

Opinion No. 26**Office and Officers—Legislature—State Liquor Inspector—Civil Office.****Held: A State Senator or State Representative may be employed by the State Liquor Control Board as a Liquor Inspector. Such appointment does not violate Section 7, Article V, of the Montana Constitution, as a Liquor Inspector is not a civil officer within the meaning of the above mentioned constitutional provision.**

June 2nd, 1949.

Honorable John W. Bonner
Governor of the State of Montana
Helena, Montana

Dear Governor Bonner:

You have requested an opinion from this office on the following question: "May a Senator or Representative be employed as a Liquor Inspector by the Montana State Liquor Control Board?" In answer to this question, I submit the following:

Section 7, Article V of the Montana 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: 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."

The question to be determined then is this: Is the position of Liquor Inspector under the Montana Liquor Control Board a civil office?

In *State ex rel. Barney v. Hawkins, et al.*, 79 Mont. 506, 528; 257 Pac. 411, the Supreme Court of Montana states:

"After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public employment, in order to make it a public office of civil nature; (1) It must be created by the constitution or by the legislature or 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 power 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 office or body; (5) It must have some permanency and continuity and not be only temporary or occasional. In addition in this State an officer must take and file an official oath, hold a commission or other written authority and give an official bond, if the latter be required by proper authority."

The decision of the Court in the above case was to the effect that the employment of an "auditor" appointed by the State Board of Railroad Commission under its authority to employ other assistants did not create a "civil office" under the State and therefore the appointment does not violate the above provisions of the constitution, although the employee was a member of the Legislature.

Following the above mentioned case the Supreme Court, in *State ex rel. Nagle v. Page*, 98 Mont. 14; 37 Pac. (2d) 575, had before it the question whether or not a State Senator could hold the office of State Boiler Inspector. The Court held that under the five elements as set forth in *State ex rel. Barney v. Hawkins et al.*, *supra*, the State Boiler Inspector was not a **public officer** but a mere employee of the State, and the appointment of a Senator thereto did not violate Section 7, Article V of the State Constitution.

However, in the case of *State ex rel. Nagle v. Kelsey*, 102 Mont. 8, 55 Pac. (2d) 685, the Montana Supreme Court held under the rules as

laid down in the Hawkins case, *supra*—A State Senator appointed as a member of the Montana Relief Commission was, as such member, a "civil officer" and therefore could not hold such a position as it violated the provisions of Section 7, Article 5 of the State Constitution. The Court held in this case at page 17 of the Montana citation:

"A careful review of the powers and authority of officials and boards existing in the State of Montana at this time fails to disclose any board or official vested with more sweeping and comprehensive powers than those conferred upon the Montana Relief Commission. So we say that unquestionably the individuals who constitute the membership of the commission are civil officers, not mere State employees, or even minor civil officers, but public officials, invested with large powers and comprehensive discretion. A member of the commission is a civil officer of the State of Montana, and as such is subject to all of the provisions of the Constitutions and Laws of the State applicable thereto."

Under the State Liquor Control Act, Liquor Inspectors are appointed by the Liquor Board under the authority of Section 2815.150, Revised Codes of Montana, 1935, which is as follows:

"The Board may appoint one or more inspectors and prosecuting officers, who, under its discretion, shall perform such duties as it may require, and who shall be paid such salaries, fees and expenses as the said Board may fix."

Section 2815.67, Revised Codes of Montana, 1935, provides for the functions, powers and duties of the State Liquor Board, sub-section (g) of the above section provides that the Board shall have the duties and powers:

"To appoint vendors, and also every officer, inspector, clerk or other employee, required for the operation or carrying out of this act, and to dismiss the same, fix their salaries or remuneration, assign them their title, define them their respective duties and powers, and to engage the service of experts and persons engaged in the practice of a profession, if deemed expedient."

Therefore, in applying the rules of the Hawkins case, *supra*., to determine whether or not the position of Liquor Inspector is a "civil office", we find:

(1) The position of Liquor Inspector is not created by Statute. Section 2815.150 and Section 2815.67, *supra*., merely authorizes the Liquor Control Board to appoint said inspectors when they deem it necessary, whether or not inspectors will be employed at all is entirely within the discretion of the Board.

(2) The delegation of some part of the sovereign power of government is in the Liquor Board and not in the Liquor Inspectors.

(3) The duties of the Liquor Inspectors are not defined directly or impliedly by the Legislature, but their duties and powers are prescribed and defined by the Liquor Board.

(4) Their duties are not performed independently and without control of a superior power.

(5) Although the position of Liquor Inspector may be deemed to have some permanency and continuity, yet the Liquor Board may fix their salaries, increase, decrease and define their duties, and the inspectors serve only at the will and pleasure of the Board. Furthermore, the inspectors do not take or file an oath, hold a commission or give an official bond.

It would therefore seem that the office of State Liquor Inspector is not a civil office within the rules of the Hawkins case, *supra.*, and is not a civil office as contemplated by Section 7, Article 5 of the Montana Constitution.

It is my opinion that a State Senator or State Representative may be employed by the Montana Liquor Control Board as a Liquor Inspector.

For reference to other Attorney General's Opinions on this same subject, see Volume 10, Opinions of the Attorney General, Page 42, wherein it was held: "A member of the House of Representatives is not disqualified from serving as instructor in the University of Montana."

Volume 15, Opinions of the Attorney General, Opinion 477, page 329, held: "A Liquor Vendor is not within the meaning of Section 7, Article V of the Constitution, a civil office. Therefore, the Liquor Control Board may appoint, during his term, a member of the Legislature to the position of Vendor."

Volume 15, Opinions of the Attorney General, Opinion 478, page 329, held, in effect that the office of Assistant Income Tax Auditor is not a civil office under the Constitution and therefore a member of the House of Representatives was not precluded by the Constitution from holding such office.

Volume 16, Opinions of the Attorney General, Opinion 279, page 288, held: "The head of the Division of Labor and Industry is a mere employee, holding his position at the pleasure of the Commissioner of Agriculture, and the appointment of a member of the Legislature to that position does not violate the Montana Constitution."

Volume 18, Opinions of the Attorney General, Opinion 13, page 16, held: "A State Senator may serve as a member of a joint commission of two states to study the rights to waters in the tributaries of the Yellowstone River, and in the study of an interstate compact between the states as to said waters, and may receive per diem and expenses while so serving, such membership being only temporary."

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.