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COUNTIES — Tax appeal board, membership; COUNTIES — Tax appeal board, travel and per diem; OFFICES AND OFFICERS — County tax appeal board, membership; OFFICES AND OFFICERS — County tax appeal board, travel and per diem; TAXATION — County tax appeal board, membership; TAXATION — County tax appeal board, travel and per diem. Article VIII, section 7, Constitution of Montana, 1972; sections 59-538, 59-801, and 84-601, R.C.M. 1947.

HELD: 1. County commissioners cannot appoint themselves to the county tax appeal boards created in section 84-601, R.C.M. 1947.

2. Members of the county tax appeal boards created in section 84-601, R.C.M. 1947, are only entitled to travel and per diem as provided in sections 59-538 and 59-801, R.C.M. 1947.

June 26, 1973

Mr. Ray J. Wayrynen, Chairman
State Board of Equalization
Sam W. Mitchell Building
Helena, Montana 59601

Dear Mr. Wayrynen:

You have requested my opinion on the following questions:

1. By section 84-601, R.C.M. 1947, as amended by Chapter 405, Laws of 1973 (H.B. 16), may the county commissioners of the respective counties of Montana appoint themselves to the newly-created county tax appeal boards?
2. Pursuant to section 84-601, R.C.M. 1947, as amended by Chapter 405, Session Laws of 1973, to what travel and per diem are members of county tax appeal boards entitled while in session?

Your first question involves an interpretation of Article VIII, section 7, Constitution of Montana, 1972, which provides:

The legislature shall provide **independent** appeal procedures for taxpayer grievances about appraisals, assessments, equalization, and taxes. The legislature shall include a review procedure at the local government unit level. (Emphasis supplied)

Pursuant to this constitutional directive, the Forty-third Legislative Assembly enacted section 36 of Chapter 405, Session Laws of 1973, which provides in pertinent part:

The board of county commissioners of each county shall appoint the three (3) member county tax appeal board. The members of each tax

appeal board shall be residents of the county in which they serve; they shall serve four (4) year terms and shall receive travel expenses and per diem only when the county tax appeal board is in session to hear taxpayer appeals from property tax assessments.

The question of whether an officer or board having an appointing power may use such power and means of conferring an office upon himself or themselves has been considered by the courts of many states. In **State v. McDaniel**, 157 A.2d 463, the Supreme Court of Delaware stated, page 466:

Both the common law and the statute demand that the power of appointment be exercised fairly and impartially. ... the general law has been laid down — reinforced in many instances by appropriate statutes — that is contrary to public policy to permit a Board to exercise its power of appointment by designating someone from its own body.

In **Ehlinger v. Clark**, 8 S.W.2d 666, the Supreme Court of Texas stated at page 674:

It is because of the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body that the courts have with great unanimity throughout the country declared that all officer who have the appointing power are disqualified for appointment to the offices to which they may appoint.

And finally, in **Arbogast v. Shields**, 14 S.E. 2d 4, the Supreme Court of West Virginia stated at page 7:

No officer with power to appoint to another office or position is permitted to appoint himself. "It is contrary to the public policy to permit an officer, having the power to appoint to an office, to exercise that power in his own interest by appointing himself." . . . And no board consisting of more than one officer can appoint one of its members to another office or position. The common conscience of mankind revolts at the idea that a public officer should confer upon himself the power for emoluments of an additional office, or that a group of officers holding the power of appointment should confer such a position or office upon one of their number.

These cases indicate the general rule that boards with appointing power may not appoint their own membership to another office or position. Section 7 of Article VIII, *supra*, further provides that the appeal procedures for taxpayer grievances shall be "independent". This language indicates an intent by the framers of the constitution to create a totally independent county tax appeal board. While most of the duties relative to the assessment and collection of taxes have been removed from the jurisdiction of the county commissioners, there still remains the duty of the county commissioners to establish the annual mill levy. The public policy arguments stated above, and the language of the constitution requiring an "independent" appeal board, dictate that county

commissioners cannot appoint themselves to the county tax appeal board created in section 36 of Chapter 405, Session Laws of 1973.

Section 36 of Chapter 405, *supra*, provides that members of the county tax appeal board "shall receive travel expenses and per diem only when the county tax appeal board is in session ...". The statute does not provide a specific amount of travel or per diem expense to be paid; therefore, it is necessary to turn to the general state travel and per diem statutes. Section 59-801, R.C.M. 1947, sets forth the mileage rate for public officers in the state. As amended, this statute provides that public officers are entitled to 12¢ per mile when using their own automobiles in the performance of official duties. Section 59-538, R.C.M. 1947, sets forth the per diem allowance for persons in state service. Pursuant to section 84-601, *supra*, travel and per diem of county tax appeal boards are paid by the state tax appeal board through a legislative appropriation. As the state board is responsible for paying travel and per diem expenses, section 59-538, *supra*, would apply. Section 59-539, R.C.M. 1947, sets forth the method of computation of the per diem allowance. Based on the foregoing discussion, the county tax appeal boards should be reimbursed for travel and per diem expenses pursuant to the provisions of sections 59-538 and 59-801, *supra*. If members are to receive any other amount for travel and per diem, legislative action to so provide is necessary.

THEREFORE, IT IS MY OPINION:

1. County commissioners may not appoint themselves to the county tax appeal board established pursuant to section 36 of Chapter 405, Session Laws of 1973; and
2. Members of the county tax appeal board established pursuant to section 36, Chapter 405, Session Laws of 1973, are entitled only to travel and per diem expense reimbursement pursuant to the provisions of 59-538 and 59-801, R.C.M. 1947.

Very truly yours,
ROBERT L. WOODAHL
Attorney General