

Opinion No. 65

**Civil Office—Warden, State Prison—Governor, Appointing Power of
Held: The Governor may legally appoint an out-of-state resident as
warden of the Montana State Prison.**

Honorable J. Hugo Aronson
Governor
Helena, Montana

July 24, 1958

Dear Governor Aronson:

You have requested my official opinion in your letter of July 23, 1958, as follows:

"As you already know, the Montana Council on Corrections has submitted to me a list of three names for my final consideration for appointment as Warden of the Montana State Prison.

"All three of these men are out-of-state residents.

"In view of this, I am hereby requesting that you give me a direct, official, written opinion, as Attorney General of the State of Montana, as to whether I, as Governor of the State of Montana, can legally appoint an out-of-state resident as Warden of the Montana State Prison, if I should so desire.

"I would appreciate this official opinion as soon as possible so that there will be no unnecessary delay in making this important appointment."

The only constitutional or legislative provision which could conceivably prohibit the appointment of a non-resident as warden of the Montana State Prison is found in Section 7, Article IX of the Montana Constitution. Sec. 7, Art. IX, *supra*, provides:

"No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state at least one year next before his election or appointment."

If applicable, this provision would require that any person appointed Warden must have resided within the state for at least a year prior to his appointment.

It is well established that this provision does not apply to every position of public employment but only to "civil offices" or "military offices".

The words "civil office", in our Constitution mean any **public** office not of a military character. (*St. ex rel. Barney v. Hawkins*, 79 Mont. 506, 515, 257 Pac. 411.)

The test for determining whether an appointee is a public officer, holding a public office has been declared by the Supreme Court of Montana in two leading cases on this subject. (*Turnbull v. Brown*, 128 Mont. 254, 260, 273 Pac. (2d) 387.) These cases are: *State ex rel. Barney v. Hawkins*, *supra*, and *State ex rel. Nagle v. Page*, 98 Mont. 14, 37, Pac. (2d) 575.

In the case of *Barney v. Hawkins*, *supra*, after expressing the views of a host of authorities on this subject, the court at page 528 of 79 Mont. set forth this test:

"After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public em-

ployment, 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 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."

Of particular significance is the statement of the court in the Barney case that all five of the elements must be present in order to characterize a public office, none of the elements being dispensable in any case. (See, also, in this regard: *State ex rel. Nagle v. Page*, supra; *Tipton v. Sands*, 103 Mont. 1, 16, 60 Pac. (2d) 662; *State ex rel. James v. Aronson*,Mont....., 314 Pac. (2d) 849, 855; *Harrington v. State*, 200 Ala. 480, 76 So. 442, 423.)

An examination of the legislative authority for the creation of the office of Warden indicates that this position appears to fulfill four of the requirements set out in the case of *State ex rel. Barney v. Hawkins*, quoted above. The office is created by statute. (Section 80-705, RCM, 1947, as amended, Section 1, Chapter 61, Laws of 1957.) The powers conferred and duties to be discharged are defined by statute (Sections 80-706, 80-707, RCM, et seq.) The office has permanency and continuity over a period of time subject to the general control of a superior body, the state board of prison commissioners (Section 80-705, supra). So our examination of the office is concerned with the remaining element, the possession, by the office and officer, of a delegated portion of the sovereign power to be exercised for the benefit of the public. If this element is lacking the office of Warden of the state prison is not a public or civil office within the meaning of Sec. 7, Art. IX of the Montana Constitution.

The most recent case in Montana dealing with the element of delegated sovereign power is the case of *State ex rel. James v. Aronson*,Mont..... 314 Pac. (2d) 840, which gave constitutional validity to the Montana Legislative Council. In this case the question was raised whether the Council was a "civil office" to which members of the Legislature could not be appointed during the term for which they were elected. (Section 7, Article V, Montana Constitution.) The question, as in this case turned upon the existence of the element of delegated sovereign powers in the Council. In concluding that no such

sovereign power existed in the Council the court quoted with approval the definition of "sovereign power" set forth in the dissenting opinion to the case of *State ex rel. Mitchell v. Holmes*, 128 Mont. 275, 274 Pac. (2d) 611, dealing with the same subject, to the effect that:

"Sovereign power is defined as that power in a state to which none other is superior or equal, and which includes all the specific powers necessary to accomplish ends and purposes of government. *Black's Law Dictionary, Deluxe Ed., p. 1643.*"

The element of delegated sovereign power was earlier examined by the Montana court in the case of *State ex rel. Nagle v. Page*, 98 Mont. 14, 37 Pac. (2d) 575. The court in holding that a boiler inspector did not possess the element of delegated sovereign power stated, at page 21 of 98 Mont., that:

"It is conceded that prior to the amendment of 1917 a portion of the sovereign power of the state was delegated to the state boiler inspector, and that the inspection of boilers and the examination of applicants for licenses as engineers were an exercise of this power. **Sovereign power is exercised by that portion of the personal force of the state by which it thinks, acts, determines and administers, to the end that its Constitution may be effective and its laws operative.** (*State ex rel. Boyle v. Hall*, 53 Mont. 595, 165 Pac. 757.) The mere fact that the law prescribes certain duties to be performed by one occupying a public position is not determinative of the fact that a portion of the sovereign power has been delegated, as in the case of a public administrator. (*Wooten v. Smith*, 145 N.C. 476, 59 S.E. 649), or of a court reporter. (*Robertson v. Ellis County*, 38 Tex. Civ. Appeals 146, 84 S.W. 1097.) (Emphasis supplied.)

"In the case of *Harrington v. State*, 200 Ala. 480, 76 So. 422, a somewhat similar situation was involved as here. Under section 1467 of the Alabama Code of 1907, no person was permitted to hold an office who had not been a resident of the state for a specified time. A full-time county health officer was employed who was not a resident of the state. Section 700 of the Alabama Code provided that the county health board should be under the general supervision and control of the state board of health. By section 703 it was made the duty of the county board of health to perform a large number of enumerated duties. It was there held that such county health officer was not a public officer.

"In the case of *Middleton v. Miller County*, 134 Ark. 514, 204 S.W. 421, it was held that a county health officer was not a public officer but an employee, where he performed such duties 'as may be prescribed for him under the rules, regulations and requirements of the Arkansas State Board of Health'."

Similar to the view taken in *James v. Aronson*, *supra*, the court held that it was essential to the possession of delegated sovereign power

that no superior authority supervise the conduct or exercise a paramount authority or discretion in the administration of the office in question when, at page 22 of 98 Mont. it was said:

"In the following cases it was held that persons who performed certain duties for the benefit of the public, but over whom there was a superior officer who supervised their conduct and exercised discretion in administering the affairs of the office, were employees and not public officers: *Johnson v. State ex rel. Maxcy*, 99 Fla. 1311, 128 So. 853; *Jagger v. Green*, 90 Kan. 153, 133 Pac. 174; *In re Nagler*, 194 Wis. 437, 216 N. W. 493; *Burrell v. Bridgeport*, 96 Conn. 555, 114 Atl. 679; *La Chicotte v. City of New York*, 166 App. Div. 279, 151 N.Y. Supp. 566; *Devlin v. City of New York*, 149 N.Y. Supp. 1061."

In this connection the Montana Supreme Court in the case of *Aleksich v. Industrial Accident Fund*, 116 Mont. 127, 132, 151 Pac. (2d) 1016, in characterizing public officers reflected the same opinion when, at page 132 of 116 Mont., it was said:

"They are neither under the control, direction or command of a superior, but, on the contrary are invested with a portion of the sovereign functions of government to be exercised for the benefit of the public."

Under the rule formulated in these cases, in order to possess the element of delegated sovereign power the office in question must be the force or authority by which the state thinks, acts, determines and administers to the end that the laws of Montana relating to the conduct of the state prison may be made effective and operative. And, coexistent with this, the office in question can be subject to no superior authority which can divest this office of the power to exercise the delegated sovereign power with the exception of the legislature itself.

For the purpose of making the determination whether the office of warden of the state prison possesses a portion of the delegated sovereign power with respect to the conduct of the state prison it is necessary to examine the statutes through which the legislature has delegated its power in this regard. (*State ex rel. Nagle v. Kelsey*, 102 Mont. 8, 14, 55 Pac. (2d) 685; Section 20, Article VII, Montana Constitution.)

In response to the authority granted to the legislature there have been enacted several statutes under Chapter 7, of Title 80, RCM, 1947, relating to the conduct of the state prison. To the board of state prison commissioners has been delegated the authority of:

". . . full control of the state prison ground, buildings, prison labor and prison property; . . . (the) . . . power to purchase or cause to be purchased, all needed commissary supplies, all raw material and tools necessary for any manufacturing purposes carried on at said prison; and to sell all manufactured articles

and collect the money for the same. The board has power to make all needful rules and regulations in regard to the management of the prison, the discipline of the convicts and the conduct and compensation of the guards and assistants." (Section 80-702, RCM, 1947.)

To the office of warden of the state prison has been delegated the power:

". . . to appoint and remove all necessary guards and assistants, in and about the prison, subject to the approval of the board as to the number appointed." (Section 80-706, RCM, 1947.)

An additional power delegated to the office of warden is the power to superintend prison discipline and prison labor, pursuant to those regulations adopted by the board of prison commissioners under the authority of Section 80-702, *supra*. (Section 80-707, RCM, 1947.)

An examination of Sections 80-716, RCM, 1947, through 80-745, RCM, 1947, reveals that the **state board of prison commissioners** is the office which possesses the **sole and exclusive** authority to: advertise for the furnishing of supplies (Sec. 80-718, RCM, 1947); control the labor of convicts (Sec. 80-719, RCM, 1947); regulate the employment of convicts (Sec. 80-720, RCM, 1947); sell the hides that are tanned or treated in the prison tannery (Sec. 80-728, RCM, 1947); use the labor of male prisoners for construction or repair of buildings at the prison (Sec. 80-731, RCM, 1947); receive all sums that are due the state for any manufactured article sold, or labor performed, either within or without the prison walls and pay the same into the state treasury (Sec. 80-734, RCM, 1947); enter into contracts with county commissioners for additional jail facilities for the confinement of prisoners (Sec. 80-743, RCM, 1947); remove a prisoner from the prison to the insane asylum (Sec. 80-745, RCM, 1947).

In comparison, the authority granted the office of warden in connection with the conduct of the prison is to be exercised subject to the board of prison commissioners as to "consent" (Sec. 80-724, RCM, 1947); "control" (Section 80-730, RCM, 1947); "supervision" (Sec. 80-722, RCM, 1947); "supervision and control" (Sec. 80-730, RCM, 1947); "direction" (Sec. 80-726 and 80-729, RCM, 1947); and "judgment" (Sec. 80-723, RCM, 1947).

It is clear from the statutes heretofore reviewed, that the power to supervise the conduct of the office of warden is vested in the board of state prison commissioners. The authority to exercise discretion and formulate the regulations and policy relating to the prison is in the board. The control over the property, buildings, inmates, products and purchases of the prison is in the board. This can mean but one thing. The delegated sovereign power is in the board of state prison commissioners. The board is the officer, under these statutes, who administers the law, and exercises discretion and independence of action (State *ex rel. Nagle v. Page*, 98 Mont. 14, 22, 37 Pac. (2d) 575)

and the sovereign power in regard to the conduct of the state prison does not reside in the office of warden. Without this power the office is an agency of the state and not a public or "civil office" within the meaning of Section 7, Article IX of the Montana Constitution. (*Tipton v. Sands*, 103 Mont. 1, 16, 60 Pac. (2d) 662; *Gagnon v. Jones et al.* 103 Mont. 365, 368, 62 Pac. (2d) 683; *State ex rel. Nagle v. Page*, supra.)

The cases of *State ex rel. Stephens v. District Court*, 43 Mont. 571 and *Stephens v. Conley*, 48 Mont. 352, 363, 138 Pac. 189, in which the warden of the state prison was held to be a public officer within the meaning of the provisions of Section 93-2902, RCM, 1947, relating to the venue of actions against a public officer; and relating to actions against an officer in his official as opposed to personal capacity, are clearly distinguishable. In both cases the term "public officer" is used in the sense of an employee of the state exercising duties in connection with his position of employment. (See *Harrington v. State*, 200 Ala. 480, 76 So. 422, 423.)

Since the office of warden is not a "civil office" within the meaning of Section 7, Article IX of the Montana Constitution, the restrictions on the right to hold office contained therein do not apply. It is therefore my opinion that the governor may legally appoint an out-of-state resident as warden of the Montana State Prison.

Very truly yours,
FORREST H. ANDERSON
Attorney General