

LEGISLATURE - Dual officeholding by member of Legislature and municipal officer;
MUNICIPAL GOVERNMENT - Dual officeholding by member of Legislature and municipal officer;
PUBLIC OFFICE - Dual officeholding by member of Legislature and municipal officer;
MONTANA CODE ANNOTATED - Section 5-2-104;
MONTANA CONSTITUTION - Article V, section 9;
OPINIONS OF THE ATTORNEY GENERAL - 8 Op. Att'y Gen. at 393 (1920), 35 Op. Att'y Gen. No. 90 (1974), 40 Op. Att'y Gen. No. 46 (1984).

HELD: An elected mayor holds a "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), and is thereby prohibited by article V, section 9 of the Montana Constitution from serving as a member of the Legislature while serving as mayor.

15 August 1986

James R. Weaver
City Attorney
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Dear Mr. Weaver:

You have asked my opinion on the following question:

Does article V, section 9 of the Montana Constitution permit an elected mayor to serve simultaneously as an elected representative in the state Legislature?

Your question requires an interpretation of article V, section 9 of the Montana Constitution, and 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, in pertinent part:

(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.

As you have mentioned in your opinion request, the question of dual officeholding by a member of the state Legislature and a municipal officer was addressed in 40 Op. Att'y Gen. No. 46 at 184 (1984). As cited in that opinion, the most significant Montana case on dual officeholding is State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411 (1927). Barney sets forth a five-pronged test for determining whether certain public offices are public offices "of a civil nature," and are thereby affected by the language of article V, section 9 of the Montana Constitution.

(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 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, supra, at 528-29.

Positions found to be civil offices under article V, section 9 of the Montana Constitution (or its predecessor, article V, section 7) include a county high school trustee, 8 Op. Att'y Gen. at 393 (1920), and a member of a local government study commission, 35 Op. Att'y Gen. No. 90 at 252 (1974).

I concluded in 40 Op. Att'y Gen. No. 46 at 184 (1984) that, in general, an office which is created by the Legislature or by a municipality through authority conferred by the Legislature is a civil office under the state and therefore affected by article V, section 9, Montana Constitution, if that office involves the exercise of the sovereign power of government. 40 Op. Att'y Gen. No. 46 at 184 (1984) should be consulted for a history of the constitutional provision and its various local interpretations.

The office of mayor is an office created by a municipality through authority conferred by the Legislature. Tit. 7, ch. 3, MCA. The office of mayor is also vested with a portion of the sovereign power of government which is executive in character.

THEREFORE, IT IS MY OPINION:

An elected mayor holds a "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), and is thereby prohibited by article V, section 9 of the Montana Constitution from serving as a member of the Legislature while serving as mayor.

Very truly yours,

MIKE GREELY
Attorney General

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