

**Constitution. Disqualification of Legislative Member to Hold Public Office.**

Under the provisions of the Constitution a member of the legislature cannot be appointed to any other public office during the time for which he shall have been elected, and this disability does not cease until the expiration of the full period of time for which he was elected.

Helena, Montana, March 13, 1907.

Mr. Otto Schoenfeldt,  
Secretary of the Bureau of Child and Animal Protection,  
Helena, Montana.

Dear Sir:—

This morning while in consultation with me you propounded the question as to whether or not you could, consistent with your oath of office, appoint a member of the Tenth Legislative Assembly as one of your deputies; and further, whether such person so appointed could legally act as a deputy. And you requested that I reduce to writing my views upon this subject, in the form of a written opinion, and I accordingly now address you.

Section 2 of Article V of our State Constitution provides:

“Senators shall be elected for the term of four years, and representatives for a term of two years, except as otherwise provided in this Constitution.”

And Section 7 of the same Article 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.”

It will be seen from the sections of the Constitution above quoted that a senator is elected for a term of four years, and that a Representative is elected for a term of two years, and during such term they are disqualified to be appointed to any civil office under the State Government. The language of the Constitution upon this subject is very clear and plain and does not necessitate interpretation.

The Supreme Court of Minnesota has decided the question which

you present, under a constitutional provision the same as our own, and under facts quite similar to those presented by you. In Minnesota it appeared that one John B. Sutton was elected as a Representative in the Legislative Assembly in the fall of 1894, and that thereafter he duly and regularly qualified and entered upon the discharge of his duties as such Representative at the commencement of the session in January, 1895, and served in that capacity until about the close of the session, when he resigned his office as such member, and thereafter he was appointed to the position of a Boiler Inspector for one of the Districts in the State, which office had been created prior to his election as a member of the Legislature. Subsequently quo warranto proceedings were instituted by the Attorney General of the State testing the right and qualification of said Sutton to hold such office. The Supreme Court ousted him from the office, and in deciding the case said in part:

“There can be no serious question raised as to the right of a member of the Legislature to resign his office, but if he does so it cannot enlarge his right to hold another office in violation of this constitutional prohibition. The disability only ceases at the expiration of the full period of time for which he was elected.”

See also *Ellis vs. Lennon*, 49 Mich. 310.

In the case you present it appears that the office which you desire to fill by appointment was actually created, and the salary fixed, by the Legislative Assembly of which the applicant was a member, and therefore a stronger case is presented than that which arose in Minnesota, and the applicability and reason for the constitutional prohibition is made more apparent.

Therefore, I am of the opinion that were you to appoint a member of the Tenth Legislative Assembly you would not only violate your oath of office, but the official actions of such deputy would be open to question respecting his right, power and authority to act, and he could without difficulty be ousted from office; the office involving, as it does, more than mere ministerial or clerical duties.

Respectfully submitted,

ALBERT J. GALEN,

Attorney General.