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ELECTIONS — Legislators, eligibility for state office; LEGISLATURE — Members of, term of office, holding civil office; OFFICES AND OFFICERS — State office, legislators' term of office, compatibility of offices. Article V, Sections 3 and 9, Constitution of Montana; section 43-202, R.C.M. 1947.

HELD: A member of the Montana legislature may run for another public office during the term for which the member has been elected, provided that the terms of the respective offices do not overlap.

April 2, 1974

Senator Jim Moore
Two Dot,
Montana 59085

Dear Senator Moore:

You have requested my opinion as to whether a member of the Montana Senate, elected for a four-year term, may, during that term, run for another state office.

The Montana Constitution, Article V, Section 9, 1972, provides:

No member of the legislature 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 the militia) under the United States or this state, shall be a member of the legislature during his continuance in office. (Emphasis supplied)

In **Forty-second Legislative Assembly v. Lennon**, 156 Mont. 416, 481 P.2d 330 (1971), the Montana Supreme Court construed an identical provision

under the 1889 Montana Constitution and declared that senators and representatives were prohibited from holding more than one office during the term for which they were elected. A similar decision was reached in **Mahoney v. Murray**, 159 Mont. 176, 496 P.2d 1120 (1972). In **Mahoney** the court held that a constitutional convention delegate was prohibited by this constitutional provision from holding another public office.

A legislator is, therefore, prohibited from holding two civil offices by Article V, Section 9 of the Montana Constitution and the court decisions in **Lennon** and **Mahoney**.

The question of what constitutes a civil office under the state was considered by the Montana Supreme Court in **Barney v. Hawkins**, 79 Mont. 506, 257 P. 411 (1927). The **Barney** decision construed the term "civil office" to be synonymous with "public office". The court then set forth the requirements for a public office 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.

It is abundantly clear that an elective state office would be a civil office within the meaning of Article V, Section 9 of the Montana Constitution and the **Barney** decision.

In regard to terms of office, Article V, Section 3 of the Montana Constitution provides:

A member of the house of representatives shall be elected for a term of two years and a member of the senate for a term of four years each to begin on a date provided by law. One-half of the senators shall be elected every two years.

Section 43-202, Revised Codes of Montana, 1947, defines the term of office for state legislators:

The term of office of a senator is four years, and of a representative two years; and the term of service thereof shall begin on the first Monday of January next succeeding his election, and if a senator or

representative be elected to fill a vacancy, his term of service shall begin on the next day after his election.

Since the constitutional prohibition in Article V, Section 9, bars a legislator from holding two civil offices during the "term" for which he is elected, a legislator may run for another public office if the terms of the offices do not overlap. However, if the legislative term and the term of another public office are overlapping and conflicting, a legislator is constitutionally prohibited from being a candidate for that office.

THEREFORE, IT IS MY OPINION:

A member of the Montana legislature may run for another public office during the term for which the member has been elected, provided that the terms of the respective offices do not overlap.

Very truly yours,

ROBERT L. WOODAHL
Attorney General