

**Opinion No. 37**

**Schools—High School Districts, Creation of—Board of County  
Commissioners—County Superintendent of Schools—  
Discretion of Commissioners as to Creation  
of High School Districts.**

**Held: Chapter 275, Montana Session Laws of 1947, which provides  
for creation of High School Districts is mandatory in terms and**

**leaves no discretion in the Commission, consisting of the Board of County Commissioners and the County Superintendent of Schools, as to the creation of such Districts. The Districts must be established if requested by a High School Board of Trustees in the County.**

July 21st, 1949.

Mr. John J. Cavan  
County Attorney  
Wheatland County  
Harlowton, Montana

Dear Mr. Cavan:

You have requested my opinion upon the following question:

"Under Chapter 275, Montana Session Laws of 1947, providing for the establishment of High School Districts, may the Commission consisting of the Board of County Commissioners and the County Superintendent of Schools exercise discretion as to the creation of such High School Districts?"

Chapter 275, Montana Session Laws of 1947, repealed Sections 1301.1 to 1301.6, Revised Codes of Montana, 1935, as amended, and contains the present law as to the creation of High School Districts. Section 2 of Chapter 275 reads in part as follows:

"In all counties having a high school, or high schools, **a Commission consisting of the County Commissioners and the County Superintendent of Schools shall at the request of any High School Board of Trustees in the County, divide the County into High School Districts for the purpose of this Act, after hearing.** That the Commission shall fix the time, date and place, and at such time, date and place hold a public hearing of the requested division of the County into High School Districts, at which hearing any interested person may appear and be heard concerning the requested division. . . . (Emphasis mine.)

If the above quoted Section is held to be mandatory in its terms then the Board of County Commissioners and the County Superintendent of Schools cannot exercise any discretion as to the creation of the High School Districts. The wording of the statute is that the Commission "shall" divide the County into High School Districts at the request of any High School Board of Trustees.

The question as to how the courts will interpret the word "shall" in a statute has arisen many times in the past. The general rule is stated in 50 Am. Jur., Statutes, Section 28, p. 49-50, as follows:

"The intention of the Legislature as to the mandatory or directory nature of a particular statutory provision is determined primarily from the language thereof. Words or phrases which are generally regarded as making a provision mandatory, include "shall" and "must". . . ."

Further, in Section 30 under Statutes at pp. 51-52 of 50 Am. Jur. it is said:

“. . . However, it should be helpful to keep in mind the fundamental rule that ordinarily the words "may" and "shall" or "must" are not used interchangeably or synonymously, but are given their ordinary meaning. When the use of the words in other than their ordinary meaning is intended, the intention to do so must clearly appear."

In the case of State ex rel. McCabe v. District Court, 106 Mont. 272, 76 Pac. (2d) 634, the Montana Supreme Court had under consideration the interpretation of the word "must" in a statute holding that the District Judge must appoint a special administrator under certain circumstances. While the court in that case held that "must" was not mandatory but only permissive, it was made clear that the case fell into the exception to the general rule. On page 277 of the decision the court said:

"We are reluctant to contravene or construe away terms of a statute which in themselves are mandatory upon their face, except where the intent and purpose of the legislature are plain and unambiguous and clearly signify a contrary construction; the synonymous terms 'must' and 'shall' in that connection, being generally interpreted as mandatory, and the term 'may' being generally construed as permissive or directory only."

The latest consideration by the Montana Supreme Court as to whether a statute is mandatory or directory is the case of State ex rel. Sullivan v. District Court, \_\_\_\_\_ Mont. \_\_\_\_\_, 196 Pac. (2d) 452. The court construed Section 11702, Revised Codes of Montana, 1935, dealing with removal of public officers, and held that the portion of Section 11702 which said "the court must cite the party charged to appear before the court at a time not more than ten or more than ten nor less than five days from the time the accusation was presented" was directory and not mandatory. The court gave two reasons for its decision, (1) that statutory provisions as to precise time are many times not regarded as of the essence but are regarded as directory merely and (2) a statutory provision is generally regarded as directory where a failure of performance will result in no injury or prejudice to the substantial right of the interested persons, and as mandatory where such injury or prejudice will result. The Sullivan case is distinguishable from the instant situation on both counts. Here we are not concerned with a statutory provision as to time, and secondly it cannot here be said that a failure of performance will not result in injury or prejudice to the parties requesting the division into High School Districts. Thus the Sullivan case is not controlling in the question at hand and need not govern the decision in this opinion.

Accepting as a general rule the proposition that "shall" is mandatory in nature unless it clearly appears from the remainder of the statute that a permissive use was intended, all that remains to be done

is to determine if anything in Chapter 275, Montana Session Laws of 1947, indicates that the Commission is to have any discretion in the establishment of High School Districts.

I find nothing in Chapter 275 to take it out of the general rule. While the Commission does have discretion as to the territorial aspects of the division, i.e., how many districts shall be created and how much land shall be placed in each one, it has no discretion as to whether or not it will create the districts. Chapter 275 makes the creation mandatory.

Therefore, it is my opinion that the direction in Chapter 275, Montana Session Laws of 1947, to the Commission consisting of the Board of County Commissioners and the County Superintendent of Schools to divide the County into High School Districts at the request of any High School Board of Trustees is mandatory and not permissive and therefore such Commission may not exercise any discretion as to whether or not such districts shall be created.

Very truly yours,  
ARNOLD H. OLSEN,  
Attorney General.