

set forth both in the Constitution and the statutes, the provision contained in the Teachers Retirement Act providing for the retirement of members reaching the age of (70) seventy years, may not be properly against a duly elected county superintendent of schools.

March 13, 1952.

Mr. R. W. Harper, Executive  
Secretary  
The Teachers Retirement System  
Helena, Montana

Dear Mr. Harper:

You have requested my opinion as to whether a county superintendent of schools, elected to a four year term of office, and with three years left to serve, may be compelled to retire at the age of seventy under the provisions of the Teachers Retirement System Act, namely Section 75-2707 (1) which reads:

"From and after the passage and approval of this act, any member in service who has attained the age of seventy (70) years, during any school year shall be retired by said retirement board on the first day of September following his or her seventieth (70th) birthday."

The office of county superintendent of schools is an office created by the Montana Constitution. In Section 5, Article XVI of the Constitution it is provided that in each county there shall be elected one county superintendent of schools. It is also provided in this section that "Persons elected to the different offices named in this section shall hold their respective offices for the term of (4) four years, and until their successors are elected and qualified." The constitution further prescribes the requisite qualifications for the said office. Section 10, Article IX declares that "all persons possessing the qualifications for suffrage prescribed by Section 2 of this article as amended and such other qualifications as the legislative assembly may by law prescribe, shall be eligible to hold the office of county superintendent of schools or any other school district office." This section, it will be noted,

**Opinion No. 71**

**Teachers Retirement System—County  
Superintendent of Schools—  
Constitution—Elective Officers—  
Qualifications**

**Held:** The office of county superintendent of schools, being an office specially provided for by the Montana Constitution, and for which the qualifications for taking and holding have been

was amended by an act approved March 12, 1937 (Ch. 93, L. 1937), and adopted at the general election November 8, 1938, and became effective under the governor's proclamation on December 2, 1938. The amendment added the words, "who shall possess the qualification for suffrage prescribed by Section 2 of Article IX of this Constitution and such other qualifications as may be prescribed by law" to the first sentence of the section. Prior to the amendment, the first sentence simply read "There shall be elected in each county the following county officers:" When the section read thus, it was held in the case of *State ex rel. Chenoweth v. Acton*, 31 Mont. 37, 77 Pac. 299, that since the office of county superintendent of schools was an office created by the Constitution, it was incompetent for the legislature to prescribe as an additional qualification to those prescribed by the Constitution, that an aspirant to such office should be the holder of a specified teachers certificate. In the *Chenoweth* case (*supra*) the court in considering the statute prescribing that "no person shall be deemed legally qualified for the office of county superintendent unless he or she holds a certificate of the highest county grade, is a citizen of the United States, has resided one year next preceding the election in this state . . ." said "the constitution has spoken, and it has prescribed the qualifications required of a county superintendent. The legislature may not supplement the constitutional pronouncement upon this subject."

Following the amendment above referred to the court said in *State ex rel. Palagi v. Regan*, 113 Mont. 343, 126 Pac. (2d) 818 ". . . thus, prior to the amendment of Article IX, Section 10, the people had no more power, by initiative measure, to prescribe additional qualifications for county superintendents of schools than the legislature had."

The effect of the aforementioned amendment was to permit the legislature to fix additional qualifications to those previously considered to be the sole qualifications for the office of county superintendent of schools. Section 75-1502 reads as follows:

"No person shall be eligible to the office of county superintendent of schools in any county of Montana,

who, in addition to the qualifications required by the constitution of the state of Montana, is not the holder of a state certificate offered by the state of Montana, granted by endorsement upon graduation from a standard normal school, or college or University; or who is not the holder of a certificate offered by the state of Montana, designated as a state certificate granted by the state board of educational examiners; and who has not had at least three years successful experience as a teacher, principal or superintendent of public schools. The above qualifications shall not prohibit the re-election of present incumbents."

No other qualifications of eligibility to hold office has been added to this section or to the constitutional provision by the legislature, unless the Teachers Retirement Act can be considered amendatory of the act setting up qualifications for eligibility. This could only be so considered by implication. Amendments by implication are not favored. (*State v. Board of Commissioners of Cascade County*, 89 Mont. 37, 296 Pac. 1).

The purpose of the Teachers Retirement Act is to provide for payments of annuities to retired teachers, who contribute a percentage of their earnings to an annuity savings fund and are entitled to retirement pay purchased by such deposits. (*See Clarke v. Ireland, et al.*, 122 Mont. 191, 199 Pac. (2d) 965). The relationship between the teacher and the system is contractual in nature, the terms of which must be ascertained by reference to the statutes. One of the terms embodied in the act is that any member of the system who has attained the age of seventy years, during any school year "shall be retired" on the first day of September following his or her seventieth birthday. (Section 75-2707, Revised Codes of Montana, 1947). This provision was interpreted by the Montana Supreme Court as being mandatory and compulsory as applicable to members under the system. (*Abshire, et al. v. School District No. 1*, — Mont. —, 220 Pac. (2d) 1058). However, the question of compulsory retirement of elected public school officials was not before the court and has not been passed on previously, and since as previously noted that the courts do not favor amend-

ments by implication, the provision in the Teachers Retirement Act for the retirement of members reaching the age of seventy years, may not be considered as constituting an additional qualification to hold public office.

It may be that an elected official would be ineligible for membership in the Teachers Retirement System upon superannuation but certainly it does not follow from that, that the Teachers Retirement System Act can be considered to have amended the existing statutes concerning qualification to hold office.

It is therefore my opinion that the office of county superintendent of schools, being an office specially provided for in the Montana Constitution, and for which the qualifications for taking and holding such office have been set forth both in the Constitution and the statutes; the provision contained in the Teachers Retirement Act providing for the retirement of members reaching the age of seventy (70) years, may not be properly applied against a duly elected county superintendent of schools.

Very truly yours,  
ARNOLD H. OLSEN  
Attorney General