

Opinion No. 14.**State Board of Equalization—Public
Officers—Salaries.**

HELD: Members of the State Board of Equalization are public officers.

Those members of the State Board of Equalization who were appointed to office prior to the enactment of Chapter 109, Laws of 1953 are not entitled to the increase in salary provided for in that Act, since such would violate the constitutional prohibition that the salary of a public officer may not be increased or diminished during his term of office.

March 31, 1953.

Mr. W. L. Fitzsimmons
Executive Clerk
State Board of Examiners
Capitol Building
Helena, Montana

Dear Mr. Fitzsimmons:

You have submitted the following letter to my office:

"Enclosed herewith, please find a supplemental payroll of the State Board of Equalization containing the names of the three Board Members with payments based upon a law passed by the 1953 Legislature increasing the salaries of the Board Members.

"The Board of Examiners ordered the payroll referred to you for an opinion as to whether the increases in salaries could be applied to the members of the Board during the term of office for which they are appointed or whether applying this increase would be in violation of constitutional or statutory provisions."

Senate Bill No. 110, now Chapter 109, Laws of 1953, increased the salary of the members of the State Board of Equalization from \$5,000.00 per annum to \$7,000.00 per annum. The Act provided that it was to go into effect upon passage and approval by the Governor. The Governor approved the Act on the 28th of February, 1953.

Section 84-701, R. C. M., 1947, provides that the members of the Board shall hold office for a term of six years. Of the present Board, one member was appointed March 1, 1949, one March 1, 1951, and the other member was appointed on March 1, 1953. Therefore, as to the latter member of the Board, there is no question but that his salary may be increased at this time, since the law took effect prior to his appointment. See: 23 Opinions of Attorney General 318, No. 118.

Section 31 of Article V of the Constitution of Montana provides:

"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: provided, that this shall not be construed to forbid the legislative assembly from fixing the salaries or emoluments of those officers first elected or appointed under this Constitution, where such salaries or emoluments are not fixed by this Constitution." (Emphasis supplied.)

For a discussion of the reasons for the enactment of Section 31 of Article V of the Constitution of Montana, see: *Poorman v. State Board of Equalization*, 99 Mont. 543, 45 Pac. (2d) 307, and *State ex rel. Jackson v. Porter*, 57 Mont. 343, 188 Pac. 375.

The question, therefore, is: Are the members of the State Board of Equalization public officers so that they fall within the prohibitory provision quoted above?

Our Supreme Court has defined what constitutes a public office in the case of *Barney v. Hawkins*, 79 Mont. 506, 257 Pac. 411. Therein the court ruled:

" . . . 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 a civil nature: (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 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."

A study of the provisions of Section 15 of Article XII of the Constitution of Montana, which creates the State Board of Equalization, and Sections 84-701, et seq., R. C. M., 1947, conclusively establishes that the members of the Board meet all the requirements

enumerated in the above quoted decision. The Board is created by the Constitution; it possesses the power to equalize the taxation of property within the State of Montana and is charged with the duty of collecting the taxes which are levied by the Legislature; the Board has complete authority in the exercise of its power subject only to those limitations placed upon it by the legislative enactments, and it possesses the attribute of permanency and continuity.

It is therefore my opinion that those members of the State Board of Equalization who were appointed to office prior to the enactment of Chapter 109, Laws of 1953, are not entitled to the increase in salary provided for in that Act.