

VOLUME NO. 43

OPINION NO. 32

ARMED FORCES - Absence due to active military duty;  
CONSTITUTIONS - Eligibility of elected officers of the executive branch for compensation from other governmental agencies;  
PUBLIC OFFICERS - Absence due to active military duty; eligibility of elected officers of the executive branch for compensation from other governmental agencies;  
PUBLIC SERVICE COMMISSION - Absence due to active military duty; eligibility of elected officers of the executive branch for compensation from other governmental agencies;  
MONTANA CODE ANNOTATED - Sections 2-15-2601, 2-16-111(1), 2-16-112, 2-16-501, 10-2-221(2), 10-2-228, 69-1-103;  
MONTANA CONSTITUTION - Article VI, section 5(2);  
MONTANA LAWS OF 1971 - Chapter 272.

- HELD: 1. Absence from the state attributable to active military duty does not result in a vacancy within the office of public service commissioner.
2. Elected members of the Public Service Commission may not receive additional compensation for simultaneous service in the Montana Army National Guard.

September 12, 1989

John B. Driscoll  
Public Service Commission  
2701 Prospect Avenue  
Helena MT 59620

Dear Mr. Driscoll:

You have requested my opinion concerning the following questions. (I have consolidated your second and third questions for the sake of convenience.)

1. What is the extent of the freedom of a member of the Public Service Commission to be out of state for active military duty, while continuing to hold state office?

2. Is a member of the Public Service Commission entitled to additional compensation for simultaneous service in the Montana Army National Guard?

The foregoing issues have resulted from your decision to accept an opportunity for additional training as a member of the Montana Army National Guard. During the 4½-month training period you will be on active duty at the United States Army Command and General Staff College in Fort Leavenworth, Kansas. You have indicated that it is your intention to maintain your position as a member of the Public Service Commission and to participate in its functions during your absence.

Extended absence from the state generally implicates the provisions of section 2-16-501, MCA, which provides in pertinent part:

**Vacancies created.** An office becomes vacant on the happening of any one of the following events before the expiration of the term of the incumbent:

....

(5) his ceasing to be a resident of the state or, if the office be local, of the district, city, county, town, or township for which he was chosen or appointed or within which the duties of his office are required to be discharged;

(6) his absence from the state, without the permission of the legislature, beyond the period allowed by law;

(7) his ceasing to discharge the duty of his office for the period of 3 consecutive months, except when prevented by sickness or when absent from the state by permission of the legislature[.]

I conclude that the foregoing statutory provision does not result in a vacancy within the Public Service Commission in this instance.

There is no indication that your tenure at the United States Army Command and General Staff College in Fort Leavenworth, Kansas, is anything other than temporary. Therefore, it does not appear that a change of residence is present which implicates the provisions of section 2-16-501(5), MCA.

There is no limitation upon the length of absence of a member of the Public Service Commission from the state which would serve to implicate the provisions of section 2-16-501(6), MCA. Section 2-16-112, MCA, provides:

**Absence from the state.** No officer mentioned in 2-16-111(1) and no officer appointed by the governor and confirmed by the senate must absent himself from the state for more than 60

consecutive days unless upon business of the state or with the consent of the legislature.

Application of the 60-day limitation on absence from the state is limited to those public officers either subject to gubernatorial appointment or listed in section 2-16-111(1), MCA. Members of the Public Service Commission are elected rather than appointed, § 69-1-103, MCA, and they are not among the officers listed in section 2-16-111(1), MCA, which requires certain officers to both reside and maintain office at the seat of government. Therefore, the statutory limitation on absence from the state has no application to members of the Public Service Commission.

It is your stated intention to fulfill your obligation as a member of the Public Service Commission during your absence. There is therefore no basis to anticipate the applicability of section 2-16-501(7), MCA, which provides that the failure to discharge official duties for a period of three consecutive months renders an office vacant.

My conclusion is further buttressed by the fact that your absence is attributable to active military duty. Section 10-2-228, MCA, provides as follows:

**Absence for military service creates no vacancy in office.** It is specifically provided that the provisions of 2-16-112, subsections (5), (6), and (7) of 2-16-501, and 7-4-2208, shall not be, and the same are declared not to be, applicable insofar as they relate to absence or residence of any officer of the state or political subdivision thereof caused by the military service of such officer as set forth in 10-2-221. It is specifically declared that the absence of such officer caused by such military service shall not create a vacancy in the office to which he was elected.

Section 10-2-221(2), MCA, provides that a public officer is entitled to restoration to the remainder of his elected term of office upon completion of the military service which prevented performance of official duties.

The Montana Supreme Court has given the following interpretation to the foregoing statutory provisions:

[They make] such absence result, not in a permanent vacancy of office, but with the officer's concurrence, in something of the nature of his leave of absence, or his suspension or relief from duty, with a right, under certain conditions, to resume his office, thus resulting in a temporary vacancy in the office[.]

Gullickson v. Mitchell, 113 Mont. 359, 126 P.2d 1106, 1110 (1942). To the extent that section 2-16-501, MCA, would otherwise apply, its effect is

ameliorated by sections 10-2-221 and 10-2-228, MCA, where absence is attributable to active military service.

I therefore conclude that absence from the state attributable to active military service does not result in a vacancy within the office of public service commissioner.

With respect to your second question, I conclude that a member of the Public Service Commission may not receive additional compensation for simultaneous service in the Montana Army National Guard.

The elected members of the Public Service Commission are subject to the provisions of Article VI, section 5(2) of the Montana Constitution, which provides as follows:

(2) During his term, no elected officer of the executive branch may hold another public office or receive compensation for services from any other governmental agency. He may be a candidate for any public office during his term.

The inclusion of the Public Service Commission within the executive branch of government is nowhere more clearly demonstrated than by the Executive Reorganization Act of 1971. 1971 Mont. Laws, ch. 272. The foregoing legislation designated the Public Service Commission to serve as the department head of the Department of Public Service Regulation, a department of the executive branch of government. See § 2-15-2601, MCA. "No person or persons charged with the exercise of power properly belonging to one branch [of government] shall exercise any power properly belonging to either of the others[.]" Mont. Const. Art. III, § 1. Had the character of the Public Service Commission been anything other than executive, its designation as head of a department of the executive branch of government would have constituted a breach of the principle of separation of the powers of government. See, e.g., State ex rel. Judge v. Legislative Finance Committee, 168 Mont. 470, 543 P.2d 1317 (1975).

Inclusion of the Public Service Commission within the executive branch of government is consistent with its historical character and function. It is "a department of our government created by the legislature, whose officials are elected to carry out and promote a legislative function." Cascade County Consumers Association v. Public Service Commission, 144 Mont. 169, 394 P.2d 856, 868 (1964); cert. denied, 380 U.S. 909, 85 S. Ct. 891, 13 L. Ed. 2d 796 (1965). Its function has been characterized as follows:

The Legislature itself has the undoubted authority to regulate public utilities, and by means of a duly constituted Commission it operates through its administrative medium.

Billings Utility Co. v. Public Service Commission, 62 Mont. 21, 203 P. 300, 368 (1921). Clearly, the Legislature may "make a policy determination and delegate to an executive agency or officer the duty to later implement the legislature's policy determination." State ex rel. Judge v. Legislative Finance Committee, *supra*, 543 P.2d at 1321. It is "beyond dispute" that the Public Service Commission has been delegated the authority to fix rates charged by public utilities pursuant to legislated standards. State ex rel. Olson v. Public Service Commission, 131 Mont. 272, 309 P.2d 1035, 1038 (1957). The Public Service Commission is an "administrative agency [and] has only those powers specifically conferred upon it by the legislature." City of Polson v. Public Service Commission, 155 Mont. 564, 473 P.2d 508, 511 (1970). The above-cited cases support a determination that the Public Service Commission is a part of the "executive branch" as that phrase is used in Article VI, section 5(2) of the Montana Constitution.

It is equally beyond dispute that service in the Montana National Guard is within the constitutional proscription of compensation for additional governmental service by elected members of the executive branch. Simply stated, the Montana National Guard is a governmental agency as referred to in Article VI, section 5(2) of the Montana Constitution. The following discussion occurred at the constitutional convention prior to approval of that provision of the new constitution:

DELEGATE KELLEHER: Mr. Joyce, no elected officer may receive compensation for his services from any governmental agency. I'm just concerned with National Guard Officers. For instance, my brother Pete, down the row here, is a National Guard officer. Could he be governor and still hold his commission? Or say, Auditor, or something--a governmental agency, would that be--

DELEGATE JOYCE: He could be Governor and he would then be, maybe--statutorily, he'd be the Commander of the National Guard, but he couldn't get any extra salary other than his Governor's salary for being the Commander of the National Guard.

DELEGATE KELLEHER: What if he were State Treasurer?

DELEGATE JOYCE: He couldn't either, under this section.

IV Mont. Const. Conv. 629 (1972).

For the reasons discussed above, I conclude that elected members of the Public Service Commission may not receive additional compensation for simultaneous service in the Montana Army National Guard.

THEREFORE, IT IS MY OPINION:

1. Absence from the state attributable to active military duty does not result in a vacancy within the office of public service commissioner.
2. Elected members of the Public Service Commission may not receive additional compensation for simultaneous service in the Montana Army National Guard.

Sincerely,

MARC RACICOT  
Attorney General