

January 30, 1954.

Mr. A. E. Burgan, Director
Department of State Personnel
Sam W. Mitchell Building
Helena, Montana

Dear Mr. Burgan:

You have requested my opinion concerning a proposed Personal History Statement to be completed by state employees and filed with your department.

The information requested and the form of the questions, with one exception, are not confusing, and elicit information which your department has the discretionary power to require. The certificate and loyalty oath to be executed by each applicant and present holder of state employment presents a problem.

No person can properly object to a pledge of allegiance and, from my viewpoint as a private citizen I endorse the taking of a loyalty oath. However, subscribing a formal oath does not increase the obligation of allegiance that a citizen owes to his state and the United States. Lord Coke said:

"All subjects are equally bowden to their allegiance as if they had taken the oath; because it is written by the finger of the law in their hearts, and the taking of the corporal oath is but an outward declaration of the same." (2 Coke's Institutes, 121.)

If an oath is to be required for employees of the State of Montana, the form of the oath is prescribed in Section 1, Article XIX of the Montana Constitution, which reads as follows:

"Members of the legislative assembly and all officers, executive, ministerial or judicial, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation, to-wit: 'I do solemnly swear (or affirm) that I will support, protect and defend the constitution of the United States, and the constitution of the state of Montana, and that I will discharge the duties of my office with fidelity; and that I have not paid, or contributed or promised to pay or contribute,

**Opinion No. 58.
Constitutional Oath, Exclusive — Department of State Personnel—Oath of State Employees—Constitutional Law.**

HELD: That Section 1, Article XIX of the Montana Constitution prescribes the form of oath for any office or position of trust, and such oath cannot be varied in any manner.

either directly or indirectly, any money or other valuable thing to procure my nomination or election (or appointment) except for necessary and proper expenses expressly authorized by law; that I have not knowingly violated any election law of this state, or procured it to be done by others in my behalf; that I will not knowingly receive, directly, or indirectly, any money or other valuable thing for the performance or non-performance of any Act or duty pertaining to my office other than the compensation allowed by law, so help me God.' And no other oath, declaration or test shall be required as a qualification for any office or trust."

The language used in the above quoted portion of our Constitution is plain and does not require interpretation, and in particular the last sentence of Section 1, Article XIX, supra, which states, "And no other oath, declaration or test shall be required as a qualification for any office or trust," precludes the requirement of any other oath or pledge or allegiance. This conclusion is emphasized by Section 29, Article III of the Constitution which states:

"The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

The Supreme Court of Montana in considering Section 1, Article XIX, supra, said in *State ex rel. Wallace v. Callow*, 78 Mont. 308, 254 Pac. 187:

"This section, in requiring every public officer to take the constitutional oath, is self-executing (*State ex rel. Scollard v. Board of Examiners for Nurses*, 52 Mont. 91, 156 Pac. 124), and in requiring that every such officer shall both take and subscribe such oath before entering upon the duties of his office, the Constitution has spoken and the legislature is prohibited from enunciating a contrary rule, as the provisions of the Constitution are mandatory and prohibitory (Sec. 29, Art. III), and its declarations with reference to subjects upon which it presumes to speak are conclusive."

In the construction of a statute which required state officers, state employees and candidates for office to sign an oath of allegiance, the Supreme Court of New Jersey in the case of *Imbrie v. Marsh*, 3 N.J. 578, 71 A. (2d) 352, 18 A.L.R. (2d) 241, held that the constitutional oath is exclusive and the legislature has no power to add to, subtract from or in any way vary such oath. This opinion is in accord with above-cited Montana decisions which preclude a variance from the constitutional oath.

As I indicated above, one of the questions in the proposed Personal History Statement is confusing and also is not a proper request for information. The question I refer to reads as follows:

"Have you ever been or are you a member of any Communist group or other organization designed to promote the overthrow of the U.S. Government?"

The reason for asking the question is laudatory as it is directed at the menace of World Communism. No person should be employed by the state who advocates the overthrow of our government by force or violence. However, this question is objectionable for the reason that it is ambiguous and confusing and also the oath is a sufficient protection. The ambiguity in the question is apparent when it is observed that there is no definition of the prohibited organizations" designed to promote the overthrow of the U.S. Government." It is the overthrowing of the government by force, violence and unconstitutional means which is the seditious type of disloyalty that we must guard against. If belonging to an organization which has its object the defeat of the party in power by constitutional means, which the question might include, then political freedom would be violated.

That a supplementary statement as to an employee's loyalty is unnecessary and in fact cannot be required, was the opinion of a California District Court of Appeals in the case of *Tolman v. Underhill*, 103 Cal. App. (2d) 348, 229 Pac. (2d) 447. In that case, the California Court held that the constitutional oath was exclusive and the

regents of the University of California could not legally require faculty members to execute the constitutional oath and in addition sign an acceptance of appointment which contained a statement that, "I am not a member of the Communist Party or any other organization which advocates the overthrow of the government by force or violence." The similarity of the facts in the Tolman case to those here considered is more than apparent. The constitutional oath, "I will support, protect and defend," is an affirmative pledge; it goes much further than a mere negation of Communism and other "isms." The constitutional oath does not merely negative other "isms" --it promises action.

It is therefore my opinion that Section 1, Article XIX of the Montana Constitution prescribes the form of oath for any office or position of trust and such oath cannot be varied in any manner.