:

"THE CIVIL SERVICE COMMISSION SHALL RECOMMEND TO THE GOVERNOR AND TO THE LEGISLATURE RATES OF COMPENSATION FOR ALL APPOINTED UNCLASSIFIED POSITIONS WITHIN THE EXECUTIVE DEPARTMENT." Official Record, Constitutional Convention 1961, p. 637.

On the first reading, Delegate Durst explained the pertinent language of Committee Proposal No. 22 as follows:

"This is merely a recommendation and there is nothing binding on the legislature. It is our understanding that the legislature has, for the last couple of years, requested this service from the civil service commission; this merely makes it mandatory that they furnish this service to the legislature." Official Record, Constitutional Convention 1961, p. 668.

On first reading, Delegate Downs offered an amendment to Committee Proposal No. 22 as follows:

"Amend page 2, line 8, by striking out 'recommend to the governor and to the legislature' and inserting 'determine', so the language will then read, 'The civil service commission shall determine rates of compensation for all appointed unclassified positions within the executive department.'" Official Record, Constitutional Convention 1961, p. 704.

Delegate Martin responded to this proposed amendment and, in part, said:

"Mr. Chairman, the committee did consider this question at some length, and we realize that there are some jobs in the upper levels in which the base pay of the top man in the department may be less than the pay of some member of his department. On the other hand, the committee felt that there should be a line drawn between the responsibilities of the civil service commission, which responsibilities are to handle the civil service employees, and those employees who are specifically made exempt from the civil service provisions and thereby made the responsibility of the legislature; and for that reason the committee determined that the provision would merely go so far as to require the commission to submit recommendations as to what these salaries should be in the light of what certain civil service salaries might be but should not get itself into the position of determining what the salaries should be, since these are noncivil service jobs." Official Record, Constitutional Convention 1961, p. 705.

The amendment was not adopted. Official Record, Constitutional Convention 1961, p. 705.

The above quotations are the only significant debate concerning the portion of Article XI, Section 5, which is applicable here. They clearly support the intent of the delegates that the power of the Legislature to fix salaries of unclassified persons be not limited, but that the Civil Service Commission be required to make a recommendation as to what such salaries should be. These recommendations are not binding upon the Legislature.

Therefore, it is the opinion of the Attorney General that the Legislature is empowered to set the salaries for persons occupying positions excepted or exempted from the classified state civil service.

FRANK J. KELLEY,  
*Attorney General.*

651018.1

**CORPORATIONS:** Corporation may not form a partnership.

**PARTNERSHIPS:** Corporation may not form a partnership.

The Michigan Corporation and Securities Commission may not issue a certificate of authority pursuant to Sec. 94 of Act 327, P.A. 1931, as amended, to an Ohio corporation seeking to be admitted into Michigan for the purpose of entering into a partnership.

No. 3652

October 18, 1965.

Mr. Lenton G. Sculthorp, Commissioner  
Corporation and Securities Commission  
300 East Michigan Avenue  
Lansing, Michigan

You have asked my opinion on the following question:

"May the Michigan Corporation and Securities Commission issue a certificate of authority pursuant to Sec. 94 of Act 327, P.A. 1931,<sup>1</sup> as amended, to an Ohio corporation seeking to be admitted into Michigan for the purpose of entering into a partnership?"

Under Section 94 of the General Corporation Act, a foreign corporation may be issued a certificate permitting it to transact business in this state if it is incorporated for a purpose for which a corporation may be formed under the laws of this state.

Expression of intention to form a partnership, however, is not an expression of purpose, but of intent to assume an identity other than that of a corporation. The term "purpose" means the business activity to be engaged in; e.g., selling shoes, purveying services, not the identity to be assumed. Therefore, the question is: does a corporation have the power to form a partnership and to do business as a partnership?

In 1887, in *The Cleveland Paper Company v. The Courier Company*,<sup>2</sup>

<sup>1</sup> Act 327 is the Michigan General Corporation Act; § 94 was last amended by P.A. 1961 No. 15; C.L.S. 1961 § 450.94; M.S.A. 1963 Rev. Vol. § 21.95.

<sup>2</sup> 67 Mich. 152.