

LEGISLATURE - Dual officeholding by member of the Legislature and municipal officer;
MUNICIPAL GOVERNMENT - Dual officeholding by member of the Legislature and municipal officer;
PUBLIC OFFICE - Dual officeholding by member of the Legislature and municipal officer;
MONTANA CODE ANNOTATED - Sections 5-2-104, 7-3-1215;
1889 MONTANA CONSTITUTION - Article V, section 5;
1972 MONTANA CONSTITUTION - Article V, section 9;
OPINIONS OF THE ATTORNEY GENERAL - 8 Op. Att'y Gen. at 393 (1920), 10 Op. Att'y Gen. at 42 (1922-24), 15 Op. Att'y Gen. at 478 (1934), 16 Op. Att'y Gen. No. 245 (1936), 16 Op. Att'y Gen. No. 279 (1936), 18 Op. Att'y Gen. No. 13 (1939), 19 Op. Att'y Gen. No. 155 (1941), 23 Op. Att'y Gen. No. 26 (1949), 34 Op. Att'y Gen. No. 4 (1971), 34 Op. Att'y Gen. No. 25 (1971), 34 Op. Att'y Gen. No. 34 (1972), 35 Op. Att'y Gen. No. 90 (1974), 36 Op. Att'y Gen. No. 80 (1976).

HELD: A municipal officer who holds "public office of a civil nature" as that phrase is defined in State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411 (1927), is prohibited by

article V, section 9 of the Montana Constitution from serving as a member of the Legislature during his continuance in municipal office.

11 April 1984

Jim Nugent
City Attorney
201 West Spruce
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Dear Mr. Nugent:

You have asked my opinion on the following question:

Does article V, section 9 of the Montana Constitution prohibit an individual from serving as a municipal officer and as a state legislator at the same time?

As a preliminary matter, it should be noted that there are specific statutes that prohibit dual officeholding of certain public officers. For example, section 7-3-1215, MCA, prevents a county commissioner from holding any other public office except notary public or member of the state militia. Your request, however, involves the scope of the constitutional provision regarding dual officeholding by members of the State Legislature. The applicable law is found in the Montana Constitution, article V, section 9 and in section 5-2-104, MCA. Article V, section 9 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 added.]

Section 5-2-104, MCA, provides:

(1) No member of the legislature may, during the term for which he was elected, be

appointed to any civil office under the state. A member of the legislature may become a candidate for public office during his term.

(2) A member of the legislature who is elected to other public office shall resign from the legislature prior to assuming the office to which he was newly elected.
[Emphasis added.]

Neither the Constitution nor the statute defines the phrase "civil office under the state" or "public office." The phrases are admittedly ambiguous when applied to the situation where a member of the State Legislature wishes to seek election to local office or vice versa.

The transcript of the proceedings of Montana's 1972 Constitutional Convention includes discussions of the meaning of article V, section 9, which is identical in substance to its predecessor in the 1889 Constitution, article V, section 7. However, it is difficult to derive any clear or uniform intent of the delegates from a reading of the relevant portion of the 1972 transcript. Initially, the Committee of the Whole proposed a provision that prohibited appointment of a member of the Legislature to civil office under authority of the State, which office was created during the member's term in the Legislature but did not prevent altogether the holding of dual offices. The rationale for proposing this substitute in place of the 1889 constitutional provision, art. V, § 7, was that the 1889 provision had not been enforced and had necessitated excessive interpretation. Delegate Robinson stated at one point: "They've had a hard time discovering what constitutes a civil office--is that everything from county superintendent of schools on up to Supreme Court justice?" She added later, "Now you know in the last session of the Legislature there were a city council person serving and also a mayor. Present section 7 simply isn't being applied as it was read to be intended [sic]." Montana Constitutional Convention transcript, February 19, 1972, pp. 595, 597.

The Committee on the Whole's proposal to amend the 1889 constitutional provision was not approved, and instead the Committee adopted the language of the 1889 provision. Subsequently, on March 7, 1972, the

delegates discussed revised language submitted by the Committee on Style and Drafting, which had been written to specifically prohibit a member of the state senate from holding during his term "any civil, federal, state, county, or municipal office." Discussion on this proposal is somewhat confusing. It is clear, however, that the language drafted by the Style and Drafting Committee was intended to get rid of the phrase "under the state," as used in the 1889 Constitution, because it was regarded as an "imprecise term that had no real legal consequences," according to Delegate Schiltz. Montana Constitutional Convention transcript, March 7, 1972, p. 1575. The Style and Drafting Committee's proposal was eventually rejected because it did not address appointment to other office, and in the end the convention agreed to use the language of the 1889 constitutional provision with certain technical changes that are inconsequential in the context of this discussion.

I am unable to conclude from the discussion and debate of the 1972 Constitutional Convention precisely what the delegates intended by use of the phrase "any civil office under the state." Background materials distributed to the delegates by the Montana Constitutional Convention Commission include some historical perspective on the subject of dual officeholding. The Commission's Report No. 12, entitled "The Legislature," refers to the policy of most states to avoid a conflict of interest or place too much power in the hands of one person. Report No. 12 at 102. Perhaps the only conclusion that can be drawn from the 1972 Constitutional Convention discussion on article V, section 9, is that the delegates meant to retain the 1889 constitutional provision, the meaning of which was not altogether clear to them.

The proceedings of Montana's 1889 Constitutional Convention do not include discussion of former article V, section 7. See Proceedings and Debates, Constitutional Convention, 1889, pp. 134, 604, 644. However, the 1889 provision has been interpreted in several Montana Supreme Court and Attorney General opinions, discussed below. With respect to the case law, it should be noted as a preliminary matter that none of the cases requiring an interpretation of former article V, section 7, involved a legislator appointed or elected to a local office. Rather, the factual

situations concerned office or employment on the state or county level of government.

The seminal Montana case on the subject of dual officeholding is State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411 (1927). The Montana Supreme Court's opinion in Barney, which sets forth a five-pronged test for determining what is a public office of a civil nature, is still referred to by other state courts as well as by Montana courts. In Barney, the court was confronted with the question of whether the job of auditor of the State Board of Railroad Commissioners was a "civil office" under the 1889 Montana Constitution, art. V, § 7. After a thorough discussion of the case law in other states, the Court concluded that a "civil office" is a public office not of a military character. As for the definition of a "public office of a civil nature," the Court established the following five-pronged test:

(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.

Barney at 528-29. Applying the five-pronged test to the position of auditor of the State Board of Railroad Commissioners, the Court determined that it was not a civil office under the state because there was no

delegation of a portion of the sovereign power of government. While the Court's opinion is more clearly an explanation of "civil office" than of the phrase "under the state," the suggestion remains, nonetheless, that an office created by the Legislature or by a municipality through authority conferred by the Legislature is a civil office under the state so long as it involves the exercise of the sovereign power of government.

Subsequent Montana cases have concluded that the following positions were "civil offices" under former article V, section 7: a member of the State Relief Commission, State ex rel. Nagle v. Kelsey, 102 Mont. 8, 555 P.2d 685 (1936); a member of the State Constitutional Convention, Forty-Second Legislative Assembly v. Lennon, 156 Mont. 416, 481 P.2d 330 (1972), and Mahoney v. Murray, 159 Mont. 176, 496 P.2d 1120 (1972). The positions of state boiler inspector and member of the State Legislative Council were found not to be "civil offices" under former article V, section 7: State ex rel. Nagle v. Page, 98 Mont. 14, 37 P.2d 575 (1934); State ex rel. James v. Aronson, 132 Mont. 120, 314 P.2d 849 (1957). The opinions in these cases refer to Barney's five-pronged test in order to distinguish between a public officer and an employee who is not a public officer. Although the issue of whether the positions in question involve civil office "under the state" is not specifically addressed in these opinions, the Court appears to have construed the constitutional provision to apply to "public office" in general. In Mahoney v. Murray, supra, the Court concluded: "Accordingly, we find that Relator Mahoney now holds a public office, and he is prohibited by the Constitution from holding another public office." Mahoney v. Murray, 159 Mont. at 189, 496 P.2d at 1126-27. And in Mulholland v. Ayers, 109 Mont. 558, 565, 99 P.2d 234, 238 (1940), the Court offered the following as dictum:

Section 7, Article V of our state Constitution 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." It is difficult to conceive of any office the incumbent of which is chosen at a general election which, if accepted by one holding the office of state senator, would not cause a vacancy in the senatorship under this section of the Constitution. [Emphasis added.]

The opinions of the Attorney General issued under article V, section 9 and former article V, section 7, also deal, for the most part, with appointment, election, or employment in a position in state government. Those positions which were determined to be "civil offices" include: county high school trustee, 8 Op. Att'y Gen. at 393 (1920); member of the Montana Relief Commission, 16 Op. Att'y Gen. No. 245 (1936); member of the State Soil Conservation Commission, 19 Op. Att'y Gen. No. 155 (1941); delegate to the 1972 Constitutional Convention, 34 Op. Att'y Gen. No. 34 (1972); and member of a local government study commission, 35 Op. Att'y Gen. No. 90 (1974). Positions found not to be "civil offices" include: University of Montana instructor, 10 Op. Att'y Gen. at 42 (1922-24); assistant income tax auditor, 15 Op. Att'y Gen. No. 478 (1934); head of the Division of Labor and Industry in the State Department of Agriculture, Labor and Industry, 16 Op. Att'y Gen. No. 279 (1936); member of a joint commission to study water rights, 18 Op. Att'y Gen. No. 13 (1939); inspector for the State Liquor Control Board, 23 Op. Att'y Gen. No. 26 (1949); legal counsel to a state agency, 34 Op. Att'y Gen. No. 25 (1971); and precinct committeeman, 36 Op. Att'y Gen. No. 80 (1976). As with the Montana case law mentioned earlier, clarification of the phrase "under the state" is not provided in the opinions of the Attorney General; however, the constitutional provision is frequently analyzed with reference to "public office" in general. See, for example, 34 Op. Att'y Gen. No. 4 (1971), at 96-97.

I have also examined other state constitutions in order to identify any provisions similar to article V, section 9 of the Montana Constitution. My research indicates that while 46 state constitutions have some kind of prohibition against dual officeholding, only a few have language similar to that used in Montana's Constitution. By far, the most frequently used provision concerning dual officeholding is one which

prohibits a state legislator from accepting appointment, during the term for which he was elected, to any public office which was created by the Legislature during the legislator's term of office. Several state constitutions use the phrase "civil office under the state," and the phrase has been interpreted by those states in a variety of ways. For example, the Arkansas Constitution, art. V, § 10, like the Montana Constitution, prohibits the election or appointment of a legislator, during the time for which he shall have been elected, to any civil office under the state. In Collins v. McClendon, 5 S.W.2d 734 (Ark. 1928), the Supreme Court of Arkansas ruled that a legislator was ineligible to be elected mayor under the Arkansas Constitution. New Mexico's constitution prohibits appointment of a member of the legislature to "any civil office in the state." That phrase has been determined by the New Mexico Attorney General to apply to an appointment to state, county, or municipal office. 1972 Op. Att'y Gen. No. 72 at 61. In Missouri, however, under a former constitutional provision (art. IV, § 15), which prohibited a legislator, during the term for which he shall have been elected, from being appointed to any civil office under the state, it was held that the Mayor of St. Louis was not an officer under the state. Britton v. Steber, 62 Mo. 370 (cited in Carpenter v. People, 5 P. 828, 836 (Colo. 1885)). In Michigan, the state constitution, art. 4, § 9, prohibits a legislator from receiving a civil appointment "within this state" from any state authority, during the term for which he is elected. The Supreme Court of Michigan found that the office of Mayor of Detroit was a "local office" and not a "state office" and thus was not covered by the constitutional prohibition. Young v. Edwards, 389 Mich. 333, 207 N.W.2d 126 (1973). And in Begich v. Jefferson, 441 P.2d 27 (Alaska 1968), the Alaska Supreme Court concluded that an office "under the state" is not synonymous with an office under a political subdivision of the state.

As mentioned earlier, the statutory provision that reflects article V, section 9 of the Montana Constitution, is section 5-2-104, MCA. The statute was enacted in 1977 as Senate Bill 184. Discussion of Senate Bill 184, and a similar bill, Senate Bill 179, indicates that the Legislature was concerned with making it clear that a legislator could resign his seat in the Legislature and run for civil office. At one point, Senator Feda asked, "What if I wanted to run for city

council?" Senator McCallum, referring to proposed Senate Bill 179, responded, "With this bill, you could." Subsequently, the following colloquy is reported:

Senator Towe: I refer you to the Constitution, Article 5, Section 9. It says that nobody in office can be appointed to a state office. The Supreme Court, in its frenzy, also said that no one could resign and run for other office. When Senators have four year terms, they can never run during their term.

Senator Ryan: Define "civil office."

Senator Towe: That's the rub. Civil office has been interpreted by the Supreme Court to mean the same as elected office....

Senator Kropp: Are there any county civil offices?

Senator Towe: Any elected office. So, you couldn't resign your seat and run for any county office.

Minutes of the Senate State Administration Committee, March 11, 1977.

In summary, what authority does exist regarding the interpretation of the phrase "civil office under the state" favors a definition that includes local office, so long as the office in question meets the five-pronged test of State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411 (1927).

THEREFORE, IT IS MY OPINION:

A municipal officer who holds "public office of a civil nature" as that phrase is defined in State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411 (1927), is prohibited by article V, section 9 of the Montana Constitution from serving as a member of the Legislature during his continuance in municipal office.

Very truly yours,

MIKE GREELY
Attorney General