

Opinion No. 20**Barbers—Section 66-409, RCM, 1947—Straight Line—Barber
Examiners—Emolument—Chapter 237, L. 1957**

Held: A straight line must be drawn from the nearest point shown upon the city-plat to the questioned location to determine whether the location is within three miles of the city limits.

Article V, Section 31, Montana Constitution, prohibits incumbent members of the State Board of Barber Examiners from receiving the increased emolument granted by Chapter 237, Laws of 1957.

July 16, 1957

Mr. Chris Evenson
Board of Barber Examiners
809 West College
Bozeman, Montana

Dear Mr. Evenson:

You have presented the following questions to me for my opinion.

First, you state that Section 66-409, RCM, 1947, provides in part:

“. . . a city or town shall be deemed to include within its legal limits, the territory adjacent to it and lying within three miles of said legal limits . . .” You wish to know whether the three mile area is determined by the nearest accessible road or whether it is measured by a straight line drawn from the nearest point shown upon the city plat to the questioned location.

Second, you wish to know whether incumbent members of the State Board of Barber Examiners may receive the increased emolument provided by Chapter 237, Laws of 1957. The amendment was effective July 1, 1957.

In answer to your first inquiry, this question has been determined in *Davis v. Stewart*, 54 Mont. 429, 437, 171 Pac. 281. There the court interpreted a classification which provided in part: “. . . lands within the limits of any town or city or within three miles of such limits . . .” The decision concluded:

“. . . the three-mile distance from the limits of the town would necessarily be measured from the nearest point shown upon the town-site plat.”

Therefore, a straight line must be drawn from the nearest point shown on the city-plat to the questioned location to determine whether it falls within the three-mile limit. The distance of the most accessible road from the city limits to the disputed location cannot be used as a standard in this case. See also, 10 ALR (2d) 605.

In reply to your second inquiry, the question is whether the members of the Montana Board of Barber Examiners are officers. Article V, Section 31, Montana Constitution, provides in part:

“. . . no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election or appointment . . .”

Chapter 237, Laws of 1957 increases the per diem of Board Members from \$10.00 per day to \$15.00 per day while attending Board meetings. The act was effective July 1, 1957.

A per diem payment has been declared an emolument. See, 25 Opinion of the Attorney General, No. 55, and 26 Opinion of the Attorney General, No. 47.

In *Adami v. County of Lewis and Clark*, 114 Mont. 557, 560, 138 Pac. (2d) 969, the court affirmed a general proposition by stating:

“. . . A constitutional prohibition against changing the compensation of an officer during his term applies only to officers having a fixed and definite term. (46 C.M. 1023, sec. 256) . . . As a general rule constitutional restrictions against changing the salaries, fees or emoluments of public officers during their incumbency apply only to officers having a fixed and definite term of office and not to appointive officers who hold at the pleasure of the appointing power, such as deputies and assistants. (43 Am. Jur. 144, sec. 351).”

In *State ex rel. Barney v. Hawkins*, 79 Mont. 506, 528, 257 Pac. 411, the court enunciated five elements which are indispensable to constitute a public office. The court stated:

“(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." See, also, State ex rel. Nagle v. Page, 98 Mont. 14, 37 Pac. (2d) 575; State ex rel. Nagle v. Kelsey, 102 Mont. 8, 55 Pac. (2d) 685; State ex rel. Dunn v. Ayers, 112 Mont. 120, 113 Pac. (2d) 785.

In Scharrenbroich v. Lewis and Clark County, 33 Mont. 250, 257,Pac....., the court stated:

" 'Salary' means what it ordinarily means: a fixed compensation, made by law to be paid periodically for services, whether there be any services actually rendered or not. The word 'emolument' is more comprehensive than 'salary' . . . We acknowledge that the word 'emolument' includes the meaning of 'gain,' 'profit,' 'compensation,' . . ." See, also Taxpayers League of Carbon County v. McPherson, 54 Pac. (2d) 897, 901, 49 Wyo., 251; Dugger v. Board of Surveyors of Panola County, 104 So. 459, 461, 139 Miss. 552; 106 ALR 767, 772.

The members of the Board are appointed by the governor for a period of three years and may be removed by him for cause. See Section 66-406, RCM, 1947. The secretary and treasurer must post a bond of \$5,000.00 with the secretary of state. See Section 66-407, RCM, 1947. The members of the Board have filed their commissions with the secretary of state. Each member receives \$15.00 while attending Board meetings plus additional expenses. See, Chapter 237, Laws of 1957.

The Board may conduct examinations for barber licenses; it may issue certificates of registration; it may license barber shops; it may approve price agreements; it may make rules and regulations to enforce the act; it may revoke or suspend any license or certificate and failure to comply with the act or with the rules promulgated by the Board is a misdemeanor. All of these powers are governmental.

It is apparent from the test enunciated in State ex rel. Barney v. Hawkins, supra, that members of the State Board of Barber Examiners are officers and are prohibited by Article V, Section 31, Montana Constitution, from receiving the increased emolument granted by Chapter 237, Laws of 1957.

It is therefore my opinion:

1. A straight line must be drawn from the nearest point shown upon the city-plat to the questioned location to determine whether the location is within three miles of the city limits.

2. Article V, Section 31, prohibits incumbent members of the Montana State Board of Barber Examiners from receiving the increased emolument granted by Chapter 237, Laws of 1957.

Very truly yours,
FORREST H. ANDERSON
Attorney General