

Opinion No. 137**Nominations — Election — Offices,
Nomination to More Than One
Justice of the Peace—Public
Administrator**

Held: One person cannot accept the nomination to more than one office and the offices of Justice of the Peace and Public Administrator are incompatible and may not be held by one person.

August 31, 1948

Mr. E. Gardner Brownlee
County Attorney
Ravalli County
Hamilton, Montana

Dear Mr. Brownlee:

You have requested my opinion on "whether or not a man can be elected as Justice of the Peace for the Township and also Public Administrator for the County."

You state a candidate for nomination to the office of Justice of the Peace at the primary was successful in being nominated as candidate for that office and also was nominated by write-in votes for the office of Public Administrator.

There are several points involved in this question. In order to be nominated by write-in votes, the condition of Section 640, Revised Codes of Montana, 1935, as amended by Chapter 27, Laws of 1945, must be met.

That section provides, in part:

"Any person receiving the nomination by havng his name written in on the primary ballot, and desiring to accept such nomination, shall file with the secretary of state, county clerk, or city clerk, a written declaration indicating his acceptance of said nomination within ten (10) days after the election at which he receives such nomination, and at the same time he shall pay to the officer with whom such declaration of acceptance is filed the fee above provided for filing a primary nominating petition for such office, provided that such person must receive at least five per cent (5%) of the votes cast for such office at the last preceding general election."

To be nominated by write-in votes and qualify so his name may appear on the ballot, the requirements enumerated are:

1. Such candidate must receive at least five per cent (5%) of the votes cast for the same office in the last preceding general election at which the office was filled.

2. Such candidate must file a written declaration with the county clerk within ten (10) days after the election, indicating his acceptance of said nomination. (State ex rel. Wulf v. McGrath, 111 Mont. 96, 106 Pac. (2d) 183; State ex rel. Wilkinson v. McGrath, 111 Mont. 102, 106 Pac. (2d) 186).

3. Such candidate must, at the time of filing his acceptance, pay the filing fee required by Section 640, Revised Codes of Montana, 1935.

The last sentence provdies that a candidate may not have his name printed on the ballot unless he has complied with all the provisions above listed. Thus, failure to receive the requisite number of votes, failure to file the acceptance within the period allowed, or failure to pay the filing fee at the time of filing the acceptance would preclude said person, from having his name printed on the official ballot at the general election.

Section 616, Revised Codes of Montana, 1935, provides:

"No certificate of nomination must contain the name of more than one candidate for each office to be filled. No person must join in nominating more than one person for each office to be filled, and no person must accept a nomination to more than one office. (Emphasis supplied).

This language is plain and unambiguous. This section alone would prevent any person from appearing on the official ballot as a candidate for more than one office.

Your ultimate question is whether or not a person may be elected as Justice of the Peace and Public Administrator at one and the same election and hold the two offices simultaneously.

There is no general statutory prohibition against the holding of two offices by one person. However, there are certain special prohibitions.

The Justice of the Peace is a judicial officer and is properly a part of the Judicial Department of the state government as set out in Article VIII, Section 1, Constitution of Montana, and the duties of the Justice of the Peace require the exercise of judicial powers.

Article VIII, Section 1, provides:

"The judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, and such other inferior courts as the legis-

lative assembly may establish in any incorporated city or town."

The Public Administrator is an officer of the executive department of the government.

A Justice of the Peace is a "person . . . charged with the exercise of powers properly belonging to" the judicial department of the state government, and as such comes within the prohibition of Article IV, Section 1, as the Constitution of Montana, which provides:

"The powers of the government of this state are divided into three distinct departments: The legislative, executive, and judicial, 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" (Emphasis supplied).

The prohibition is directed to "person or collection of persons" and prohibits the exercise of the powers of more than one department by any such "person or collection of persons." This question was dealt with in *State ex rel. Schneider v. Cunningham*, 39 Mont. 165, 168, 101 Pac. 962, where in the Court said:

"The Constitution of this state divides the powers of government into three distinct departments—the legislative, executive and judicial. (Article IV, section 1). It then provides that 'no person or collection or persons charged with the exercise of powers belonging to one of these departments shall exercise any powers properly belonging to either of the others;' the only exception being where some provision is found in the Constitution expressly providing otherwise. It is not our purpose to discuss this provision, nor to attempt to define with exactness the limitations imposed by it. 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 may act as a check upon the other,

and thus may be prevented the tyranny and oppression which would be the inevitable result of a lodgement of all power in the hands of one body. It is incumbent upon each department to assert and exercise all its power whenever 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 other departments. This statement applies with special force to the judicial department, since it is the body upon which is cast the duty of deciding finally in particular cases whether there has been excess on the part of the executive or legislative departments calling for restraint or defect requiring compulsory action in order to supply it."

The Montana Supreme Court noted the separation of the county judicial offices and county executive offices in *State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 586, 144 Pac. 162, where in it said, "It will be noted that the offices of clerk of the district court, county attorney and justice of the peace are enumerated among judicial offices, and are to be excluded from the enumeration of the offices referred to in section 5 of Article XVI of the Constitution, supra."

Thus it will be seen, the holding of an office of the executive department of government by a person holding an office of the judicial department of government is expressly prohibited by Article IV, Section I, Constitution of Montana.

Two offices may not be held by one person when the offices are incompatible. Black's Law Dictionary, Third Edition, page 945, defines incompatibility in public offices as follows:

"Public offices are 'incompatible' when their functions are inconsistent, their performance resulting in

antagonism and a conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both. (Citing cases.)”

The Montana Court, in the case of State ex rel. Klick v. Wittmer, 50 Mont. 22, 24, 144 Pac. 648, said:

“Offices are ‘incompatible’ when one has power of removal over the other, (citing cases), when one is in any way subordinate to the other (citing cases), when one has power of supervision over the other (citing cases), or when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both (citing cases).”

The duties of the Public Administrator are set out in Chapter 107, Revised Codes of Montana, 1935. Section 9996 of said Chapter, provides:

“The public administrator must institute all actions and prosecutions necessary to recover the property, debts, papers, or other estate of the decedent.”

Thus it may be necessary for the Public Administrator to bring and prosecute actions in the Justice Court in complying with Section 9996.

This question is in point with that presented in Opinion No. 378, Volume 19, Report and Official Opinions of the Attorney General wherein the offices of Justice of the Peace and town police officer were held incompatible for the same reason as herein stated with relation to the offices of Justice of the Peace and Public Administrator.

Therefore, it is my opinion one person cannot accept the nomination to more than one office and the offices of Justice of the Peace and Public Administrator are incompatible and may not be held by one person.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General