

Opinion No. 22.

State Examiner—Ex-Officio Superintendent of Banks—Public Office—Term, Commencement of—Appointment by Governor—Confirmation by Senate—Salaries.

HELD: 1. That the office of State Examiner and Ex-Officio Superintendent of Banks is a public office, and that the legislature has fixed the salary for such office at \$5,400 per annum.

2. That the term of office of a public officer commences upon appointment by the Governor and not upon confirmation by the Senate.

3. Chapter 98, Laws of 1953, cannot be construed in such a manner as to increase the salary of the present incumbent of the office of State Examiner and Ex-Officio Superintendent of Banks, since such would constitute an increase in salary during the term for which the officer has been appointed in violation of Section 31 of Article V of the Constitution of the State of Montana.

June 1, 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:

"I am attaching hereto a request made by the State Examiner and Ex-officio Superintendent of Banks, regarding his salary at the present time in view of the enactment of Senate Bill No. 193 by the 1953 Legislative Assembly increasing the salary of the State Examiner.

"This letter was considered by the Board of Examiners at a meeting held March 25, and the Clerk was ordered to transmit the letter to you for an opinion."

The first question which must be decided is the date which the State Examiner took office.

The office of State Examiner was created by Section 8 of Article VII of the Constitution of Montana. Acting in conformity thereto the legislature, through Section 82-1001, R. C. M., 1947, provided:

"There shall be a state examiner who shall be appointed by the governor and confirmed by the senate, and shall hold his office for a term of four years and keep his office at the capitol."

On the 5th day of January, 1953, the records of the Office of Secretary of State disclosed that the following letter was received by that office from the Governor of the State of Montana:

"Jan. 5, 1953.

"Honorable Sam W. Mitchell
Secretary of State
The Capitol
Helena, Montana

"Dear Sir:

"I am this day appointing and do hereby appoint Mr. R. E. Towle of Helena, Lewis and Clark County, Montana, to the position of State Examiner and Ex-Officio Superintendent of Banks for a term of four years, which term will expire on the first Monday in January, 1957.

"Very truly yours,
/s/ J. Hugo Aronson,
"Governor."

A similar letter was received on that day by the State Board of Examiners wherein the term was again defined and a salary request presented to the board based on the law prior to Senate Bill No. 193. The board approved the salary on January 8, 1953, for a term commencing on January 5, 1953.

On the 9th day of January, 1953, the appointee filed his oath of office as required by Section 1 of Article XIX of the Constitution of the State of Montana and Section 59-413, R. C. M., 1947; he also filed a bond in the sum of \$25,000.00, as required by Sections 6-101 and 82-1013, R. C. M., 1947. His appointment was forwarded to the Senate for confirmation under the provisions of Section 7 of Article VII of

the Constitution of the State of Montana and Section 82-1001, *supra*. On the 26th day of February, 1953, under a letter signed by the Secretary of the Senate, the Secretary of State was informed that the appointment had been confirmed.

Senate Bill No. 193, now Chapter 98, Laws of 1953, increased the salary for the office of State Examiner and Ex-officio Superintendent of Banks from \$5,400.00 per annum to \$7,000.00 per annum, inasmuch as Sections 82-1001 and 5-605, R. C. M., 1947, provide:

"82-1001. Appointment and Term of Office. There shall be a state examiner who shall be appointed by the Governor and confirmed by the Senate, and shall hold his office for the term of four years and keep his office at the capitol."

"5-605. Superintendent of Banks—Salary. The superintendent of banks shall receive a salary of five thousand four hundred dollars (\$5,400.00) per annum, payable monthly. The salaries of all clerks and bank examiners appointed by the superintendent of banks, shall be fixed by the superintendent of banks, subject to the approval of the governor."

The Act, which took effect upon passage and approval, was approved by the Governor on the 25th day of February, 1953.

The question thus presented is whether the term of the State Examiner commences upon his appointment by the Governor or upon his confirmation by the Senate.

At the outset, I direct your attention to Section 5-602, R. C. M., 1947, which provides:

"5-602. State Superintendent of Banks—Bond. The term of office of the superintendent of banks shall be four (4) years from and after his appointment, and it shall be his duty to execute all laws in relation to banks, acting personally or through his examiners, regular or special. He shall file a bond as superintendent of banks in a penal sum of ten thousand dollars with a surety or sureties to be approved by the governor, conditioned upon the faithful performance of the duties of his office as superintendent of banks."

A study of the decisions of the Supreme Court of the State of Montana fails to reveal a case in which this specific issue was decided. However, in the case of *State ex rel. Morgan v. Knight*, 76 Mont. 71, 245 Pac. 267, our Supreme Court announced the rule which is generally followed in other jurisdictions. That is:

"Where the law creates an office and prescribes the length of the term, omitting to fix the date when the term shall begin, but designates the power which is vested with authority to fill the office by appointment, it follows necessarily that the appointive power has the right to fix the commencement of the term." (Citing Authority.)

Also in the case of *People v. Nickel*, 9 Cal. A. 783, 100 Pac. 1075, the California court stated:

"Section 368 (Pol. Code) provides for their appointment by the governor with the consent of the senate, and Section 369 (Pol. Code) provides that port wardens shall hold their offices for 'the term of four years.' It will be thus seen that the term of office of a port warden is simply fixed as a period of time—four years—and no particular date is established for either the beginning or ending of the term. Under such circumstances it is well established that each incumbent takes a term, running from the date of his appointment, equal in duration to the period of time fixed by the statute as the term of the office. This is the rule in the absence of a statutory provision to the contrary. . . . The new term begins only upon the making of a new appointment."

See also: *People v. Morris*, 40 Cal. (2d) 439, 106 Pac. (2d) 635; *State ex rel. Hoornstra v. Atkinson*, 136 Ohio State 569, 27 N. E. (2d) 249; *Grey v. Quintilian*, 121 Conn., 300, 184 Atl. 382; *People v. Reinberg*, 263 Ill. 536, 105 N. E. 715.

For authority to the effect that title to the office comes through an appointment and not through the confirmation, see *State v. Malone*, 131 Tenn. 149, 174 S. W. 257.

Further, in *People v. Addison*, 10 Cal. 1, and *People v. Mizner*, 7 Cal. 519, that court declared that the appointment by the Governor fixed in the appointee the right to hold office for his full term subject only to be defeated by the non-concurrence of the Senate.

If it were held that the term commences upon confirmation by the Senate, in this instance, the appointee would not serve for a full four-year term as provided in Section 82-1001, R. C. M., 1947.

The next question presented is whether or not the office of State Examiner and Ex-Officio Superintendent of Banks is a public office within the meaning of Section 31 of Article V of the Constitution of the State of Montana, which 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.)

In the case of *State ex rel. Dunn v. Ayers*, 112 Mont. 120, 113 Pac. (2d) 785, our court held:

"In *State ex rel. Nagle v. Kelsey*, 102 Mont. 8, 55 Pac. (2d) 685, 689, the test to be applied in determining whether a particular person is a public officer or a mere employee is stated to be:

"(1) It (the office) must be created by the Constitution or by the legislature, or created by a municipal or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of the 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.'" (*State ex rel. Nagle v. Page*, supra (98 Mont. 14, 37 Pac. (2d) 575.)

See also: *State ex rel. Barney v. Hawkins*, 79 Mont. 506, 257 Pac. 411, 53 A. L. R. 583.

The office in question is created by Section 8, Article VII of the Constitution, and it possesses a portion of the sovereign powers of the State of Montana. Sections 5-101 to 5-1311, and 82-1001 to 82-1013, R. C. M., 1947. The powers are directly conferred upon the officer by the legislature and are to be performed without the control of any superior power other than the law. The office is a permanent and continuing one, and in addition thereto, the officer is required to, and has filed, a bond and an official oath of office.

Therefore, it follows that if the salary increase provided for by Chapter 98, Laws of 1953, were granted the present examiner, it would increase the salary of a public officer during his term of office, since the term of the State Examiner commenced on the 5th day of January, 1953, while the Act took effect on the 25th day of February, 1953.

It is therefore my opinion:

1. That the office of State Examiner and Ex-Officio Superintendent of Banks is a public office and that the legislature has fixed the salary for such office at \$5,400.00 per annum.

2. That the term of office of a public officer commences upon appointment by the Governor and not upon confirmation by the Senate.

3. Chapter 98, Laws of 1953, cannot be construed in such a manner as to increase the salary of the present incumbent of the office of State Exam-

iner and Ex-Officio Superintendent of Banks, since such would constitute an increase in salary during the term for which the officer has been appointed in violation of Section 31 of Article V of the Constitution of the State of Montana.