

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 61

CONSTITUTIONS - Rights of the convicted: holding public office;
ELECTIONS - Eligibility of candidate convicted of official misconduct;
MISFEASANCE AND MALFEASANCE - Effect of official misconduct conviction on eligibility for future office;
PUBLIC OFFICE - Right to hold office after state supervision for conviction has terminated;
QUALIFICATIONS - Effect of official misconduct conviction on eligibility for future office;
WORDS AND PHRASES - "Permanently forfeit his office;"
MONTANA CODE ANNOTATED - Section 45-7-401(4);
MONTANA CONSTITUTION - Article II, section 28;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 32;
REVISED CODES OF MONTANA, 1947 - Sections 94-3523, 94-3910.

HELD: A person who is no longer under state supervision is not disqualified as a candidate for justice of the peace by a conviction for official misconduct during a previous term in that office.

1 June 1982

Robert L. Deschamps, III, Esq.
Missoula County Attorney
Missoula County Courthouse
Missoula, Montana 59801

Dear Mr. Deschamps:

You have asked for my opinion on the following question:

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Is a person eligible for the office of justice of the peace, if he or she was convicted of official misconduct while holding that office during a previous term and state supervision for the offense has terminated?

In my opinion, such a person is eligible to run for the office of justice of the peace.

Section 45-7-401(4), MCA, provides:

A public servant who has been charged [with official misconduct] 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 backpay.

The statute does not explicitly address whether a convicted official is disqualified from holding future office. The answer to your question turns on the construction of the phrase, "permanently forfeit his office."

The phrase is ambiguous; arguments can be made in support of either side of the issue you have raised. On one hand, it is arguable that the word "permanently" indicates a legislative intent to forever disqualify the convicted person from holding future office. See 37 Op. Att'y Gen. No. 32 at 140, 142 (1977). On the other hand, it is arguable that the absence of express disqualifying language indicates a legislative intent to allow the convicted person to be reelected to the office. See Cannon v. Town of Tempe, 36 Ariz. 16, 281 P. 947, 948 (1929); 63 Am. Jur. 2d Public Officers and Employees § 60, at 666-67 (1972); 67 C.J.S. Officers § 101, at 445 (1978); compare § 45-7-401(4), MCA, with § 94-3523, R.C.M. 1947, and § 94-3910, R.C.M. 1947. My research has revealed no Montana cases concerning the possible disqualifying effect of section 45-7-401(4), MCA, nor any statutes from other jurisdictions that include the phrase "permanently forfeit his office," which would be helpful in answering your question.

In deciding between the alternative interpretations of section 45-7-401(4), MCA, given above, one principle of statutory construction is determinative. If a

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construction of a statute is fairly possible by which a serious doubt of constitutionality may be avoided, that construction should be adopted. See McMillen v. Arthur G. McKee and Co., 166 Mont. 400, 409, 533 P.2d 1095, 1099 (1975); accord Califano v. Yamasaki, 442 U.S. 682, 693 (1979). In this case, construing the statute to disqualify a person from running for an office, because of a criminal conviction, after state supervision for the crime has terminated would raise a serious doubt as to its constitutionality. Article II, section 28 of the Montana Constitution states: "Rights of the convicted. Laws for the punishment of crime shall be founded on the principles of prevention and reformation. Full rights are restored by termination of state supervision for any offense against the state." The Montana Supreme Court, interpreting this provision, has said:

In our view the constitutional provision refers to those rights commonly considered political and civil rights incident to citizenship such as the right to vote, the right to hold public office, the right to serve as a juror in our courts and the panoply of rights possessed by all citizens under the laws of the land.

State v. Radi, 176 Mont. 451, 469, 578 P.2d 1169, 1180 (1978), quoting State v. Gafford, 172 Mont. 380, 389-90, 563 P.2d 1129, 1134 (1977) (emphasis added); see V Montana Constitution Convention Transcript 1800. To avoid doubt as to whether section 45-7-401(4), MCA, complies with this constitutional guarantee, I conclude that the term "permanently forfeit his office" does not disqualify a person who has been convicted of official misconduct from holding office after state supervision for the offense has terminated.

This conclusion does not render the word "permanently" meaningless in the context of section 45-7-401(4), MCA. That term clearly mandates forfeiture of a convicted official's entire term of office, and precludes the imposition of a temporary suspension instead. The word "permanently" means that a person who has forfeited his or her office may not subsequently be reinstated, reappointed, or reelected to the same term of office. See 37 Op. Att'y Gen. No. 32 at 145; compare State ex rel. Tyrrell v. Jersey City, 25 N.J.L. 536, 542-43 (1856) with State v. Rose, 74 Kan. 262, 86 P. 297,

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298-99 (1906). In 37 Op. Att'y Gen. No. 32 at 145, I said that the word "permanently" "must be construed as contemplating a more drastic and broader remedy" than statutes using the unmodified term "forfeit," which have been narrowly construed. Nothing in this opinion should be interpreted as negating that statement or the holding of that opinion.

THEREFORE, IT IS MY OPINION:

A person who is no longer under state supervision is not disqualified as a candidate for justice of the peace by a conviction for official misconduct during a previous term in that office.

Very truly yours,

MIKE GREELY
Attorney General