

State Council of Defense—Members of State Council of Defense—Eligibility to Appointment to the State Council of Defense.

Members of the House or Senate of the Fifteenth Legislative Assembly are not eligible to appointment under the Council of Defense Act.

March 2nd, 1918.

Hon. S. V. Stewart,
Governor of Montana,
Capitol Building.

Dear Sir:

I am in receipt of your letter of recent date submitting the following:

"In view of the fact that two members of the old State Council of Defense were members of the Legislative Assembly of the State of Montana, and in view of the further fact that new appointments must be made under the State Council of Defense Law now in force, I respectfully ask for an interpretation of the law as to whether or not members of the House or Senate will be eligible to appointment under the new Act."

Section 7, Art. V of the Constitution of the State 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 has uniformly been held by the courts that it is contrary to the policy of the law for a person to use his official authority to place himself in office and that a person is not eligible to appointment to an office created by a body of which he was a member at the time such office was created.

29 Cyc. 1381.

It has often been held that members of legislative bodies are ineligible to offices created by such bodies."

23 Ency. of Law, 338.

Montgomery vs. State 107 Ala. 372.

People vs. Curtis, 1 Idaho 753.

Shelby vs. Alcorn, 36 Miss. 273.

State vs. Valle, 41 Mo. 29;

State vs. Boyd, 21 Wis. 208.

The constitution divides the powers of the government of the state into three departments, the legislative, executive, "and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted." Art IV, 31.

It was said by the Supreme Court in the case of *State ex rel. Schneider vs. Cunningham*, 39 Mont. at page 168, referring to this provision of the constitution.

"It is within the knowledge of every intelligent man that its purpose is to constitute each department an exclusive trustee of the power vested in it, accountable to the people alone for its faithful exercise, so that each man act as a check upon the other, and thus may be prevented the tyranny and oppression which would be the inevitable result of a lodgment of all power in the hands of one body. It is incumbent upon each department to assert and exercise all its power when public necessity requires it to do so; otherwise, it is recreant to the trust reposed in it by the people. It is equally incumbent upon it to refrain from asserting a power that does not belong to it; for this is equally a violation of the people's confidence. Indeed the distinction goes so far as to require each department to refrain from in any way impeding the exercise of the proper functions belonging to either of the departments."

The functions of the State Council of Defense pertain to the administrative department of the State government in which a member of the legislative branch is forbidden by Art. IV, Sec. 1 to participate.

Gibson vs. Kay 137, Pac. (Or) 864.

From the foregoing, I am of the opinion, that members of the House or Senate of the Fifteenth Legislative Assembly are not eligible to appointment under the Council of Defense Act.

Respectfully,

S. C. FORD, Attorney General.