

## Opinion No. 279.

**Offices and Officers—Division of Labor and Publicity—Civil Office  
— Constitutional Law —  
Legislative Assembly.**

HELD: The head of the Division of Labor and Industry is a mere employee, holding his position at the pleasure of the Commissioner of Agriculture, and the appointment of a member of the legislature to that position does not violate the Montana Constitution.

May 5, 1936.

Hon. Elmer Holt  
Governor of Montana  
The Capitol

Your letter of April 16, is as follows:

"Since the decision of the Supreme Court in the case of State ex rel. Nagle v. Kelsey, there has been considerable discussion over the State as to other State activities which are presided over by members of the legislature, particularly with respect to the 'Division of Labor and Industry' within the Department of 'Agriculture, labor and industry'.

"As you know, of course, the 'department' of labor and industry was abolished in 1921, as a separate department and, to some extent, the duties of the office, respecting labor, were placed under the control of the 'Commissioner of Agriculture,' but to what extent control was vested in the Commissioner is not clear to me from the statutes (Chapter 254, Part III of the Political Code of 1921.)

"In the light of the fact that that 'department' was created for the 'promotion of the agricultural and labor interests of the state' equally (Section 3558), and of the broad scope of the duties and powers imposed upon the 'division' of labor and industry, and the, seeming, discretion vested in it (Sections 3635-3637), the status of this 'division' should be set at rest.

"I desire your opinion, therefore, as to whether the head of the 'division of labor,' being a member of the legislature, comes within the rule laid down in the Kelsey case, or merely is an employee and entitled to continue in the position under the authority of State ex rel. Nagle v. Page and State ex rel. Hawkins against the Board."

It may be interesting and perhaps helpful to trace briefly the history of our legislation relating to the welfare of agriculture, labor and industry. In accordance with the authority conferred on it by the Constitution (Section 1, Article XVIII) the legislature by an Act passed on February 17, 1893, created the bureau of agriculture, labor and industry. The executive officer thereof was a commissioner appointed by the Governor for a term of four years. Chapter 55, Laws of 1913, created the department of labor and industry and provided that the governor shall appoint a commissioner of labor and industry for a term of four years. Chapter 56, Laws of 1913, created the department of agriculture and publicity whose executive officer shall be a commissioner appointed by the Governor for a term of four years. It repealed the law which created the bureau of agriculture, labor and industry. By Chapters 55 and 56 the duties theretofore required of the commissioner of the bureau of agriculture, labor and industry were divided between the commissioner of labor and industry and the commissioner of agriculture and publicity.

At the regular session of 1921 the legislature passed Chapter 216. It appears in the Revised Codes of 1921, as Sections 3555 to 3649. Section 3555 creates the department of agriculture, labor and industry, and declares its general purpose to be "the promotion of the agricultural and labor interests of the State." (American Surety Co. v. Butler, 86 Mont. 584.) Section 3556 provides that the chief executive officer of the department of agriculture, labor and industry shall be a commissioner of agriculture appointed by the Governor, by and with the consent of the senate, and who shall hold office for a term of four years. Section 3557 provides

that before entering upon the duties of his office he shall take the constitutional oath of office and give bond in the sum of five thousand dollars. Section 3558 empowers him to prescribe regulations for the government of his department, the conduct of its employees and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers, books, documents and property pertaining thereto. Section 3559 vests him with authority to appoint such number of secretaries, assistants, clerks and other employees as he shall deem necessary for the performance of the work of the department. All persons so employed shall receive the compensation fixed by law or fixed by the board or department to whom may be entrusted the power to fix the compensation of deputy state officers and employees; if not so fixed, he shall determine the amount of such compensation. Section 3561 prescribes the powers and duties of the department. Section 3563 establishes four main divisions of the department, namely, the division of farming and dairying; the division of grain standards and marketing; the division of horticulture, and the division of labor and publicity. The divisions so created are intended only to promote the logical and convenient classification of the work of the department, and nothing found in said section shall be deemed to prevent any person engaged in the work of a particular division from performing the work of another division. Then follow in regular order sections which prescribe the powers and duties of the different divisions. Section 3635 provides that the department, through the division of labor and publicity, shall be charged with the duty of enforcing all the laws of Montana relating to hours of labor, conditions of labor, protection of employees, and employment of children. Section 3637 provides that the commissioner of agriculture, in discharging the duties imposed upon the division of labor and publicity, shall have the power to administer oaths, to examine witnesses under oath, to take depositions or cause the same to be taken, to deputize any male citizen over the age of twenty-one years to serve subpoenas upon witnesses, and

to issue subpoenas for the attendance of witnesses before him in the same manner as for attendance before district courts. He shall likewise have the authority to inspect any mine, factory, workshop, smelter, mill, warehouse, elevator, foundry, machine shop, or other industrial establishment. Section 3638 provides that the department, through the division of labor and publicity, shall prepare statistics and data, and shall publish a report relating to the agricultural, commercial, mining, manufacturing and other resources of the state, and such report shall be published and distributed in such form and quantity as in the judgment of the department may be deemed expedient and practicable. Section 3646 abolished among other things the department of labor and industry and the department of agriculture and publicity.

The legislature has not created the position of labor commissioner, but our understanding is that the commissioner of agriculture has for the purpose of convenience designated the head of the division of labor and publicity "labor commissioner." The commissioner of agriculture has also fixed the compensation of the labor commissioner, so-called.

Section 7, Article V of the Constitution declares that "no senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the state." The question to be determined then is this: is the position of labor commissioner, so-called, a civil office? In *State ex rel. Barney v. Hawkins*, 79 Mont. 506, followed by *State ex rel. Nagle v. Page*, 98 Mont. 14, the court held that five elements are necessary to render any position of public employment a public office of a civil nature, namely: (1) 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; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority; (4) 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; (5) it must have some permanency and continuity and not be only temporary or occasional. In this state, too, a public officer must take and file an official oath, hold a commission or other written authority and, when required, give an official bond.

The position of inspector of boilers was established by law in territorial days and has been continued under varying degrees of authority ever since. Yet the court in *State ex rel. Nagle v. Page*, supra, ruled that it was not a public office. A comparison of the law relating to the inspector of boilers with the law relating to the division of labor and publicity will convince anybody that the position of inspector of boilers comes far closer to being a public office than does the so-called position of labor commissioner. The court in *State ex rel. Nagle v. Kelsey*, 55 Pac. (2d) 685, applied the test of a civil office laid down in *State ex rel. Barney v. Hawkins*, supra, and concluded that a Montana Relief Commissioner is a civil officer. We do not regard the case, however, as in point here so far as the facts are concerned.

It is our opinion, therefore, that the head of the division of labor and publicity is a mere employee, holding his position at the pleasure of the commissioner of agriculture, and that his appointment as such is not a violation of Section 7 of Article V of the Constitution.