

Opinion No. 245.

**Legislature—Montana Relief Commission—Offices and Officers
—Civil Service.**

HELD: No senator or representative may, during the term for which he shall have been elected, be validly appointed to a membership in the Montana Relief Commission.

February 3, 1936.

Hon. Elmer Holt
Governor of Montana
The Capitol

This will acknowledge receipt of your communication containing the following inquiry:

“Will you please refer to Section 7, of Article 5, of the Constitution of the State of Montana and advise me as to whether or not membership on the Montana Relief Commission may be construed as in violation thereof?”

Section 7 of Article V, Constitution of the State of Montana, provides: “No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the state; and no member of congress, or other person holding an office (except notary public or in the militia) under the United

States or this state, shall be a member of either house during his continuance in office."

The ultimate question to be determined is: **Is a membership upon the Montana Relief Commission a civil office under the State?**

If it be an office at all, it is a civil office. Therefore, it remains to be determined whether or not it be an office. In the case of State ex rel. Barney v. Hawkins, 79 Mont. 506, 528, 257 Pac. 411, the Court held there were five elements indispensable to a public office of a civil nature.

This rule was reaffirmed in State ex rel. Nagle v. Page, 98 Mont. 14, 37 Pac. (2d) 575, 576.

Let us take these requirements in the order stated by the court and determine whether or not a membership upon the Montana Relief Commission meets them.

I.

"It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; * * *"

Chapter 109, Laws of 1935, creates the office. Section 1 thereof reads in part as follows: "There is hereby created and established a state department and institution of public relief, composed of a commission of five (5) members * * *"

II.

"It must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; * * *"

Chapter 109, Laws of 1935, delegates all the necessary powers to carry out the purposes of the Act. The purpose of the Act, as indicated by Section 1, is to provide means for the sustenance of life, shelter and relief of distress among the people of the State whom economic conditions, industrial inactivity, old age, unemployment or other causes over which they have no control have deprived of support, and to aid dependent children, and for such other economic security functions as are or may be assumed by the State. Section 23 states, among other things, that the

powers conferred are for the purpose of relieving distress and preventing irreparable injury to the people of the State so that public peace, health and safety can be preserved immediately.

Section 18 expressly states that the Act is necessary for the welfare of the State.

A fund is established (§4), the Commission is empowered to administer the fund (§5), it is empowered and commanded to supervise the expenditure of the fund (§9), it is directed to cooperate with Federal authorities (§10), it is empowered and required to appoint an administrator, who shall be subject to the Commission (§11), it is empowered to approve or disapprove county relief committees (§12), it is empowered to make rules and regulations in connection with application for relief, to investigate the same, to require standards and reports, and to supervise and regulate distribution of relief funds received from agencies of the United States, or made available otherwise (§13). It may acquire property and take title in its own name (§15). It may enter into contracts with the agencies of the United States to carry out any of the purposes of the Act. (§16).

III.

"The powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority; * * *"

The references in Subdivision II, above, show that the various powers and duties of the Montana Relief Commission are defined, either directly or impliedly, by the provisions of Chapter 109, Laws of 1935.

IV.

"The duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature and by it placed under the general control of a superior officer or body; * * *"

Said Chapter 109 nowhere provides for control by any power superior to the Montana Relief Commission. On the contrary, it reposes all powers in the Commission. Section 5 thereof,

which provides that the fiscal rules of the United States Government as enjoined upon the Montana Relief Commission shall be used as a method of accounting for all the funds, is not a provision for "control of a superior power." It is not a control at all. It merely specifies a method of accounting. It is merely an adoption of methods for ministerial work. If by any stretch of imagination this provision should be deemed a "control," then the clause would be invalid because even the legislature itself could not delegate to the United States power to control the Montana Relief Commission, and the rest of the act would stand without that clause. Section 8 authorizes the Commission to prepare a budget in case the Federal government should require it before allocating funds to the State of Montana. All through the act, whether it be Section 4 or 5 or 8 or 9 or 10 or 11 or 12 or 13 or 16, the control exercised is the control of the law and nothing else.

V.

"It must have some permanency and continuity and not be only temporary or occasional."

The Commission is permanent so far as a legislative assembly could make it permanent. That is to say, there is no limitation upon its terms of existence, either expressed or implied, in the Act. The intent of the legislature to provide for a permanent organization is further evidenced by the use of the word "institution," which in itself imports permanency. The terms of the Commissioners are definitely fixed by Section 2 of the Act.

V(a).

"In addition, in this State, an officer must take and file an official oath * * *."

Section 2 of the Act states: "The members of the 'Montana Relief Commission' shall take and subscribe to the constitutional oath of office * * * ." The Act does not expressly require filing of the oath, but this is necessarily required by Section 432, R. C. M. 1921, requiring filing within thirty days, and from Section 434, R. C. M. 1921, which provides that every oath of office must be filed within the time required by law,

except when otherwise specially provided, and further provides that the oath of all officers whose authority is not limited to any particular county shall be filed within the office of the Secretary of State.

V(b).

"[An officer must] hold a commission or other written authority."

The Act does not specifically require a written commission, but Section 426, R. C. M. 1921, provides that the Governor must commission " * * * all officers appointed by the Governor * * * ." It is noteworthy that even in the case of appointments to fill the vacancies of elective officers about whose status as "officers" there can be no doubt, there is no special law requiring the issuance of a commission, but such persons constitute officers nevertheless, and the commission is required to be issued by the Governor under the general law.

V(c).

"[An officer must] give an official bond, if the latter be required by proper authority."

Section 2 of the Act requires a bond of \$25,000 to be given by the members of the Commission.

It will be observed, also, that the legislature uses the term "office" in requiring the constitutional oath to be given. Such use has been held to be persuasive.

That each membership upon the Commission is an office seems clear from the case of State ex rel. Boyle v. Hall, 53 Mont. 595, 165 Pac. 757.

CONCLUSION

Each of the essential elements to constitute a public office of a civil nature, or, in the exact words of the Constitution a "civil office," as set forth by the Supreme Court of the State of Montana in the cases first above mentioned, are found to be present in a membership on the Montana Relief Commission. It is our opinion, therefore, that no Senator or Representative may, during the term for which he shall have been elected, be validly appointed to a membership in the Montana Relief Commission.

Note: See State ex rel. Nagle v. Kelsey, 102 Mont. —, 55 Pac. (2d) 685, holding a state senator may not

hold office of member of Montana Relief Commission.