

VOLUME NO. 34

Opinion No. 33

JOINT MERIT SYSTEM - Inclusion of state agencies; DEPARTMENT OF LABOR AND INDUSTRY - Workmen's Compensation Division. Section 82A-206, R.C.M. 1947; Chapter 251, Session Laws of 1953; Article IV, section 1, Constitution of Montana.

HELD: Inclusion of the workmen's compensation division of the department of labor and industry in the Montana joint merit system is a matter for legislative action and should not be implemented by an opinion of the attorney general.

January 25, 1972

Mr. Kermit D. Bovee
Assistant Administrator
Workmen's Compensation Division
Department of Labor and Industry
815 Front Street
Helena, Montana 59601

Dear Mr. Bovee:

You have requested my opinion as to whether the workmen's compensation division of the department of labor and industry may be included in the Montana joint merit system.

This office has received an increasing number of requests from various state agencies and departments relative to whether the particular agency or department involved may be included in the Montana joint merit system. These requests have been submitted pursuant to an accepted, but statutorily unsupported, understanding that inclusion of state agencies in the state merit system may be accomplished by opinion of the attorney general. This procedure was considered necessary since there are no specific statutes which either define the limitations of the Montana joint merit system or establish

guidelines for state agency inclusion. Although several opinions of the attorney general, including former attorney general Forrest H. Anderson and the present attorney general, have been rendered based upon the foregoing rationale, I feel the procedure is in need of reevaluation and revision.

The Montana joint merit system was created by executive proclamation on June 1, 1940. This proclamation established a single employment merit system for the department of public welfare, the department of unemployment compensation and the maternal and child health division of the state department of health.

The legislature then created a system of personnel administration in Montana in 1953 by chapter 251, Laws of 1953. This act provided, in essence, for the creation of a department of state personnel and for the administration of this department. The general purposes of the act were contained in section 2, which provided:

“It is the general purpose of this act and the public policy of this state that:

(a) Employment in the state government shall be based upon merit and fitness.

(b) Efficiency and economy shall be promoted through just and equitable incentives and conditions of employment.

(c) That (sic) compensation be based on service rendered, or to be rendered and promotions be based on systematic tests and evaluations.

(d) That (sic) uniformity and compensation of state employees for similar work shall be based on uniform classification of state employees.”

The act also provided, in section 3, that certain state employees be excluded from its provisions. However, chapter 251, supra, was repealed in its entirety by chapter 3, Ex. Laws of 1967, which also provided authorization for the state budget director to enter into any necessary contract or agreement with a firm, partnership, corporation or association, for the purpose of conducting a study and preparing a plan of state personnel administration.

In 1969, the forty-first legislative assembly considered a proposal for the establishment of a state department of personnel administration, this being Senate Bill 31. This proposal did not survive committee consideration, however, and was never passed into law.

There does not exist, therefore, any statutory authority for the operation of the Montana joint merit system which specifies how this

system is to operate and the limitations of its authority. The merit system council, which previously existed only by administrative directive, was given legal status by section 82A-206, Revised Codes of Montana, 1947, which provides in part:

“(1) The **administratively created agency** known as the merit system council is hereby created by law.

“(2) The council and its functions are continued.” (Emphasis supplied)

There are also certain statutory references made to the merit system within the provisions of various statutes relating to particular state agencies. See, for example, section 71-203 (2), R.C.M. 1947, which requires that a merit system of personnel be adopted to encompass the personnel of the state department of public welfare; section 69-4109 (1), R.C.M. 1947, which provides that the executive officer of the state department of health shall, with the approval of the state board, appoint department employees and set their compensation pursuant to a merit system; section 87-123, R.C.M. 1947, which provides for a system of personnel administration to be maintained by the employment security commission. It should be noted, however, that none of the above-stated statutory provisions set forth any guidelines, limitations, or methods of operation for a state merit system, nor do these sections provide that any agency, other than those specifically named, shall be included in a state merit system.

The structure of a state merit system, and the designation of which agencies within state government may or may not be included therein, are matters which should properly be determined by legislative action. The Montana legislature deemed it appropriate to adopt such legislation when it enacted chapter 251, Laws of 1953. Yet the legislature subsequently repealed this legislation in 1967, and refused to enact new legislation in this area again in 1969. Thus, the Montana legislature has not created by statute a functioning system of personnel administration with specific duties, guidelines and limitations.

The office of the attorney general of the state of Montana is within the executive branch of state government. The powers and duties of this office are specifically provided by statute. None of the specified powers or duties authorize the attorney general to render a determination as to whether a state agency may or may not be included within the operation of a merit system, itself administratively created. The continued issuance of opinions to the effect that one state agency may be included in a merit system while another may not amounts to an exercise of authority which should rest solely with the legislative branch of government. It is a well-established principle of our governmental system that the executive, legislative and judicial

branches of government shall operate independently, and that one branch must not infringe upon the authority exercised by another. Article IV, section 1 of the Constitution of Montana provides:

“The powers of the government of this state are divided into three distinct departments: The legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.”

See also: *Mills v. Porter, et al.*, 69 Mont. 325, 222 Pac 428 (1929), and *State ex rel. Smith v. District Court*, 50 Mont. 134, 145 Pac. 721 (1914).

THEREFORE, IT IS MY OPINION that a determination of whether the workmen’s compensation division of the department of labor and industry may be included in the Montana joint merit system is a matter which should be decided through legislative action rather than by opinion of the attorney general. In this regard it should be noted, however, that justification for inclusion of a state agency within the Montana joint merit system has consistently been upon the rationale that the federal government requires the inclusion of an agency in a merit system as a condition precedent to the receipt of federal funds. If such is the case with the workmen’s compensation division of the department of labor and industry, and it appears that this division would be in danger of losing federal funding if it were not included in a Montana merit system, you are advised to inform the federal agency involved to communicate immediately with this office.

Very truly yours,

ROBERT L. WOODAHL
Attorney General