

Opinion No. 2

STATE BOARD OF EDUCATION; delegation of powers—UNIVERSITY OF MONTANA: Local executive boards; powers—

Section 75-107, Revised Codes of Montana 1947; Section 75-403, Revised Codes of Montana 1947; Section 75-408, Revised Codes of Montana 1947; Sections 75-302 to 75-310, R.C.M., 1947

HELD: The State Board of Education may not delegate its powers to the local executive boards of the various units of the university system.

March 11, 1963

Mr. Alfred J. Dubbe, Executive Secretary
University of Montana
State Capitol
Helena, Montana

Dear Mr. Dubbe:

You have asked me if the State Board of Education, ex officio regents of the University of Montana, may delegate its powers to the local executive boards of the various units of the university system.

The problem arises from the conflicts between two sets of statutes dealing with our university system—Chapter 73 of the Laws of 1909 and Chapter 92, Laws of 1913. The 1909 statutes specifically gave the Board of Education the power and duty:

“To confer upon the executive board of each of said institutions such authority relative to the immediate control and management, other than financial, and the selection of the faculty, teachers, and employees, as may be deemed expedient, and may confer upon the president and faculty such authority relative to the immediate control and management, other than financial, and the selection of teachers and employees, as may by said board be deemed for the best interest of said institutions.”

Section 1, Chapter 73, Laws of 1909; codified as Section 75-107, Revised Codes of Montana, 1947.

Sections 2 to 13 of Chapter 73, Laws of 1909, now codified as Sections 75-302 to 75-310, R.C.M., 1947 treat in detail of the creation, powers, and duties of the local executive boards.

However, in 1913, the Thirteenth Legislative Assembly enacted Chapter 92, Laws of 1913. Section 2 of that Chapter, now codified with later amendments as Section 75-403, R.C.M., 1947 provides:

“The control and supervision of the university of Mon-

tana, as hereinbefore constituted, are vested in the state board of education, which must appoint a president and faculty for each of the various state institutions constituting the university of Montana, and such other officers, agents, and employees for said university of Montana and for its component state institutions as the state board may deem necessary. The board shall also prescribe the powers and duties of the president, faculty, officers, agents and employees of said institutions composing said university of Montana, and shall also establish for the government of the university of Montana and for its component institutions, and for the instruction given therein, such rules and regulations, not inconsistent with the laws of the state, as may be necessary for the proper government and control of the university of Montana and its said component institutions.”

Section 6 of that Chapter, now codified with later amendments as Section 75-408, R.C.M., 1947 provides:

“The presidents of each of the educational institutions constituting the university of Montana, as herein prescribed, in connection with their respective executive boards of the several institutions, as now prescribed by law, shall have the immediate direction, management, and control of their respective institutions, subject to the general supervision, direction and control of the state board of education. The president of a unit of the university of Montana shall not act as the executive secretary of the university system.

The conflict between the statutes just quoted and the provisions of Chapter 73, Laws of 1909 are readily apparent. Section 75-403 makes the employment of the presidents, faculties, and staffs of the various units the direct responsibility of the Board of Education and does not provide the power to delegate that duty. It is a well-established principle of law, expressed in the maxim “delegatus non potest delegare”, that a delegated power may not be further delegated by the person to whom such power is delegated. In the case of **State ex rel Phillips v. Ford**, 116 Mont. 190, 151 P. 2d 171, our Supreme Court stated, in discussing a regulation of the Board of Education:

“If the provision in question conferred on the president

the power to make appointments of administrative officers, members of the instructional and scientific staff and other employees of the university it conflicted . . . wholly with section 853, Revised Codes of Montana, 1935. (now Section 75-403, R.C.M. 1947).”

Section 75-408, R.C.M., 1947 is in direct conflict with Sections 75-302 and 75-307 in that the former gives the immediate direction, management and control of the various units to the presidents of those units while the latter two sections give this control to the local executive boards.

Ordinarily, to the extent two statutes are inconsistent with one another, the later enacted statute governs. **In re Clark's Estate**, 105 Mont. 401, 74 P. 2d 401. However, section 7 of Chapter 92, Laws of 1913, provides:

“Nothing herein contained shall be construed to contravene, abrogate, or conflict with any of the provisions of the Act of the Legislative Assembly of the State of Montana approved March 1, 1909, being Chapter 73 of the Session Laws of the Eleventh Legislative Assembly”

Fortunately, the dilemma posed by this legislative ambivalence has been at least partially resolved by our Supreme Court. In **State ex rel Phillips v. Ford, supra**, the court stated that only the Board of Education had the power to appoint the faculty and employees to the various units, thus resolving one conflict between the 1909 and 1913 statutes in favor of the later statute. Following this precedent, I am constrained to recognize that there is a conflict between these two legislative acts, in spite of the protestation to the contrary which is contained in section 7, Chapter 92, Laws of 1913. In such cases, the later statute must govern. **In re Clark's Estate, supra**. Thus, Section 75-403, R.C.M., 1947 constitutes an implied repeal of those statutes which purport to allow the Board of Education to delegate to local executive boards the power to select faculty, teachers and employees. Section 75-408, R.C.M., 1947 repeals by implication those statutes giving local executive boards the immediate direction, control and management of the units of the university system and gives this power to the presidents of the

units. The local executive boards apparently are to serve the presidents in an advisory capacity.

For the reasons just discussed, it is my opinion that the Board of Education may not delegate its powers to the local executive boards.

Very truly yours,
FORREST H. ANDERSON
Attorney General