

VOLUME NO. 37

OPINION NO. 32

CRIMINAL LAW - Removal of public official upon conviction of official misconduct occurring in prior term; OFFICIAL MISCONDUCT - Removal of public official upon conviction of official misconduct occurring in prior term; PUBLIC OFFICIALS - Removal from office upon conviction of official misconduct occurring in prior term; REVISED CODES OF MONTANA, 1947 - Section 94-7-401.

HELD: A public servant convicted under section 94-7-401, R.C.M. 1947, of official misconduct which occurred during a prior term of office forfeits his current term of office.

2 June 1977

Arthur W. Ayers, Jr., Esq.
Carbon County Attorney
Carbon County Courthouse
Red Lodge, Montana 59068

Dear Mr. Ayers:

You have requested my opinion concerning the application of section 94-7-401(4), R.C.M. 1947, which requires that a public servant convicted of official misconduct "shall permanently forfeit his office." I have stated your question as follows:

Under section 94-7-401(4), R.C.M. 1947, does an elected public official who is convicted of official misconduct occurring during a prior term of office forfeit his current term of office?

Section 94-7-401, R.C.M. 1947, defines the crime of official misconduct as follows:

94-7-401, R.C.M. 1947, OFFICIAL MISCONDUCT.

(1) A public servant commits the offense of official misconduct when, in his official capacity, he commits any of the following acts:

(a) purposely or negligently fails to perform any mandatory duty as required by law or by a court of competent jurisdiction; or

(b) knowingly performs an act in his official capacity which he knows is forbidden by law; or

(c) with the purpose to obtain advantage for himself or another, he performs an act in excess of his lawful authority; or

(d) solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law; or

(e) knowingly conducts a meeting of a public agency in violation of section 82-3402.

Subsection (2) of section 94-7-401 provides a maximum sentence of six (6) months imprisonment and/or a five hundred dollar (\$500) fine upon conviction. In addition, subsection (4) provides:

(4) A public servant who has been charged as provided in subsection (3) may be suspended from his office without pay pending final judgment. Upon final judgment of conviction he shall permanently forfeit his office. Upon acquittal he shall be reinstated in his office and shall receive all back pay. (Emphasis added.)

Section 94-7-401 was enacted into law in 1973 as a part of the new Montana Criminal Code. Subsection (4), which provides that a public servant convicted of official misconduct shall forfeit his office, does not distinguish between misconduct occurring during a prior term of office and that occurring during a current term. There are no Montana Supreme Court cases in point under either the new provision or prior statutes on the same subject.

Numerous jurisdictions have construed statutory provisions on removal of public officials and determined whether their local statutes permit removal of an officer convicted of official misconduct occurring during a prior term of office. The various cases are collected in "Annotation: Removal of Officers Prior Term's Acts," 42 A.L.R.3d 691 (1972, with current pocket part). The Annotation points out that statutes concerning removal of public officers can be categorized into several types:

Among the various types of statutory and constitutional provisions dealing with the removal of public officers, there are those which either specifically authorize or specifically disallow removals based upon misconduct which occurred in a

prior term of office. And there is another type of removal statute in which the penalty of removal for official misconduct is expressly limited to the remainder of the term of office being served when the misconduct occurred. Given the applicability of statutory or constitutional provisions such as these to the facts of a particular case, the propriety of removing a public officer for misconduct committed in a prior term of office is obvious.

Another type of removal statute is that which authorizes the removal of public officers guilty of misconduct and provides additionally that officers so removed shall be disqualified or ineligible to hold public office in the future, either indefinitely or for a term of years. In construing provisions of this nature, courts have generally held that misconduct in a prior term of office will justify removing the guilty officer from his current office, ***.

Finally, there are those statutory and constitutional provisions which merely authorize removal as the penalty for official misconduct and do not refer in any way to the term of office in which the misconduct must occur in order to justify removal. *** 42 A.L.R.3d at 695-696. (Footnotes omitted.)

Section 94-7-401 appears to fall within the last category of statutes which make no mention of the term of office in which misconduct must occur to justify removal from office. It is also arguable that section 94-7-401, by using the term "permanently forfeit his office" (emphasis added), places it among those statutes which disqualify the office holder from holding future office.

The jurisdictions which have construed statutes which make no mention of the term of office in which misconduct must occur to permit removal from office have reached two opposite results. Approximately half of the jurisdictions hold that an officer may be removed for misconduct occurring in a prior term and the other half hold that an officer may not be removed for misconduct occurring during a prior term. "Annotation," 42 A.L.R.3d at 691. The split of authority is long standing. A 1922 annotation on the identical subject noted that the number of cases adopting such position "are nearly evenly divided." "Annotation: Removal of Public Officer for Misconduct During Previous Term," 17 A.L.R. 279 at 279 (1922). Notwithstanding the assertion of at least

one recent case, no clear, majority rule has emerged. Compare State ex rel. Turner v. Earle, 295 So.2d 609, 613 (Florida, 1974) with State v. Schroeder, 403 P.2d 304, 313, 199 Kan. 403 (1967), and "Annotation: Removal of Officers Prior Terms Acts," 42 A.L.R.3d 691, supra.

I have reviewed many of the decisions which hold that general removal statutes do not permit the removal of an officer for misconduct occurring during a prior term of office. The decisions are typically based upon one of two considerations. First, many of these jurisdictions reason that re-election of an officer subsequent to his misconduct amounts to a condonation of the officer's misconduct. Second, some jurisdictions base the result on strict statutory interpretation. Neither ground supports a restrictive interpretation of the Montana forfeiture provision; the first because it is an unacceptable statement of legislative intent and purpose, and the second because the Montana forfeiture statute uses words which are not susceptible to narrow, constrictive interpretation.

State v. Blake, 280 P. 833, 834, 138 Okla. 241 (1929), is illustrative of condonation rationale used in some jurisdictions which have adopted the non-removal rule for misconduct occurring in prior terms.

***"The court should never remove a public officer for acts done prior to his present term of office. To do otherwise would be to deprive the people of their right to elect their officers. When the people have elected a man to office it must be assumed that they did this with knowledge of his life and character, and that they disregarded or forgave his faults or misconduct, if he had been guilty of any. It is not for the court, by reason of such faults or misconduct, to practically overrule the will of the people." (Quoting an old New York decision, citation omitted. Emphasis added.)

See also, e.g., Barnham v. McCollum, 298 S.W. 483, 484, 175 Ark. 86 (1927). Jurisdictions which have adopted the anti-podal rule have observed that it is difficult to believe that any electorate would knowingly re-elect a public official guilty of misconduct. E.g., State v. Schroeder, 430 P.2d 304, 313-315, 199 Kan. 403 (1967). In State v. Schroeder the Kansas Supreme Court pointed out that the wrongdoing public official had campaigned throughout denying any acts of wrongdoing. A similar case is Application of Abare, 248 N.Y.S.2d 826 (1964).

Rejection of the condonation rule is more in accord with the American presumption of innocence. The better interpretation of re-election of an officer charged with misconduct is that the electorate re-elects an official charged with misconduct believing him to be innocent. The rationale of condonation by re-election has no validity and cannot be employed in ascertaining the intent of the Montana Legislature in enacting section 94-7-401.

Jurisdictions adopting the rule that general removal statutes permit removal of an official for misconduct occurring in a prior term, have frequently premised their holdings on the finding that the obvious purpose of such statutes is to purge public officers who have violated the public trust. In State v. Schroeder, supra, 430 P.2d at 315, the Kansas Supreme Court stated:

The object of removal of a public official for official misconduct is not to punish the offending incumbent but to protect and preserve the office, and to free the office of an unfit officer.

See also Stanley v. Jones, 2 So.2d 45, 50, 197 La. 627 (1941); State v. Twitchell, 367 P.2d 985 (Wash. 1962); and Allen v. Tufts, 131 N.E. 573, 17 A.L.R. 274, 278-279 (Mass. 1921). The Montana Supreme Court has adopted a similar statement concerning the legislative purpose of a prior Montana statute which disqualified officers who entered into prohibited contracts from further public office, stating that the provision, and other similar provisions, are "obviously intended to purge public service of persons who betray the public trust reposed in them * * *." Grady v. City of Livingston, 115 Mont. 47, 59, 141 P.2d 346 (1943). More directly on point is the recent case of State v. DeGeorge, 33 St. Rptr. 1077 (1976), in which the Montana Supreme Court determined that forfeiture of office upon conviction under section 94-7-401, R.C.M. 1947, should not be stayed pending appeal. The Court approvingly quoted a portion of the Arizona Supreme Court decision in State v. Sullivan, 66 Ariz. 348, 188 P.2d 592, 599, which concerned the purpose of removal statutes:

The object of the removal of a public officer for official misconduct is not to punish the officer, but to improve the public service. The public interest demands that public affairs be administered by officers upon whom rests no stigma of conviction of a felony, or of any offense involving a violation of their official duties. 133 St. Rptr. at 1079.

The obvious purpose of the Montana forfeiture statute is identical to the supportive purpose which has been frequently referred to in decisions holding that general removal statutes permit removal of an officer for misconduct occurring in a prior term of office.

Turning to the particular Montana statute in question, section 94-7-401 uses the words "he shall permanently forfeit his office." (Emphasis added.) Section 94-7-401(4) must be construed to give effect to the intention of the Legislature, Security Bank & Trust Co. v. Conners, 500 P.2d 1313, (1976). Legislative intention must in turn be ascertained, if possible, from words used. Montana Deaconess Hospital v. Cascade County, 164 Mont. 256, 260, 521 P.2d 198 (1974). The word "forfeit" means to lose or give up, usually on account of some error, fault or offense. Use of the word "forfeit" without any modifying adjective would require the loss of office for the remainder of a current term in which misconduct occurred, and be open to an interpretation that requires forfeiture of office for misconduct occurring in a prior term. However, the Legislature added the adjective "permanently" to modify "forfeit." If the adjective is given meaning it must be construed as contemplating a more drastic and broader remedy than removal for misconduct occurring during a current term only. The word "permanently" denotes something which is lasting and not subject to change. Section 94-7-401(4) should be construed to give effect to the term "permanently". "Maxims of Jurisprudence," section 49-133, R.C.M. 1947, ("An interpretation which gives effect is preferred to one which makes void"); and see State ex rel Townsend v. Davidson, Inc., 166 Mont. 104, 109, 531 P.2d 370 (1975). The language employed in section 94-7-401(4) does not permit the strict, narrow construction given by courts in other jurisdictions to the more limited language of their own removal statutes. Compare with Stokes v. Probate Court, 258 N.E.2d, 22 Ohio St.2d, 120 (1970) (statute permitting removal for misconduct "in office") and State v. Scott, 247 P. 699, 35 Wyo. 108 (1926)(statute permitting removal for misconduct "in office"). The obvious intent of the Legislature in using the term "permanently forfeit," and the apparent legislative purpose which is evident from the provision--that of purging from public office those officers who betray the public trust, compels the conclusion that section 94-7-401(4) requires forfeiture of office without regard to the particular term of office in which the misconduct was committed.

THEREFORE, IT IS MY OPINION:

A public servant convicted under section 94-7-401, R.C.M. 1947, of official misconduct which occurred

during a prior term of office forfeits his current term of office.

Very truly yours,

MIKE GREELY
Attorney General