

Opinion No. 1

**Agriculture, Labor and Industry—
Labor, Department of—Constitution.**

Held: The Labor Division cannot be transferred by legislative enactment to another department because Article XVII, Section 1 of the Montana Constitution is mandatory as to the provision establishing one Commissioner for the Department of Agriculture, Labor and Industry.

December 21, 1946.

Mr. Albert H. Kruse
Commissioner
Department of Agriculture
Labor and Industry
State Capitol
Helena, Montana

Dear Mr. Kruse:

You have requested an opinion whether the Labor Division can be transferred, by legislative enactment, to another department. The answer to your question entails an interpretation of Article XVII, Section 1 of the Montana Constitution, which reads as follows:

"The legislative assembly may provide for a Bureau of Agriculture, Labor and Industry, to be located at the Capitol and be under the control of a Commissioner appointed by the Governor subject to the confirmation of the Senate. The Commissioner shall hold his office for four years and until his successor is appointed and qualified; his compensation shall be as provided by law." (Emphasis mine.)

The determination of the answer to your question is to be reached by an interpretation of whether such provision in the Constitution is mandatory. Upon this problem the history of the provision reveals the following:

1. In the constitutional debates the word "may" as outlined above, was originally "shall" but was changed by the amendment of Mr. J. K. Toole of Lewis and Clark County. See page 230, Proceedings and Debates, Constitutional Convention, 1889.

2. Research further reveals that the Constitutional Convention was of the opinion that in the establishment of such a department economy was to be of the essence. See statements of Mr. Burleight of Custer County, page 197 of the Constitutional Proceedings.

3. Further, Mr. Clark of Silver Bow County, at page 198 of the Constitutional Proceedings, urged that labor and agriculture be provided for in one provision but limited any other departments being therein added in order to promote better efficiency, a situation which Mr. Clark emphasized would not result in the event too many departments were added to the duties of the Commissioner.

4. An attempt was made by Mr. J. K. Toole of Lewis and Clark County, to do away with such provision as being something which the legislature would have the power to do in its own right. See page 199, Constitutional Proceedings. However, the convention saw fit to enact the same in its present form after hearing the discussions above noted.

While it is true that the implication raised by using the word "may" makes it "directory" upon the legislature and not mandatory, it would seem once the legislature has so established this department the implication is mandatory that it be carried out in the manner provided for in this Constitution. This is further emphasized by the fact that throughout these debates there is no attempt or argument to place these departments under more than one Commissioner, and support thereof the delegates to the convention brought out that such was the policy of many of the other states of the Union at that time. See pages 197, 238, 240, Constitutional Proceedings.

It is worthy to note also that Article III, Section 29 of the Montana Constitution provides as follows:

"The provisions of this Constitution are mandatory and prohibitory, unless by express words declared to be otherwise."

Thus it would appear that though it is not mandatory upon the legislature to provide for such a department,

the means of so providing is "self-executing" and once such a department has been established, it is mandatory that such action be taken in the manner and form prescribed by the Constitutional Convention.

It is true that there was such a division as you have advocated from the year 1913 to 1921. There is, however, a paucity of cases and opinions upon the question of the constitutionality of this provision. A thorough research also reveals no reason why the provision was removed from the statutes of Montana. Nor could eight years of such a division of departments create an acquiescence in the law so as to make such provision legally valid.

It is therefore my opinion that the Labor Division can not be transferred by legislative enactment to another department because Article XVII, Section 1 of the Montana Constitution is mandatory as to the provision establishing one Commissioner for the Department of Agriculture, Labor and Industry.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General