

**Opinion No. 72.**

**Public Officers—What are Probation  
Officers—Salary—Increase in.**

HELD: Probation officers are public officers, and their salary cannot be increased during their tenure of office.

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March 30, 1937.

Board of County Commissioners  
Silver Bow County  
Butte, Montana  
Attention: Emmett P. O'Brien, Chairman

Gentlemen:

You have requested opinion as to whether or not the Probation officers

now serving are entitled to the increased salary provided by Chapter 117 of the 1937 Session Laws, in view of Article V, Section 31 of the State Constitution.

"Except as otherwise provided in this constitution, no law shall extend the term of any public officer or increase or diminish his salary or emolument after his election or appointment."

The question to be decided is whether or not probation officers are public officers. In the case of *State ex rel Barney v. Hawkins*, 79 Mont. 506, the Court lays down the following rules, in order to determine whether an office is a public office, or an officer a public officer.

"(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 officer or body; (5) it must have permanency and continuity and not be only temporary or occasional."

In determining whether or not Probation Officers are "public officers," under the test laid down by our Supreme Court in the case cited, we must look at the statutes relating to such officers. Section 12288, R. C. M., 1935, provides for the appointment, salary and duties. Section 12301, provides for the furnishing of a bond. The provisions of these sections clearly meet the requirements of a public officer as laid down in the cited case, viz, the office is created by legislative enactment; the officer possesses a delegation of the sovereign power ex-

ercised for the benefit of the public; the powers conferred and duties to be discharged are clearly defined by the legislature; the duties are performed independently, subject to a supervisory control by the appointing power; the office has permanency and continuity.

46 Corpus Juris, at page 922 lays down the following rule:

"Officer, in the sense of public office, may be defined broadly as a public station or employment conferred by the appointment of the government, or more precisely as the right, authority and duty created and conferred by law, the tenure of which is not transient, occasional or incidental, by which for a given period the individual is vested with power to perform a public function for the benefit of the public."

See also, *State ex rel Quintin v. Edwards*, 38 Mont. 250. In the case of *Coulter v. Poole* (Calif.), 201 Pac. 120, at page 123, the court says:

"The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and intrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting."

This new act increasing the salary of the probation officer became effective March 15, 1937, and any probation officer appointed prior to the time said new law went into effect cannot have his salary increased. To do so would be in violation of the constitutional provision as heretofore quoted. However, these probation officers hold office for a term without a tenure of time, subject to the pleasure of the appointing board. While it is the opinion of this office that probation officers are public officers and come within the provisions of article 5, section 31, yet the Court could at any time at its own pleasure reappoint these probation officers or give these probation officers a new appointment, and they would be entitled to the increased salary under such new ap-

pointment, even tho the new appointment was made within the present fiscal year. Therefore, it is my opinion that the probaton officers are not entitled under an appointment made prior to March 15, to the additional salary, but that the Courts or the appointing board may extend to them new appointments if they desire, and under these new appointments the probation officers would be entitled to the increased salary.