VOLUME NO. 43 OPINION NO. 54

EDUCATION - Residency requirement for public school employees;
RESIDENCE - Residency requirement for public school employees;
SCHOOL BOARDS - Residency requirement for public school employees;
SCHOOL DISTRICTS - Residency requirement for public school employees;
TEACHERS - Residency requirement for public school employees;

MONTANA CODE ANNOTATED - Sections 20-3-324, 20-3-324(16), (17), (24);
MONTANA CONSTITUTION - Article II, section 4;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 30 (1985).

HELD: A school board in the state of Montana may, as a condition of employment, require that employees of the school district be residents of the school district. This opinion does not address the question of whether, prior to effecting such a change during the term of a collective bargaining agreement, a school board may be obligated to bargain with its employees' collective bargaining representative.

February 16, 1990

Christine A. Cooke
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Dear Ms. Cooke:

You have requested my opinion on the following question:

> May a school board require school district employees to reside in the district?

Under Montana law a school board of trustees employs and dismisses school district personnel. § 20-3-324, MCA. A board also has implied and express authority to set reasonable conditions of employment. See, in general, §§ 20-3-324(16), (17), (24), and 39-31-303, MCA; 41 Op. Att'y Gen. No. 30 (1985) at 110. However, the residency requirement described in your question raises constitutional issues under the equal protection provision of the Fourteenth Amendment of the United States Constitution and Article II, section 4 of the Montana Constitution. Because the Montana Legislature has not addressed your question statutorily, a constitutional analysis is appropriate.

Generally, residency issues are analyzed under the Fourteenth Amendment of the United States Constitution and Article II, section 4 of the Montana Constitution by using two separate tests. If the governmental action penalizes the exercise of a "fundamental right" or involves a "suspect classification," the action is subject to strict scrutiny by the courts and must satisfy a compelling state interest in order to be sustained. If no fundamental right or suspect classification is involved, the action need only be justified according to the "rational basis test." Shapiro v. Thompson, 394 U.S. 618 (1969). Under the rational basis test, the classification must bear a reasonable relationship to the objective of the rule or statute.

If a statute burdens a suspect class and not other similarly situated persons, or a fundamental right of some but not all comparably-placed persons, the State must establish a compelling interest to justify such discrimination. See In re C.H., 210 Mont. 184, 197, 683 P.2d 931, 938 (1984). A fundamental right is, for Fourteenth Amendment purposes, one specifically or impliedly guaranteed in the United States Constitution (San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33-34 (1973)) or, for purposes of Article II, section 4 of the Montana Constitution, one specifically "found within Montana's Declaration of Rights or ... without which other constitutionally guaranteed rights would have little meaning." (Butte Community Union v. Lewis, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986).)

There are no Montana cases or statutes which address the residency of public school employees. However, an overview of the cases that are available, including two recent cases from the states of Arkansas and Washington, reveals that almost without exception, courts have upheld policies of public employers which require employees to reside within the public employer's jurisdiction. Additionally, most courts use the rational basis test when reviewing residency requirements for public employees and require the rule or regulation to bear only a reasonable relationship to the object of the rule or legislation. See, e.g., Wright v. City of Jackson, Mississippi, 506 F.2d 900 (5th Cir. 1975).

The United States Supreme Court has upheld a Philadelphia, Pennsylvania, ordinance which required city employees to be residents of the city. McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 96 S. Ct. 1154, 47 L. Ed. 2d 366 (1976). Other federal and state courts have reached a similar conclusion for public employees. See Andre v. Board of Trustees of Village of Maywood, 561 F.2d 48 (7th Cir. 1977); Wardwell v. Board of Education of City of Cincinnati, 529 F.2d 627 (6th Cir. 1976); Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975); Ector v. City of Torrence, 10 Cal. 3d 129, 109 Cal. Rptr. 849, 514 P.2d 433 (1973), cert. denied, 415 U.S. 935 (1974).

The Washington Court of Appeals addressed the residency policy of the Newport Consolidated Joint School District in Meyers v. Newport School District, 31 Wash. App. 145, 639 P.2d 853 (1982). In the Washington case, Mitchell Meyers was hired as a school teacher in Newport for the 1978-79 school year. He was told during his 1978 interview that he must reside within the school district within a reasonable time. Mr. Meyers, while living less than three miles from the school in which he taught, resided not only out of the school district, but out of the state of Washington. Meyers v. Newport, 639 P.2d at 854.

The Washington court, in upholding Meyers' termination for failing to reside within the school district, discussed two types of residency requirements, continual and durational. A continual residency requirement requires an employee to maintain residency in the district in order to obtain or retain

employment. A durational residency requirement mandates a period of residency before an applicant becomes eligible for employment. Durational residency requirements have frequently failed to survive constitutional scrutiny, and the United States Supreme Court has found that durational residency requirements for the receipt of welfare benefits or hospital care, or for voter registration, infringe the right of interstate travel and thus are violative of the Fourteenth Amendment. Shapiro v. Thompson, 394 U.S. 618; Dunn v. Blumstein, 405 U.S. 330 (1972); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

In Meyers, the Washington court upheld the school district's residency policy because the policy allowed teachers to be hired so long as they moved into the district in a reasonable amount of time. The residency requirement was continual, not durational, and did not violate the fundamental right to travel. The Court specifically found that the residency policy satisfied the rational basis test and specifically found that the school board's desire for its teachers to live within the district "for the purpose of community involvement and in order to educate their children within the district in which they work" was reasonable. Meyers v. Newport, 639 P.2d at 857.

In a more recent case, McClellan v. Paris Public Schools, 294 Ark. 292, 742 S.W.2d 907 (1988), the Arkansas Supreme Court also applied the reasonableness or rational basis standard to a school district's residency policy. The Paris, Arkansas, school policy required certified personnel to reside within the district boundaries or within a ten-mile driving distance of the city limits of Paris. Employees of the district when the policy was enacted were "grandfathered" in under the policy so long as they remained at their current residences. If those employees of the district who resided out of the district moved, the policy required them to move within the district boundaries or within ten miles driving distance of the city in order to retain their employment. McClellan v. Paris Public Schools, 742 S.W.2d at 908. McClellan was terminated because she moved from her in-district residence to another residence outside the designated boundaries. *Id.*

The Arkansas court specifically found the goals pronounced by the school district were essentially the same as those articulated in other jurisdictions where school teacher residency requirements had been upheld.

> Those goals are basically community involvement and district identity as it relates to the tax base and support of district tax levies. The latter goal is tied to district residency and not to distance from school while the former requires only a reasonable commuting distance from the city and not necessarily district residency. The district evidently decided not to restrict employment only to district residents but in allowing non-district residents to teach, they must meet some other reasonable

> commuting distance to achieve some aspect of the goals to be served .... We find nothing irrational in this formulation.

McClellan v. Paris, 742 S.W.2d at 911.

In summary, neither the federal nor the state constitution prohibits the establishment of a continuous residency requirement as long as the policy has a rational basis. In many of the cases reviewed, the ordinances or rules involved granted a grace period during which current employees could move within the boundaries of the district. District regulations that exempt employees who acquired outside residence prior to the effective date of the residency regulation have survived challenges generally on the ground that "grandfather" type exemptions are not unreasonable. The new regulations need only be uniform in their prospective operation. See Board of Education v. Philadelphia Federation of Teachers, 397 A.2d 173 (Pa. 1979). In all cases, the ordinance or rule was supported by an articulated reason rationally related to a legitimate government goal.

This opinion, finally, should not be construed as reaching the question of what effect an existing collective bargaining agreement may have on the Board's ability to adopt residency requirements or whether, prior to [such] a mid-contract term adoption, the Board would be statutorily obligated to bargain with its employees' representative. These questions must be resolved by reference to the collective bargaining agreement's provisions and are outside the scope of the present opinion.

THEREFORE, IT IS MY OPINION:

> A school board in the state of Montana may, as a condition of employment, require that employees of the school district be residents of the school district. This opinion does not address the question of whether, prior to effecting such a change during the term of a collective bargaining agreement, a school board may be obligated to bargain with its employees' collective bargaining representative.

Sincerely,

MARC RACICOT
Attorney General