

Opinion No. 27.

Department of State Personnel—Director of Personnel, A Montana Resident.

HELD: The Director of Personnel is a civil officer and may be selected only from applicants who are citizens of the United States and who have resided in Montana for at least one year before the appointment.

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June 15, 1953.

Mr. Harold Stearns, Chairman  
Department of State Personnel  
Harlowton, Montana

Dear Mr. Stearns:

You have requested my opinion concerning the following question:

“Must the executive head or Director of Personnel be chosen from only Montana applicants or is the commission empowered to seek a qualified director from applications either within or without the state?”

Section 7 of Article IX of the Montana Constitution provides:

"No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state at least one year next before his election or appointment."

This constitutional prohibition would apply to the Director of Personnel if the position to which he is appointed is an office. The civil nature rather than military of the position is so apparent as to obviate consideration.

Chapter 251, Laws of 1953, designated the "Personnel Administration Law," creates a Department of State Personnel which is administered by a Personnel Commission. The Director of Personnel is appointed by the commission and Section 8 of Chapter 251, states that the director "shall hold office at the pleasure of the Commission." Section 9 of the Act defines the duties of the director and enumerates specific acts to be performed by him as "executive head of the Department."

Our Supreme Court has frequently considered the meaning of "office" and in *State ex rel. Barney vs. Hawkins*, 79 Mont. 506, 257 Pac. 411, 53 A. L. R. 583 defined the essential events necessary in order for a public servant to be a public officer in the following language:

"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 applying the above quoted test, there can be little doubt that the Director is a public officer within the first four elements as his position is created by the legislature and he exercises duties fixed by statute such as the giving of examinations to test the fitness of applicants for state employment and he must make a study of the work load of the various state offices. The fifth element which required permanency and continuity of employment might possibly be considered doubtful, due to the fact the Director holds his position at the pleasure of the Commission. However, in 42 Am. Jur. 883, the text states:

§ 5. Tenure and Duration—Public office embraces the idea of tenure and duration. Although there is some expression to the contrary, it seems to be an essential element of such office that the duties thereof shall be continuing and permanent in their nature, and not occasional or intermittent. The duration of tenure, however, need not be for a fixed period, but may be at the pleasure of the power creating the office . . ."

From the above quoted, it is clear that it is the duties of the office rather than the tenure of the occupant which must be permanent. There is continuity in the duties to be performed and the fifth element of the test is satisfied.

It is therefore my opinion that the Director of Personnel is a civil officer and may be selected only from applicants who are citizens of the United States and who have resided in Montana for at least one year before the appointment.