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Opinion No. 34

CONSTITUTION - CONSTITUTIONAL CONVENTION - Delegates holding another public office; PUBLIC OFFICERS - Constitutional convention delegates holding another public office. Chapter 1, Extraordinary Session Laws of 1971; Article V, section 3; Article V, section 7; Article XIX, section 8, Montana Constitution.

- HELD:**
1. A delegate to the constitutional convention may not serve in another public office during his term as delegate, which term as delegate shall last until the constitutional convention adjourns *sine die*.
 2. A delegate to the constitutional convention may serve in any public office, the term for which commences after the constitutional convention adjourns *sine die*.

Mr. Leo C. Graybill, President
Montana Constitutional Convention
State Capitol
Helena, Montana 59601

January 28, 1972

Dear Mr. Graybill:

I am in receipt of your letter of January 26, 1972, in which you request my opinion as to "what political positions (may) delegates to the Convention stand for in the year 1972?"

Article XIX, section 8, Constitution of Montana, setting forth the provisions for calling a constitutional convention, provides in pertinent part:

"The qualifications of members (delegates) shall be the same as of the members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the legislative assembly." (Bracketed word added)

The basic qualifications for senator are set forth in Article V, section 3, Constitution of Montana, which provides:

"No person shall be a representative who shall not have attained the age of twenty-one years, or a senator who shall not have attained the age of twenty-four years, and who shall not be a citizen of the United States, and who shall not (for at least twelve months next preceding his election) have resided within the county or district in which he shall be elected."

In addition, Article V, section 7, Constitution of Montana, provides:

"... No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the state; and no member of congress, or other person holding an office (except notary public, or in the militia) under the United States or this state, shall be a member of either house during his continuance in office. . . ." (Emphasis supplied)

The provisions of Article V, section 7, *supra*, must be considered an additional qualification for the position of senator and, therefore, an additional qualification for the position of delegate to the constitutional convention. The Supreme Court of Michigan, in considering whether a member of the legislature could serve as a city councilman, stated in ***Doyle v. City of Dearborn***, 121 M.W.2d 473, 477 (1963):

“However, home-rule cities are mandated to establish in their charters the qualifications of its officers. The word ‘qualifications’ as used in the statute is used in the generic sense and includes qualifications to be elected to office and also qualifications to hold the office, sometimes referred to as eligibility.”

Thus, the prohibition against holding another office by a legislator during the term for which he was elected is a continuing qualification to hold office. As the qualifications for constitutional convention delegate are the same as those for state senator, pursuant to the provisions of Article XIX, section 8, *supra*, a delegate to the constitutional convention is bound by the provisions of Article V, section 7, *supra*.

The Montana Supreme Court stated the meaning of the additional qualification found in Article V, section 7, *supra*, in ***Forty-second Legislative Assembly v. Lennon***, M., 481 P.2d 330, 333 (1971):

“Any state and local officers who are prohibited by the constitution or laws of Montana from holding more than one office may not serve as delegates to the constitutional convention. A delegate to the constitutional convention is a ‘state officer’ holding a public office of a civil nature.

“Constitutional prohibitions against certain officers holding more than one office include state senators and representatives ‘during the term for which (they) shall have been elected’, Article V, section 7, Montana Constitution; . . .

* * *

“These restrictions prevent such officers from holding any other ‘public office’ or ‘civil office’ of the state, and these two terms are synonymous. (Citing authority) . . .” (Emphasis supplied)

As delegates to the constitutional convention have the same qualifications as state senators, delegates are also prohibited from holding more than one public office during their term.

The question of what constitutes a “public office” was considered by the Montana Supreme Court in ***State ex rel. Barney v. Hawkins***, 79 M. 506, 257 P. 411 (1927). In ***Forty-second Legislative Assembly v. Lennon***, *supra*, page 333, the court cited approvingly the requirements for a public office set forth in the ***Barney*** case, as follows:

"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 may 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."

Thus, delegates to the constitutional convention are prohibited during their term from holding any office which contains the five elements necessary to constitute a public office as set forth in the **Barney** case, *supra*.

The restriction against dual office holding applies during the term for which the delegates have been elected. The Montana Constitution does not set a specific term for delegates to the constitutional convention, but provision was made by the forty-second legislature. Chapter 1, section 7 (6), Extraordinary Session Laws of 1971, provides:

"It shall be the duty of the delegates elected to assemble in plenary session in the chambers of the house of representatives in the state capital building in the city of Helena at 10:00 a.m. on January 17, 1972. The convention, which may recess from time to time, shall then remain in session as long as necessary." (Emphasis supplied)

The Montana Supreme Court considered the duration of the term of a delegate in **Lennon**, *supra*, stating at page 335:

" . . . A delegate to the constitutional convention holds his position for the entire period of time the constitutional convention is in session. His position is permanent and continuous in the sense that it continuously exists until the duties for which it was created have been completed. . . ."

As no definite duration is specified for the term of delegate, and as a delegate will serve while the convention is in session, the term of a delegate will last until the convention adjourns *sine die*.

THEREFORE, IT IS MY OPINION that:

1. a delegate to the constitutional convention may not serve in another public office during his term as delegate, which term as delegate shall last until the constitutional convention adjourns *sine die*;
2. a delegate to the constitutional convention may serve in any public office, the term for which commences after the constitutional convention adjourns *sine die*.

Very truly yours,

ROBERT L. WOODAHL
Attorney General