

**Schools, Who May Be Trustee—Member of Legislature
May Not Be Member of School Board.**

A member of the State Legislature of Montana is not eligible to hold the office of trustee of a county high school.

April 7, 1920.

Mr. Stewart McConochie,
County Attorney of Fergus Co.,
Lewistown, Montana.

Dear Sir:

You have submitted to this office the following question:

“Is a member of the State Legislature of Montana eligible to hold the office of trustee of Fergus County High School Board?”

You have asked first, whether or not there would be any incompatibility in the two offices, and second, whether under the provisions of Article V., Section 7, the holding of the aforesaid office would be illegal.

“An office is said to be incompatible when one has the power of removal over the other.”
Attorney General vs. Counsel, 112 Mich. 145, 29 Cyc. 1382.

“When one is in any way subordinate to the other or when one has power or supervision over the other, or when the nature and duties of the two offices are such as to render it improper from consideration of public policy for one person to retain both offices.”

Meecham Public Officers, Section 422, cited in *State ex rel Klick vs. Wittmar*, 50 Mont. 25.

The Act creating the County High School, contained in Chapter 21 of Chapter 76 of the Session Laws of 1913, and may be adopted by any county upon petition to the County Commissioners who call an election at which the question is submitted along with the place of its location.

The Board consists of seven members, six of whom are appointed by the Board of County Commissioners, and the remaining member being the County Superintendent of Schools. The trustees are required to hold four regular meetings per year on the third Saturdays of April, July, October and January, and serve without compensation. It would appear that it would not be physically impossible for one person to hold the two offices nor am I able to see under any of the foregoing rules how the two offices would be incompatible. However, Section 7 of Article V. of the 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."

The question therefore rises: is this a civil office under the State?

In *State ex rel Boyle, vs. Hall*, 53 Mont, page 601, our Supreme Court defined a public office as "a part of the force by which the State thinks, acts, determines and administers to the end that its constitution may be effective and its laws operative." And further, "that while the elements of fixed term and compensation cannot be said to be indispensable to the public office, they are indices, the presence of which points to the existence of such a position."

"Civil officers within the meaning of the constitutional provision that all civil officers shall be liable to impeachment for misdemeanor in office, must be understood to mean public officers holding civil offices of any grade of honor, trust or profit under the State." *State vs. O'Driscoll*, (S. C.) 3rd Brev. 526. "They are persons in whom a part of the sovereignty is vested or imposed, to be exercised by the individuals so entrusted with it for the public good." *Board of County School Commissioners of Worcester vs. Goldsborgh*, 44 Atl. 1055.

While many constitutions contain similar provisions to Section 7 of Article V., the wording in each case is somewhat different. In the case of *Shelby vs. Elkorn*, 36 Miss. 273, construing a constitutional provision similar to ours, the Court said:

"The powers vested in the Government of the State of Mississippi are either legislative, judicial or executive, and these respective branches of powers have been committed to separate bodies of magistracy. It follows, hence, that whether an office has been created by the constitution itself or by statute enacted pursuant to its provisions the incumbent as a component member of one of the bodies of the magistracy, is vested with a portion of the power of the government, whether the portion of power of government which he is thus entitled to exercise is legislative, judicial or executive in character. It is, therefore, true

as contended by counsel that the words 'civil office under the State' contained in the Article of the Constitution above referred to import an office in which is reposed some portion of the sovereign power of the State and of necessity having some connection with the legislative, judicial or executive departments of the Government."

Montgomery vs. State of Alabama, 18 Southern 159.

In State vs. Valley, 41 Mo. 31, it is said:

"In a certain popular acceptation the words 'civil office under this State' might possibly be interpreted to mean State officers in the sense of participating strictly in the administration of the State Government as such, but they are none the less 'civil offices under this State, because their functions are confined to the local administration."

It was held in Montgomery vs. State, Suprs. that the office of Judge of the Police Court was a civil office under the State within the meaning of a similar provision of the Constitution.

In Florida their constitutional provision is similar to ours except that it adds "election during the time for which he was elected to any civil office under the constitution of this state created or the emoluments thereof shall have been increased during such time." In re members of the Legislature, Fla. 39 So. page 63; the Governor submitted to the Supreme Court the following question;

"Whether under the provisions of their constitution a Senator or member of the House of Representatives, during the time for which he was elected may be appointed by the Governor a member of a Board of Control, created by law during such time, whose term of office is different and whose powers and duties under the law consist in part of locating, controlling and managing state institutions of learning, and who are paid only actual expenses while in performance of their duties?"

The Court in answering this question said, after quoting the constitution provision:

"The purpose of this provision of the organic law is to put it beyond the power of the legislative branch of the government to create official positions to be filled by its members; thereby removing the temptation of an improvident or unwise creation of offices not expressly provided for by constitution. Under its provisions we think that it is clear that no member of either House of the Legislature is eligible to the incumbency of any civil office of this state that is created during any part of the time for which such member was elected, and that such ineligibility continues during the entire term for which such member was elected, and that such member cannot render himself eligible during such time by resigning his legislative membership. Our opinion is that you, as Governor, cannot constitutionally ap-

point any member of either House of the present Legislative branch of the Government to membership on such Board of Control."

State ex rel Childs vs. Sutton, 63 Minn. 30 L. R. A. 630.

The provisions of our constitution are not limited as in the case of the Florida Constitution, to offices created during the session of the Legislature, of which he was a member, but covers any civil office under the state without regard to the time of its creation. Our Supreme Court has never passed directly upon this question, and while disqualifications for holding office will not be extended to persons who do not come clearly within the cope of the statute of the constitutional provision making such disqualification (29 Cyc. 1380), I am inclined to view that a member of the Legislature is not eligible to the office of trustee of the County High School.

Respectfully,

S. C. FORD,

Attorney General.