670224.1

LEGISLATURE: Appointment or election to other office.

A member of the legislature may not seek election or obtain appointment to state office during the term for which he is elected regardless of whether he resigns as a member of the legislature.

No. 4573 February 24, 1967.

Honorable Robert Richardson
State Senator
The Capitol
Lansing, Michigan

You have requested my opinion on the following question:

> "Do the provisions of Sections 8, 9 or 10, Article IV of the 1963 Constitution prohibit a legislator from being elected to another office during the middle of his term if he resigns as a legislator after his election to the other office?"

Of the three sections to which you allude, only Section 9 appears to be pertinent to the question. Section 8 is not applicable because it refers to the ineligibility of persons holding another governmental office, employment or position from simultaneously holding a seat in either house of the legislature. This situation could not arise if, as your question states, the legislator were to resign after election to the other office.

Nor need we be concerned with Section 10, the conflict of interest provision, since its purpose is to prohibit legislators and state officers from having any interest in *contracts* with the state or any of its political subdivisions which would cause a substantial conflict of interest. This section, therefore, does not contain any prohibition which would prevent a legislator from seeking another public office and from resigning as a legislator after election.

The provision which is most relevant and does cover the hypothetical case is Section 9 which states:

> "No person elected to the legislature shall receive any civil appointment within this state from the governor, except notaries public, from the legislature, or from any other state authority, during the term for which he is elected."

To answer your question it is necessary to analyze and define the meaning of three key phrases that appear in this section. These phrases are: (1) "any civil appointment," (2) "from any other state authority," and (3) "during the term for which he is elected."

If the phrase "any civil appointment" is to be construed to include "an election," the phrase "from any other state authority" to include "the electorate" and the phrase "during the term for which he is elected" to mean "during the term for which he is elected whether he serves it or not," then the answer to your question must be: A legislator is prohibited from being elected to another office during the middle of his term even if he resigns as a legislator after his election to the other office.

My review of relevant authorities persuades me that these phrases must be so interpreted and that consequently the resulting conclusion constitutes the answer to your question.

Article IV, Section 9 of the 1963 Constitution is a revision of Article V, Section 7 of the Constitution if 1908 which stated:

> "No person elected a member of the legislature shall receive any civil appointment within this state or to the senate of the United States from the governor, except notaries public, or from the governor and senate, from the legislature, or any other state authority, during the term for which he is elected. All such appointments and all votes given for any person so elected for any such office or appointment shall be void. . . ."

When the revision of this and other portions of former Article V, Section 7 was offered to the Constitutional Convention in 1962, it was submitted as proposal 120 by the committee on legislative powers in the following form and with the following comments:

> "The committee recommends that the following be included in the constitution:
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> "Sec. a. No person elected a member of the legislature shall receive any civil appointment within this state [or to the senate of the United States] from the governor, except notaries public, [or] from the governor and senate, from the legislature, or FROM any other state authority, during the term for which he is elected. [All such appointments and all votes given for any person so elected for any such office or appointment shall be void. No member of the legislature shall be interested directly or indirectly in any contract with the state or any county thereof, authorized by any law passed during the time for which he is elected, nor for 1 year thereafter.]
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> "Mr. Hoxie, chairman of the committee on legislatve powers, submits the following reasons in support of Committee Proposal 120:
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> "The committee recommends that the provision preventing the civil appointment of a legislator be retained with one change. The prohibition against appointment to the United States senate is deleted. It is the opinion of the committee that if a vacancy in the office of United States senator occurs, there is no reason why a legislator, who is qualified, may not be chosen to fill it.
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> "The deletion of the sentence that makes appointments and votes for legislators void is recommended. The language is surplusage since the first part of the section provides there shall be no such appointments. If a legislator were to be appointed in violation of this prohibition, he would be subject to answer a writ of quo warranto.
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> "The final sentence regarding interest of a legislator in contracts with the state is deleted because the committee feels the matter is covered in Committee Proposal 115."
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> Constitutional Convention 1961, Official Record, Vol. II, p. 2415.

Thus, it will be noted, all three of the key phrases referred to above were retained so that the judicial construction given to these phrases under the 1908 Constitution must be deemed to have been adopted. As stated in the first headnote of *Knapp v. Palmer,* 324 Mich. 694 (1949):

"When a new Constitution is adopted by a State using language of a previous Constitution or statutes are re-enacted, the Supreme Court must presume that the language was used in the sense in which it had been judicially interpreted."

The judicial construction of these phrases as used in the 1908 Constitution was reviewed in 1945 by the attorney general who stated:

"We therefore conclude that under the law as clearly and expressly established in this State, it is legally impossible for a member of the State House of Representatives to be a candidate during the term for which he was elected to the House for the office of State Senator for a term running concurrently with his unexpired term in the House."

O.A.G. 1945-46, No. 0-3060, p. 183.

The judicial basis for this attorney general's opinion was *Attorney General v. Burhans,* 304 Mich. 108 (1942). In the *Burhans* case, the defendant who was a member of the state senate at the time, became a candidate for the office of member of the Board of Regents of the University of Michigan and received the largest number of votes cast for that office. Thereupon the attorney general, who had previously advised Senator Burhans that he could not do so (see O.A.G. 1941-42, No. 8894-30, p. 467), sought his ouster from the office of Regent of the University of Michigan by information in the nature of quo warranto. The opinion of the Michigan Supreme Court said at p. 110:

"Defendant is not a regent of the University of Michigan, for every vote cast for him at such election was void under article 5, §7, of the Michigan Constitution [of 1908], which reads:

" 'No person elected a member of the legislature shall receive any civil appointment within this State or to the senate of the United States from the governor, except notaries public, or from the governor and senate, from the legislature, or any other State authority, during the term for which he is elected. All such appointments and all votes given for any person so elected for any such office or appointment shall be void.'

"This provision applies to elections and its mandate must be obeyed. *Fyfe v. Kent County Clerk,* 149 Mich. 349."

Attorney General v. Burhans, supra, has not been overruled and, despite the adoption of a new constitution since this decision, it is, in my opinion, still the law of the state. That the elimination of the words "All such appointments and all votes given for any person so elected for any such office or appointment shall be void" in the 1963 Constitution was not intended by the framers thereof to affect the substantive portion of the section, is indicated by the previously cited statement of the committee which offered the proposal, namely:

"The deletion of the sentence that makes appointments and votes for legislators void is recommended. The language is surplusage since the first part of the section provides there shall be no such appointments. If a legislator were to be appointed in violation of this prohibition, he would be subject to answer a writ of quo warranto."

Constitutional Convention 1961, Official Record, Vol. II, p. 2415.

Resort may be made to the Constitutional Convention Debates and to the Address to the People in deciding the meaning of the Constitution. *Burdick v. Secretary of State,* 373 Mich. 578 (1964).

In so concluding I am fully mindful of the fact that the only reference to "votes" in the former section of the Constitution of 1908 (Article V, Section 7) appeared in this deleted sentence. However, in arriving at my conclusion, I also considered the reasoning and language of the *Fyfe* case which was relied upon as authority in *Burhans.* In the *Fyfe* case a state senator presented a petition to the county clerk to place his name on the ballot for a primary election as *delegate* to the Constitutional Convention. In holding that the senator was ineligible for this office, the Court noted:

> ". . . It is held in several decisions that the terms 'appointment' and 'election' are synonymous terms. . . .
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> * * *
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> "We are all of the opinion that delegates to the constitutional convention come within the term 'civil appointment,' as used in this provision of the Constitution, that they receive their appointment from State authority, and therefore that members of the legislature which enacted the law and thus provided for the offices, fixing compensation, etc., are ineligible as delegates. They are both within the spirit and letter of the law."
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> *Fyfe v. Kent County Clerk,* 149 Mich. 349 (1907), 350, 351.
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> Also see *Ellis v. Lennon,* 86 Mich. 468 (1891).

It is also to be noted however that in accordance with *Lodge v. Wayne County Clerk,* 155 Mich. 426 (1909), where the duties of office being sought by the member of the legislature are purely local in character, he would not be precluded from becoming a candidate for such office subject, of course, to the provisions of Section 8 of Article IV, Constitution of 1963, which provide:

> "No person holding any office, employment or position under the United States or this state or a political subdivision thereof, except notaries public and members of the armed forces reserve, may be a member of either house of the legislature."

I am aware that the Supreme Court held in *Weza v. Auditor General,* 297 Mich. 686 (1941), that a member of the state legislature who accepted an appointment to fill a vacancy in the office of county school commissioner had thereby vacated his former office as a legislator, but this case was decided prior to the *Burhans* case, supra, and, if inconsistent with *Burhans,* cannot be considered as authority.

As a result of the change in the subject section of the constitution by which the words "or to the senate of the United States" were deleted, it is now permissible for members of the legislature to seek election or receive appointment to either house of the United States Congress. While there has been no authoritative interpretation of the section on this point, the words "within the state" appearing therein obviously allowed a state legislator to seek a seat in the United States House of Representatives, whereas

the office of United States Senator was previously barred if it were to be held during any portion of a term for which he were elected, whether or not he served.

FRANK J. KELLEY,
Attorney General.

670301.1

LICENSES – HOROLOGISTS: Act 201, PA 1965, the horologist's certification act, does not require those engaged in the trade of watchmaking to be licensed. The act is not applicable to a watchmaker who does not advertise in any manner that he is a certified horologist.

No. 4568 March 1, 1967.

Hon. Lester J. Allen
State Representative
Lansing, Michigan

You have requested my opinion with regard to certain provisions of Act 201, P.A. 1965 (M.S.A. 1965 Cum. Supp. § 18.275(1), et. seq.) which may be cited as the horologist's certification act. Specifically you ask two questions:

1. If a watchmaker does not advertise, or make any public claim in any manner whatsoever, directly or indirectly, that he is a 'certified horologist,' would he be subject to this act?

2. Exactly which section of the act definitely sets forth the prohibition which prevents a person from practicing his trade if he does not wish to be known or cited as a 'certified horologist'?

The pertinent sections of the horologist's certification act for the purposes of your questions are sections 12, 13 and 14. These sections provide as follows:

"Sec. 12. No person may use the title 'certified horologist' unless he has a certificate certifying him to be such under the provisions of this act.

"Sec. 13. No person, other than a certified horologist, may advertise or represent himself to the public in any way which will lead the public to believe that he is a certified horologist.

"Sec. 14. Any person violating this act is guilty of a misdemeanor."

A horologist under section 2 of the act is one skilled in the science of time measurement and the construction, repairing, replacing, rebuilding or adjusting of the mechanical parts of watches.

By contrast to the Michigan statute, the statutes of Wisconsin and Minnesota which regulate the watchmaking trade provide specifically that individuals may not engage in the trade without prior licensing.

Section 2 of the Wisconsin statute (being Wis. Stat. Ann. 125.02, provides in its entirety as follows:

"No person shall engage in watchmaking for profit or compensation of any kind, without first obtaining a certificate of registration, as