

Dear Mr. Bjornlie:

You have submitted the following question to me for an opinion:

May an applicant who has taken the certified public accountant's examination and failed, take the examination again during the same year providing the Board of Examiners holds another examination that year?

Section 3241.6, Revised Codes of Montana, 1935, provides as follows:

"The university shall be entitled to receive for the examination and certificate, provided for in section 3241.1, a fee of twenty-five dollars, payable in advance at the time of making application therefor. **Any applicant who shall fail to pass an examination shall be entitled to further examinations within the next two succeeding years following such failure, but at such times only as the board of accountancy shall hold the regular examination, prescribed in section 3241.5. Such applicant shall not be entitled to more than one examination in each year, providing, that for each additional examination, after the failure of such applicant to pass, a fee of five dollars shall be paid by such applicant for each additional examination.**" (E m p h a s i s mine.)

This section specifically states that an applicant who fails in an examination is entitled to further examinations within the next two succeeding years following such failure, but that such applicant shall not be entitled to more than one examination in each year. The language of the act is plain and unambiguous and needs no interpretation.

It is therefore my opinion that an applicant who has failed in the certified public accountant's examination may take further examinations within the next two succeeding years following such failure, but in no event shall he be entitled to more than one such examination in each year.

You further question Sections 2 and 4 of the university regulations contained in the circular of information concerning certificate of certified public accountant in the State of Montana, published by Montana State University, Missoula, Montana, December,

Opinion No. 82

Certified Public Accountants—Examination, Certified Public Accountants—Failure, Examination for Certified Public Accountants—Accountant, certified Public—Public Accountants, Certified.

Held: An applicant who has failed in the certified public accountant's examination may take further examinations within the next two succeeding years following such failure, but in no event shall he be entitled to more than one examination in each year.

October 18, 1945.

Mr. Conrad T. Bjornlie, Secretary
State Board of Examiners in
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1941. The second paragraph of Section 2 of the above regulation is in direct conflict with Section 3241.6, *supra*, in stating:

"The examination fee (Sect. 3241.6) is \$25.00; the re-examination fee is \$5.00 for each additional examination taken within the next three succeeding years after the first examination (Sect. 3241.6)." (Emphasis mine.)

As you will note, Section 3241.6, *supra*, quoted above, specifically states that further examinations will be given within the next two succeeding years following a failure.

Section 4 of the university regulations states:

". . . Candidates who shall have passed the examination in auditing and commercial law, at one sitting, or having passed accounting theory and practice at one sitting, are conditioned. Three years are allowed in which to remove the condition by examination in the remaining subject or subjects (Sect. 3241.4)." (Emphasis mine.)

Section 3241.4, Revised Codes of Montana, 1935, states:

"The university shall prescribe all useful and necessary rules and regulations for the conduct, character and scope of the examinations, the methods and time of filing applications therefor, and all other rules and regulations necessary or proper, fully to carry into effect the purposes of this act."

By specifying a three-year period instead of a two year period, the regulation is in conflict with Section 3241.6, *supra*, quoted above, which specifies "within the next two succeeding years." The question thus becomes one of construction in regard to the interpretation to be placed on "any applicant who shall fail to pass an examination."

In the case of *State v. Porter*, 88 Mont. 347, 294 Pac. 363, the following language is used:

"Meaning of word or phrase in statute provision is controlled by connection in which employed, evident purpose of statute, and subject to which it relates."

Similar language is used in the case of *State v. Bowker*, 63 Mont. 1, 205 Pac. 961:

"In construing a statute, its words and phrases must be given their plain and ordinary meaning."

Webster's New International Dictionary gives the following definition for these words:

"Fail: To be wanting; to fall short; to be or become deficient in any measure or degree; . . . to be found deficient or unable to meet a test or standard of attainment, as for promotion; as, to fail in arithmetic."

"Pass: Act of passing an examination; specif., the attainment of a certain required mark enabling the candidate to satisfy the examiner but not to gain honors; the mark or certification of such passing."

The intent of the legislature in this particular matter seems to have been that any applicant who did not successfully pass the examination would be entitled to further examination within the next two succeeding years following such a failure, such examination to be limited to one a year. There being no provision made for an extension of the term provided, a strict construction of the word "fail" used in Section 3241.6, Revised Codes of Montana, 1935, must be followed. Such construction implies that a candidate who does not satisfactorily and completely meet the requirements for a passing grade is termed a failing candidate, and consequently is limited as to the number of times he may take the examination as specified in Section 3241.6.

Section 853, Revised Codes of Montana, 1935, vests control and supervision of the University of Montana in the State Board of Education. Regarding rules and regulations made by state boards, the Montana Supreme Court, in the case of *McFtridge, et al v. District Court, et al*, 113 Mont. 81, 122 Pac. (2d) 834, has stated:

"The board has undertaken to supplement the law by rules and regulations of its own adoption, vesting in itself the discretionary power it has attempted to exercise. This, of course, it cannot do. The board is

an administrative body, functioning as a bureau of the executive department of the state government. It has no law making power. Any attempt to create for itself authority and discretion not given by the legislature must fail. The board is authorized to make rules and regulations, but these must be limited in their purpose and effect as aid in the administration of the law . . .”

It is therefore my opinion that the regulations may not change the term specified by the legislature in Section 3241.6, Revised Codes of Montana, 1935, for further examinations following a failure, or a person not satisfactorily passing the examination.

It is further my opinion that the regulations may not prescribe a conditional passing or a conditioned candidate as the legislative intent evidenced in Section 3241.6, supra, provides further examinations for candidates who have failed. No mention is made or may be inferred that portions of said examination could be passed and a failing grade rendered for remaining portions. Reference to the examination in Section 3241.6 is as applied to an entity or whole. A candidate must either pass the examination as a whole or fail it as a whole. The explicit wording is not subject to any other interpretation.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General