VOLUME NO. 36 Opinion No. 75

SCHOOLS AND SCHOOL DISTRICTS — Employees, vacation leave; Section 59-1001, Revised Codes of Montana 1947.

HELD: Prior to July 1, 1973, nonteaching school district employees who worked less than twelve months during the year were not entitled to annual vacation leave as a matter of right under section 59-1001, but such vacation leave was governed solely by school district policy and regulations.

May 3, 1976

Mr. Tony Softich, Administrator
Labor Standards Division
Department of Labor and Industry
1331 Helena Avenue
Helena, MT 59601

Dear Mr. Softich:

You have requested my opinion on whether the annual vacation leave provisions of Title 59, chapter 10, R.C.M. 1947 applied to all nonteaching school district employees before 1973. In at least one county, questions have arisen concerning the vacation status of such employees who customarily work only nine or ten months during the year.

The controlling statute is section 59-1001. Prior to its amendment in 1973, it stated in pertinent part:

> (1) Each **employee** of the state, or any county or city thereof, who is in **continuous employment** and service of the state, county or city thereof, is entitled to and shall earn annual vacation leave credit from the first full calendar month of employment. However, employees are not entitled to any leave with full pay until they have worked **continuously** for a period of twelve (12) calendar months... (Emphasis added)

It is settled that the term "employee" as used in section 59-1001 means all employees of the state and its agencies, including nonteaching school district employees. **Teamsters, et al. v. Cascade County School District No. 1,** 162 Mont. 277, 280-281, 511 P.2d 339 (1973). The only issue here is whether the nonteaching school district employees who worked only nine or ten months

during the year were "continuously" employed under section 59-1001, so as to be entitled to vacation benefits as a matter of right. This issue was neither presented nor discussed in **Teamsters.** The opinion together with the history of that case demonstrate that it applied only to those nonteaching school district employees who were employed twelve months of the year.

Parenthetically, it might be noted that by reason of the 1973 amendment to section 59-1001, nonteaching school district employees who work at least nine months of the year are now entitled to vacation:

> Persons regularly employed nine (9) or more months each year, but whose continuous employment is interrupted by the seasonal nature of the position, shall earn vacation credits. However, such persons must be employed twelve (12) qualifying months before they can use the vacation credits. Section 2, Chapter 476, Laws of 1973.

A 1975 amendment to section 59-1001 reduced from twelve months to six months the qualifying time needed before vacation credits could be used by employees. Section 1, Chapter 62, Laws of 1975.

"Continuous employment" under section 59-1001 has been the subject of several attorneys' general opinions. Three are especially pertinent: In Volume 26 Opinions of the Attorney General, Opinion No. 80 (1956), then Attorney General Olsen observed:

> To be eligible for vacation leave an employee must be employed for a period of one year and until that period of service is reached, the right to vacation leave does not vest. However, once the condition precedent, service of one year, is met, all rights accumulated during the one year period vest(s), and the employee is entitled thereto as a matter of right.

In Volume 31 Opinions of the Attorney General, Opinion No. 2 (1965), then Attorney General Anderson confronted the specific question whether school district employees hired on a ten-month basis accrue vacation leave as a matter of right under section 59-1001. In holding they did not, he stated:

> The effect of this (1951) amendment, in my opinion, was to require that each employee, before he became entitled to annual vacation leave, as a matter of right, perform a period of service, characterized as a certain amount of time, as an employee of the state, city or county. This phrase "continuous employment and service...for a period of one (1) year ...," inserted in the statute by the 1951 legislature, has reference to the continuity of employment in light of its regularity over a period of time. The obvious intent of the 1951 amendment was to prohibit temporary employees, i.e., **employees who have not been in continuous service for one year,** from receiving a vacation allowance. (Emphasis added)

However, to avert injustice, Attorney General Anderson added that the school district had discretionary authority to grant such employees vacation leave, even though they lacked a statutory right to vacation.

In Volume 34 Opinions of the Attorney General, Opinion No. 1 (1971), I similarly ruled that administrative employees of the Montana university system hired on a ten-month basis were not entitled as of right to vacation, on the ground they technically could never satisfy the "continuous employment" requirement of section 59-1001. Again, out of elementary fairness to such employees, the discretionary authority of the board of regents to equitably grant vacation leave was pointed out.

Despite these opinions and the 1973 amendment to section 59-1001, it is urged that nonteaching school district employees who work less than twelve months during the year were not necessarily excluded from the purview of section 59-1001 by its "continuous employment" requirement. The premise is that the legislature, having legislated the school year, has known all along many nonteaching school district employees work only nine or ten months in a given year, and that the seasonal break of two or three months was thus never intended to destroy the continuity of their employment. Accordingly, it is concluded that even prior to 1973 such employees had a statutory right to vacation after completing twelve months of actual service.

While this line of reasoning has some appeal, it overlooks three basic considerations:

(1) As a matter of statutory construction, "continuous" or "continuously" as used in section 59-1001 plainly refers to a sequence of months within a year, as opposed to a series of years, during which a person is employed. This interpretation is at the heart of each of the attorneys' general opinions, above.

(2) Numerous legislatures acquiesced in those opinions of the attorneys general, a factor of no little weight. See **Teamsters,** 162 Mont. at 282.

(3) In 1973 the legislature amended section 59-1001 to expressly cover nine-month employees. The mere fact the legislature enacts an amendment indicates it thereby intended to change the original act by creating a new right or withdrawing an existing one. Therefore, any material change in the language of the original act is presumed to indicate a change in legal rights, that is, a change in substance rather than mere form. 1A **Sutherland, Statutory Construction,** 4th Ed., §22.30. Montana has long subscribed to the foregoing rule: **State ex. rel. Federal Land Bank of Spokane v. Hays,** 86 Mont. 58, 65-66, 282 P.32 (1929); **Nichols v. School District No. 3, Ravalli County,** 87 Mont. 181, 186, 287 P. 624 (1930); **Montana Milk Control Board v. Community Creamery, et al.,** 139 Mont. 523, 526, 366 P.2d 151 (1961). Here, the presumption that the legislature did not intend a useless act and intended to make some change in section 59-1001 by specifically including nine-month employees leads to the conclusion that such employees were not considered by the legislature to have been under the statute before 1973. See **Milk Control Board,** 139 Mont. at 526.

THEREFORE, IT IS MY OPINION:

Prior to July 1, 1973, nonteaching school district employees who worked less than twelve months during the year were not entitled to

annual vacation leave as a matter of right under section 59-1001, but such vacation leave was governed solely by school district policy and regulations.

Very truly yours,
ROBERT L. WOODAHL
Attorney General