

No. 155

OFFICERS AND OFFICES—BOARDS AND COMMISSIONS—STATE SOIL CONSERVATION COMMITTEE—LEGISLATURE

Held: A member of the State Legislature may not be appointed as a member of the State Soil Conservation Committee during the term for which he was elected as a member of the Legislature.

July 1, 1941.

Honorable Ole S. Gunderson
Member, House of Representatives
Power, Montana

Dear Mr. Gunderson:

I have your request for my opinion whether or not, as a member of the State Legislature, House of Representatives, you can be appointed as a member of the State Soil Conservation Committee. In answer to this question, I submit the following:

Section 7, Article V of the State Constitution 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 Supreme Court in the case of *State ex rel. Barney v. Hawkins*, et al., 79 Mont. 506, 257 Pac. 411, at page 528 of the Montana citation states:

"After an exhaustive examination of the authorities we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature:

- "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 addition, in this state, an officer must take and file an official oath, hold a commission or other written authority and give an official bond, if the latter be required by proper authority."

In the above case, the court held an employee of the State Board of Railroad Commissioners, appointed under its authority to employ other assistants and styled by it "auditor," who at the time of his appointment was a member of the legislature, does not hold a "civil office" under the state, and therefore his appointment does not violate the above provisions of the Constitution.

However, in the case of State ex rel. Nagle v. Kelsey, 102 Mont. 8, 55 Pac. (2nd) 685, the court held—under the rules laid down in the Hawkins case, supra—a member of the legislature (Senate) appointed as a member of the Montana Relief Commission was, as such member, a "civil officer," and therefore could not hold such position.

In that case, Kelsey was appointed under the provisions of Chapter 109, Laws of 1935, which, insofar as the rules of what constitutes a civil office are concerned, provided:

1. Appointment by governor for definite term,
2. Take and subscribe oath,
3. File a bond,
4. Per diem of \$10 per day and expenses, when engaged in business of commission,
5. Perform certain definite duties, and have defined powers and authority.

The court said:

"A careful review of the powers and authority of officials and boards existing in the state of Montana at this time fails to disclose any board or official vested with more sweeping and comprehensive powers than those conferred upon the Montana Relief Commission. So we say that unquestionably the individuals who constitute the membership of the commission are civil officers, not mere employees or even minor civil officers, but public officials, vested with large powers and comprehensive discretion."

State ex rel. Nagle v. Kelsey, 102 Mont. 6, 17, 18, 55 Pac. (2nd) 685.

The State Soil Conservation Committee was created under the provisions of Chapter 72, Laws of 1939. The committee is composed of certain elected officials acting ex-officio and "Two additional farmer members shall be chosen by the governor, one from each of a group of five (5) to be submitted by each of two (2) leading farm organizations." (Section 4-A)

The act provides "The appointed farmer members shall hold office for four (4) years and their term of office shall be concurrent with the governor;" they shall receive \$5.00 per day while on duty, and expenses, including traveling expenses. (Sec. 4-C)

Then applying the rules of the Hawkins case, the following requisites are present here:

1. The position is created by the legislature.

2. It possesses 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 are defined.
4. The duties are performed independently and without control of a superior power.
5. The office has permanency (four-year term).

It would therefore seem a member of the State Soil Conservation Committee is a "civil officer" within the rules of the Hawkins case, *supra*, and the prohibition of Section 7 of Article V of our Constitution. Therefore, a member of the legislature may not be appointed thereto.

It is hence my opinion a member of the State Legislature may not be appointed as a member of the State Soil Conservation Committee during the term for which he has been elected as such member of the Legislature.

Sincerely yours,

JOHN W. BONNER
Attorney General