

VOLUME NO. 43

OPINION NO. 43

ARMED FORCES - Compensation paid to state officer for military duty;  
CONSTITUTIONS - Eligibility of elected officers of executive branch for compensation from other governmental agencies;  
PUBLIC OFFICERS - Eligibility of elected officers of executive branch for compensation from other governmental agencies;  
PUBLIC SERVICE COMMISSION - Eligibility of elected officers of executive branch for compensation from other governmental agencies;  
MONTANA CODE ANNOTATED - Sections 2-15-501(1), 10-1-103, 10-1-501, 17-4-103(1);  
MONTANA CONSTITUTION - Article VI, sections 4(5), 5(2);  
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 32 (1989);  
UNITED STATES CODE - 32 U.S.C. § 325(a), 37 U.S.C. § 204, 37 U.S.C. § 206;  
UNITED STATES CONSTITUTION - Article VI.

- HELD: 1. Article VI, section 5(2) of the Montana Constitution has no effect upon the salary of an elected member of the Public Service Commission but restricts his right to accept additional compensation from the state for service in the Montana Army National Guard.
2. Article VI, section 5(2) of the Montana Constitution restricts the right of an elected member of the Public Service Commission to accept additional compensation from the state for service in the Montana Army National Guard when such duty constitutes state rather than federal service.
3. To the extent applicable, as noted above, the constitutional limitation upon the right of elected officers of the executive branch to accept compensation from their elected office prohibits all compensation from the state resulting from service in the Montana Army National Guard, beginning with the first instance of dual compensation.

4. A public officer has a duty to repay unauthorized compensation and the state has a corresponding right to recover the same.
5. The state auditor has the authority to compel an elected member of the Public Service Commission to repay unauthorized additional compensation received from the state for service in the Montana Army National Guard.

November 22, 1989

The Honorable Andrea Bennett  
State Auditor of Montana  
P.O. Box 4009  
Helena MT 59604

Dear Ms. Bennett:

You have requested clarification of my recent opinion wherein I concluded that, as a matter of state law, an elected state officer of the executive branch, who is also a member of the Montana Army National Guard, may not receive additional compensation for simultaneous service in the Montana Army National Guard. See 43 Op. Att'y Gen. No. 32 (1989). At the outset it is important to mention that although it was beyond the scope of the prior opinion to discuss the issue of federal preemption, your request adduced additional information concerning the different sources of compensation received, thus requiring a discussion of preemption. As will be explained hereafter, the nature of service and the source of payment affect the right of a state officer to receive additional compensation. My prior opinion was directed toward the reception of additional compensation from the state for service in the Montana Army National Guard. That opinion, although correct, is subject to clarification in view of the additional information concerning federal compensation which has come to light as a consequence of your request. Your specific questions are as follows:

1. Since your previous opinion concludes in relevant part that elected members of the Public Service Commission may not receive additional compensation for simultaneous service in the Montana Army National Guard, which salary--the salary received as an elected member of the Public Service Commission or the salary received for service in the Montana Army National Guard--is prohibited?
2. If the prohibited salary in the above question is the salary received as an elected member of the Public Service Commission, can the State Auditor unilaterally withhold payment of the salary to the elected member and revert

it to the general fund? If the State Auditor cannot unilaterally withhold payment of the salary and must receive authorization, who can provide such authorization and by what procedure?

3. Does the state constitutional violation of dual compensation begin with the first payment of the double salary? If so, must the elected official return all prohibited salary he received to the fund which paid it? If the prohibited salary was paid by the State Auditor, can the state auditor compel the elected official to return all prohibited salary he received?

The answer to your first question is dictated by the plain meaning of the language used in Article VI, section 5(2) of the Montana Constitution which provides as follows:

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. [Emphasis added.]

The intent of the framers of a constitutional provision is controlling and "should be determined from the plain meaning of the words used." State v. Cardwell, 187 Mont. 370, 373, 609 P.2d 1230, 1232 (1980). The underlined portion of the foregoing provision clearly evinces an intention to prohibit compensation attributable to service in a governmental agency other than the position to which the officer was elected. The example employed in discussion of the foregoing provision at the constitutional convention resolves all doubt.

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. [Emphasis added.]

IV Mont. Const. Conv. 929 (1972). I therefore conclude that Article VI, section 5(2) of the Montana Constitution has no effect upon the salary of an

elected member of the Public Service Commission but instead restricts that state officer's right to accept additional compensation from the state for military service.

In view of the foregoing discussion there is no reason to answer your second question.

Before discussing your third group of questions, it will be necessary to further clarify the effect of Article VI, section 5(2) of the Montana Constitution. As a result of the unique character of the National Guard, the foregoing constitutional provision does not operate as a complete bar to the receipt of additional federal compensation for military service.

In modern form, the organizational structure of the National Guard may be described as follows:

The National Guard is the organized militia of the several States. [10 U.S.C. § 101(10), (12)]. The National Guard of the United States (NGUS) consists of the members of the National Guard or organized militia who are also enlisted in a reserve component of the United States Army or Air Force. [10 U.S.C. § 261.]

In 1933, Congress established the National Guard of the United States as a component of the Army of the United States. Act of June 15, 1933, ch. 87, § 5, 48 Stat. 155. The National Guard of the United States consisted of the federally recognized members and units of the National Guard of the several States. Id. The 1933 Act created a dual enlistment system, id., §§ 7-11, 48 Stat. 156-57, whereby "an incoming guardsman joined both the National Guard of his home state and the National Guard of the United States, a reserve component of the U.S. Army." Johnson v. Powell, 414 F.2d 1060, 1063 (5th Cir. 1969). [Emphasis supplied.]

Perpich v. United States Department of Defense, 880 F.2d 11, 14-15 (8th Cir. 1989). See also § 10-1-103, MCA.

The National Guard is and always has been subject to both state and federal regulation as a result of its dual character.

The Constitution as adopted represented a compromise. A standing army was authorized, but the militia was not abolished. It was to be available for federal service in three specified contingencies. It was to be organized, armed and disciplined by Congress, but, except when in federal service, was to be governed by the States. The President was to be Commander-in-Chief of the Army, and of the militia while in federal service.

Weiner, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 184-85 (1940).

It was inevitable that the constitutional framework of dual control would provide for instances of conflicting state and federal regulation. The relevant factor in the resolution of such disputes is the determination of whether the National Guard is engaged in state or federal service at the time.

[T]he relevant dichotomy in the constitutional language is between federal service and state service. See Article I, sec. 8, cl. 16 ("The Congress shall have Power ... To provide ... for governing such Part of [the militia] as may be employed in the Service of the United States...").

Perpich v. United States Department of Defense, 666 F. Supp. 1319, 1324 (D. Minn. 1987). See also Dukakis v. United States Department of Defense, 686 F. Supp. 30, 36 (D. Mass. 1988); aff'd, 859 F.2d 1066 (1st Cir. 1988) (*per curiam*), cert. denied, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1743, 104 L. Ed. 2d 181 (1989) ("Under the dual-enlistment rationale, ... the states' authority over training of the militia, reserved in the Militia Clause, does not apply to the period during which members of the militia are on active duty as part of the NGUS.")

Congress has authorized active federal service for the National Guard in a wide variety of circumstances. Perpich v. United States Department of Defense, *supra*, 880 F.2d at 15. See, e.g., 10 U.S.C. §§ 672, 673, 3496; 32 U.S.C. §§ 503 to 506. When called into federal service, a member of the National Guard is relieved from duty in its state counterpart. 32 U.S.C. § 325(a). Thus the issue of whether a member of the National Guard is subject to state or federal regulation is determined by the nature of his service, which in turn must be determined on a case-by-case basis. Emsley v. Army National Guard, 722 P.2d 1299, 1301 (Wash. 1986) ("Whether the National Guard is in federal or state service at a given time is determined by the United States Constitution, the Washington Constitution, and federal laws").

Under Article VI of the federal Constitution, federal law has supremacy over state law, including the provisions of a state constitution. Both state and federal statutory law provide for compensation for service in the National Guard. E.g., § 10-1-501, MCA; 37 U.S.C. §§ 204, 206. In contrast, Article VI, section 5(2) of the Montana Constitution prohibits an elected officer of the executive branch from accepting additional compensation for service in the Montana Army National Guard. The apparent conflict is resolved by the foregoing discussion. A member of the National Guard engaged in federal service and thus compensated by the federal government is subject to the duties and may receive the benefits of federal law. When engaged in purely state-oriented service and thus compensated by the state, he is subject to state

regulation. Thus, Article VI, section 5(2) of the Montana Constitution has effect only in the latter instance. Therefore, the application of the second holding in 43 Op. Att'y Gen. No. 32 (1989) is hereby clarified to the extent that it applies only to compensation received from the state.

Your third group of questions concerns the recovery of compensation prohibited by Article VI, section 5(2) of the Montana Constitution. With respect to your first issue, I conclude that the prohibition set forth in the foregoing constitutional provision is absolute. The language employed therein permits no exception. When the meaning of a constitutional provision is apparent from its plain language, no other means of interpretation may be applied. *State v. Cardwell, supra*, 609 P.2d at 1232. Therefore, I conclude that to the extent of its applicability, Article VI, section 5(2) of the Montana Constitution prohibits an elected member of the executive branch from accepting any compensation from the state for service in the Montana Army National Guard beginning with the first instance of the dual compensation.

Your next issue concerns the obligation of a public officer to repay and the corresponding right of the state to recover improper compensation. While this precise issue has never been addressed by the Montana Supreme Court, the universal judicial response recognizes the right of the state to recover unauthorized compensation and imposes the obligation of repayment upon the recipient thereof.

As a general rule, any compensation paid to a public official by the governmental body not authorized by law may be recovered by the proper governmental body, although the payment was made under a mistake of law and without fraud.

67 C.J.S. Officers § 242.

The duty to repay unauthorized compensation is absolute and applies notwithstanding the absence of improper motive.

When a public official wrongfully receives public funds, although paid to him under an honest mistake of law, he must restore such funds.

Nodaway County v. Kidder, 344 Mo. 795, 129 S.W.2d 857, 861 (1939). The obligation to repay unauthorized compensation applies notwithstanding the actual rendition of public service.

Russo, therefore, received money [overtime compensation] which he had no legal right to receive, and even though services actually performed furnish the basis of such payments, they cannot be retained.

Russo v. Governor of the State of New Jersey, 22 N.J. 156, 123 A.2d 482 (1956). Erroneous approval or payment of unauthorized compensation does not affect the state's right of recovery thereof.

It has long been the rule that the State may recover public funds paid public officials in good faith but under a mistake of law, such as in the present case.

Opinion of the Justices, 175 A.2d 396, 398 (N.H. 1961); accord State v. MacDougall, 139 Ga. App. 815, 229 S.E. 667 (1976); State ex rel. Wright v. Gossett, 62 Idaho 521, 113 P.2d 415 (1941); Bockrath v. Department of Health and Human Resources, 506 So. 2d 766 (La. Ct. App. 1987); State v. Adams, 107 Wash. 2d 611, 732 P.2d 149 (1987).

The state may recover unauthorized compensation through a civil action in the proper court. State ex rel. Black v. Burch, 226 Ind. 445, 81 N.E.2d 850, 851 (1948); Bockrath v. Department of Health and Human Resources, *supra*, 506 So. 2d at 772; State v. Adams, *supra*, 732 P.2d at 153-54. See also Tit. 17, ch. 4, pt. 1, MCA.

I therefore conclude that a public officer has a duty to repay unauthorized compensation and that the state has a corresponding right to recover the same. In the instant case, the unauthorized compensation would include that compensation received from the state as a member of the Montana Army National Guard.

With respect to your final issue, I conclude that the State Auditor has the authority to compel repayment of unauthorized compensation. The duties of the State Auditor are provided by law. Mont. Const. Art. VI, § 4(5). Section 17-4-103(1), MCA, provides as follows:

(1) In his discretion it is the duty of the state auditor to examine the collection of moneys due the state and institute suits in its name for official delinquencies in relation to the assessment, collection, and payment of the revenue and against persons who by any means have become possessed of public money or property and failed to pay over or deliver the same and against debtors of the state, of which suits the courts of the county in which the seat of government may be located have jurisdiction, without regard to the residence of the defendants.

A similar provision of Arizona statutory law has been held to confer the authority to institute judicial proceedings to compel recovery of public funds upon the office of the State Auditor.

We think the auditor, considering the manifold duties of that office, is the logical person to determine whether prosecutions

to recover state money should be instituted, and to cause such action to be taken on her relation, and the legislature has evidently reached the same conclusion[.]

State ex rel. Frohmiller v. Hendrix, 59 Ariz. 184, 124 P.2d 768, 771 (1942).

The authority conferred upon the State Auditor by section 17-4-103(1), MCA, does not conflict with the duty of the Attorney General to "prosecute or defend all causes to which the state or any officer thereof in his official capacity is a party[.]" § 2-15-501(1), MCA. The latter provision does not provide a limitation upon a specific grant of authority such as that set forth in section 17-4-103(1), MCA. See Montana Power Co. v. Department of Public Service Regulation, 218 Mont. 471, 709 P.2d 955 (1985). I therefore conclude that the State Auditor has the authority to compel repayment of unauthorized compensation.

THEREFORE, IT IS MY OPINION:

1. Article VI, section 5(2) of the Montana Constitution has no effect upon the salary of an elected member of the Public Service Commission but restricts his right to accept additional compensation from the state for service in the Montana Army National Guard.
2. Article VI, section 5(2) of the Montana Constitution restricts the right of an elected member of the Public Service Commission to accept additional compensation from the state for service in the Montana Army National Guard when such duty constitutes state rather than federal service.
3. To the extent applicable, as noted above, the constitutional limitation upon the right of elected officers of the executive branch to accept compensation from their elected office prohibits all compensation from the state resulting from service in the Montana Army National Guard, beginning with the first instance of dual compensation.
4. A public officer has a duty to repay unauthorized compensation and the state has a corresponding right to recover the same.
5. The state auditor has the authority to compel an elected member of the Public Service Commission to repay unauthorized additional compensation received from the state for service in the Montana Army National Guard.



Sincerely,

MARC RACICOT  
Attorney General