

No. 494

**COUNTY AUDITOR, term of office of—CONSTITUTION,
amendments to the—OFFICES AND OFFICERS**

Held: The adoption of the proposed amendment to Section 6, Article XVI of the Constitution of the State of Montana will not itself make the term of office of County Auditor four years in length. An act of the legislature will be necessary to extend the term of such office from two to four years.

September 29, 1942.

Mr. Frank J. Roe
County Attorney
Silver-Bow County
Butte, Montana

Dear Mr. Roe:

You have submitted to this office the question:

“In the event of the adoption of the Constitutional Amendment proposed by Chapter 116 of the Laws of 1941, will the term of County Auditors elected in November, 1942, be extended to four years?”

Section 4 of Chapter 116 of the Laws of 1941 covers the proposed amendment as applied to the office of county auditor, and provides:

“That Section 6 of Article XVI of the Constitution of the State of Montana, be, and the same is hereby amended so as to read as follows:

“Section 6. The legislative assembly may provide for the election or appointment of such other county, township, precinct and municipal officers as public convenience may require and their terms of office shall be as prescribed by law, not in any case to exceed four (4) years, except as in the Constitution otherwise provided.”

The only change in Section 6 of Article XVI contemplated in the proposed amendment is in the term of office which was increased to four years from two years.

It is to be noted the proposed amendment does not specifically mention the office of county auditor.

In the case of *State ex rel. McGinnis v. Dickinson*, 26 Mont. 391, 68 Pac. 468, the Supreme Court of Montana said:

"The office of county auditor is not expressly provided for in the constitution; that instrument is silent upon the subject. (Section 5 of Article XVI) If authority be requisite for the creation of the office, such authority may be found in Section 6 of Article XVI, which ordains that 'the legislative assembly may provide the election or appointment of such other county . . . officers as public convenience may require and their terms of office shall be prescribed by law . . .'

"That the legislative assembly, having created the office, had the authority to abolish it or to restrict it to counties of a certain class, must be conceded."

From the above quoted section of the Constitution and the interpretation by the Supreme Court it is apparent the office of county auditor is not created by the Constitution, but is dependent for its existence upon the act of the legislature. The proposed amendment is not self-executing and does not establish the office or define its term, but is permissive in that the legislature may provide for the office and its term "not to exceed four (4) years" as a maximum length of time.

The proposed amendment to Section 6 of Article XVI is to be distinguished from the Amendment to Section 5 of Article XVI. The amendment to Section 6 was self-executing in that specific offices were named and their term extended from two to four years.

The case of *State ex rel. O'Connell v. Duncan*, 108 Mont. 141, 88 Pac. (2d) 73, held the amendment to the Section 5 of Article XVI was self-executing and the sheriff who was elected at the same general election the amendment was adopted was entitled to a four year term. The court in considering the question as to whether the amendment was self-executing applied the test adopted in an earlier Montana case:

"In *State ex rel. Bennett v. State Board of Examiners*, 40 Mont. 59, 104 Pac. 1055, it was said: 'A constitutional provision may be said to be self-executing if it supplied a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enjoyed and protected or, the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.'

The proposed amendment does not define "a sufficient rule by which the right given may be enjoyed" as it merely states, "The legislative assembly may provide for such other county . . . officers as public convenience may require." We must look to the codes for the statutes creating and defining the term of the office of county auditor.

Section 4725, Revised Codes of Montana, 1935, provides one of the officers of a county shall be "a county auditor, except in the sixth, seventh, and eighth class counties."

Section 4728, Revised Codes of Montana, 1935, as amended by Chapter 134, Laws of 1939, provides in part:

"The county attorneys, county auditors, and all elective township officers must be elected at each general election as now provided by law."

Section 4825, Revised Codes of Montana, 1935, provides:

"There shall be elected in and for each county of the class named in the preceding section, at the general election to be held in November, 1892, and quadrennially thereafter, some male person to serve as county auditor of the county for which he shall be elected for the term of four years, and until his successor shall be elected and qualified, the term to begin on the first Monday in January succeeding his election."

However, Section 6 of Article XVI of the Constitution provided that terms of office of "such other county offices" shall not exceed two years;

and this section limited the provisions of Section 4825, although Section 4825 had never been specifically held unconstitutional.

There is a conflict between the terms of Section 4728, Revised Codes of Montana, 1935, before amendment, and the terms of Section 4825, Revised Codes of Montana, 1935. Section 4728, before amendment, provided:

“All elective county and township officers, except county commissioners, must be elected at the general election to be held in the year 1894, and at the general election to be held every second year thereafter.”

It is not necessary to determine this conflict, however, because Section 4728, Revised Codes of Montana, 1935, was amended by Chapter 134, Laws of 1939, which impliedly amended Section 4825, as it contained the phrase “as now provided by law.”

The fact that county attorneys and county auditors are considered together in this amendment indicates that “as now provided by law” was intended to mean that both Sections 4728 and 4825 were to be construed in the light of the constitution. As county attorneys, at the time of the amendment were specifically limited to a two year term and so—auditors being grouped with county attorneys—Section 4825 was impliedly repealed insofar as it provided a four year term for auditors.

It is my opinion that, if the proposed amendment to Section 6, Article XVI, of the Constitution of the State of Montana is adopted by the people at the election held in November, 1942, the term of the office of county auditor will not be extended because of the adoption of such amendment to four years. It will take an act of the legislature to create a four year term for the office of county auditor.

Sincerely yours,

R. V. BOTTOMLY
Attorney General