

No. 437

QUO WARRANTO—INJUNCTION—OFFICE AND OFFICERS—BARBERS—BOARD OF BARBER EXAMINERS

Held: As a qualification for membership on the Board of Barber Examiners, each member shall be a practical barber who has followed the occupation of barber in the State of Montana for at least a period of five years immediately prior to his appointment.

Quo warranto is the proper legal action to determine the title to the office of a member of the Board of Barber Examiners who has not followed the occupation of barber in this state for at least five years immediately prior to his appointment to the Board.

June 27, 1942.

Mr. Michael Wagner
Secretary
State Board of Barber Examiners
409 Lewis Avenue
Billings, Montana

Dear Mr. Wagner:

You have presented to this office for an official opinion the following facts:

X has been appointed a member of the Board of Barber Examiners. He has not followed the occupation of barber in this state for a period of at least five years immediately prior to his appointment, as required by the law governing the qualifications of members of the Board.

Is X qualified to sit as a member of the Board?

What remedy exists at law to determine if X may sit as a member of the Board?

Section 3228.24 of the Revised Codes of Montana, 1935, provides:

"A board to be known as a board of barber examiners is established to consist of three (3) members appointed by the governor. Each member shall be a practical barber who has followed the occupation of barber in this state for at least five (5) years immediately prior to his appointment. The membership of the first board of barber examiners shall serve for three (3) years, two (2) years and one (1) year respectively as appointed, and members appointed thereafter shall serve for three (3) years. The governor may remove a member for cause."

The Montana Supreme Court has established the rule that—in construing legislative provisions—words used in the statute are to be construed according to their ordinary meaning. (*State v. Bowker*, 63 Mont. 1, 205 Pac. 961; *State ex rel. Kinz v. Moody*, 71 Mont. 473, 230 Pac. 575; *State ex rel. Dunn v. Ayers*, 112 Mont. 120, 113 Pac. (2nd) 785.) In the above quoted statute there is no ambiguity. The provisions are clear and specific.

I am of the opinion a person does not possess the qualifications specified by law as necessary for membership on the Board of Barber Examiners unless he is a practical barber who has followed the occupation of barber in the State of Montana for at least a period of five (5) years immediately prior to his appointment.

Assuming the facts above stated to be true, in answering your second question we must determine the status of X at the present time. X, appointed to the Board of Barber Examiners without the qualifications specified by the law in Montana, is a de facto officer.

"An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." 46 C. J. 1053.

"It is a general rule of law that an injunction will not be granted to prevent a party from exercising a public office pending proceedings to determine his right thereto." 46 C. J. 1007.

The Montana Supreme Court has had no occasion to enunciate the above rule, but it has been expressed as the law in several jurisdictions. (*Needland et al. v. State*, 39 Kan. 154, 18 Pac. 165; *Wilder v. Underwood*, 60 Kan. 859, 57 Pac. 965; *Barendt v. McCarthy*, 160 Cal. 680, 118 Pac. 228; *Cutten v. McCarthy*, 160 Cal. 809, 118 Pac. 233.)

Quo warranto has been stated to be the proper remedy to determine the title to an office. (*State ex rel. Casey v. Brewer*, 107 Mont. 550, 554, 580 Pac. (2nd) 49; and cases cited supra.)

Section 9576, Revised Codes of Montana, 1935, provides in part:

"A civil action may be brought in the name of the state:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise, within this state, or an office in a corporation created by the authority of this state; . . ."

Is a member of the Board of Barber Examiners a "holder of public office," as that term is used in Section 9576, *supra*?

In the case of *State ex rel Dunn v. Ayers*, 112 Mont. 120, 124, 113 Pac. (2nd) 785, 787, our court states the test to be applied in determining whether a particular person is a public officer or a mere employee:

"(1) It (the office) must be created by the Constitution or by the Legislature, or created by a municipal or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of the 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 office 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." (*State ex rel. Nagle v. Page*, *supra* (98 Mont. 14, 37 Pac. (2nd) 575)."

In the case of *State ex rel. Boyle v. Hall*, 53 Mont. 595, 600, 165 Pac. 757—a case involving a writ of quo warranto—the court defined the term "public office" as follows:

"The duties must be public in the sense that they comprehend the exercise of some portion of the sovereign power and authority of the state, either in making, administering or executing the laws. (Citing cases.) They must be public, also, in the sense that they imply the element or personal responsibility, as distinguished from the merely clerical acts of an agent or servant. (Citing cases.) In other words, a public officer is a part of the personal forces by which the state thinks, acts, determines and administers to the end that its Constitution may be effective and its law operative. (Citing case.) While the elements of fixed term and compensation cannot be said to be indispensable to a public office, they are indices the presence of which points to the existence of such a position, and the absence of which indicates to some extent the contrary conclusion."

The legislature has given to the Board of Barber Examiners (and the State Board of Health) the power to make and enforce all reasonable rules and regulations in regard to the sanitary operation and maintenance of barber shops so as to preserve the public health and prevent the spread of disease. (Section 3228.19, Revised Codes of Montana, 1935.) The Board conducts practical examinations of applicants for certificates of registration to practice as registered barbers and issues all certificates of registration. It may, in its discretion, appoint inspectors with authority to inspect barber shops. (Section 3228.27, Revised Codes of Montana, 1935.) The Board has the power to revoke or suspend certificates of registration under certain circumstances. (Section 3228.28, Revised Codes of Montana, 1935.) The term of members on the Board is definite and certain. (Section 3228.24, Revised Codes of Montana, 1935, quoted *supra*.) Compensation of members while attending Board meetings is provided by the law. (Section 3228.26, Revised Codes of Montana, 1935.)

I am of the opinion a member of the Board of Barber examiners is the holder of public office, as that term is used in Section 9576 of the Revised Codes of Montana, 1935, *supra*.

I have already stated above quo warranto is the proper remedy to try title to an office. It must be noted, however, the person against whom a quo warranto action is brought must "hold," or "exercise" the office. In other words he must have assumed office. (*Snyder v. Boulware*, 109 Mont. 427, 431, 96 Pac. (2nd) 913.)

It is therefore my opinion:

1. As a qualification for membership on the Board of Barber Examiners each member shall be a practical barber who has followed the occupation of barber in the State of Montana for at least a period of five (5) years immediately prior to his appointment.
2. Quo warranto is the proper legal action to determine the title to the office of a member of the Board of Barber Examiners who has not followed the occupation of barber in this state for at least five (5) years immediately prior to his appointment to the Board.

Sincerely yours,

HOWARD M. GULLICKSON
Attorney General