

OPINION NO. 35**Opinion No. 81**

ELECTIONS — School trustee election, tie vote procedure; SCHOOLS AND SCHOOL DISTRICTS — Trustee election, tie votes, special election. Article IV, section 5, and Article X, section 8, Constitution of Montana; sections 75-5917 and 75-6404, R.C.M. 1947.

HELD: When an election for school trustee results in a tie vote, the school district board of trustees should conduct a special school election to fill the trustee position.

May 3, 1974

Mr. J. Fred Bourdeau
Cascade County Attorney
County Attorney's Office
Great Falls, Montana 59401

Attention: Mr. Michael Greely
Deputy County Attorney

Dear Mr. Bourdeau:

Your request of my opinion may be phrased as follows:

What procedure is to be followed when an election for school trustee results in a tie vote?

Article X, section 5, Constitution of Montana, 1972, provides:

The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.

However, neither the Montana Constitution nor the school election laws, Title 75, chapter 64, Revised Codes of Montana, 1947, provides procedures to be followed in an election for school trustee in either a high school or an elementary district which results in a tie vote. Although the general statutes pertaining to Montana election laws set forth a procedure to be followed in the event of a tie vote, these general provisions refer to specifically named elective offices. (See: sections 23-4103 (4), 23-4119, 23-4120 and 23-4121, R.C.M. 1947.) Therefore, these general election procedures for tie votes are not applicable in the case of a tie vote in a school trustee election.

Previous Montana statutes relating to school trustees, since repealed, contained broad language relating to a vacancy in the school board. Repealed section 75-1614, R.C.M. 1947, provided in pertinent part:

... When any vacancy occurs in the office of trustee of any school district by death, resignation, **failure to elect at the proper time**, removal from the district, **or other cause**, ... the county superintendent shall immediately appoint ... (Emphasis supplied)

This procedure has been consistently construed by attorneys general for the state of Montana to mean that in the event of a tie vote for election of school trustees, a vacancy exists and an appointment to fill the vacancy must follow. (See: **9 Opinions of the Attorney General**, page 33; **10 Opinions of the Attorney General**, page 59; and **15 Opinions of the Attorney General**, No. 140.)

Section 75-1614, *supra*, referring to school trustee vacancies, was specifically repealed by section 496, chapter 5, Session Laws of 1971. The school laws of Montana, section 75-5917, R.C.M. 1947, now provide that a school trustee position is vacant upon the happening of certain events enumerated in the statute, none of which refer or relate to the contingency of a tie vote. Similar statutory enumerations of vacancies have been considered to be exclusive. **Rosborough v. Boardman**, 67 Cal. 116, 7 P. 261 (1885).

Counties and school districts have only those powers expressed or implied by law. **Fitzpatrick v. State Board of Examiners**, 105 Mont. 234, 70 P.2d 285 (1937). Thus, in the absence of statutory authority to appoint in the event of a tie vote for school trustee, a tied election may not be treated as a vacancy filled by appointment. Furthermore, the legislative repeal of statutes which had been construed to allow appointments to fill vacancies when a tie vote for trustee occurred, and a subsequent change in the wording of trustee vacancy provisions, indicate affirmative action by the legislative assembly to change the previous law.

Article IV, section 5, Constitution of Montana, 1972, provides:

In all elections held by the people, the person or persons receiving the largest number of votes shall be declared elected.

When an election for a school trustee results in a tie vote, it is a failure to elect. **State ex rel. Jones v. Foster**, 39 Mont. 583, 592, 104 P. 860 (1909). However, school trustees are authorized to conduct special school elections. Section 75-6404, R.C.M. 1947, provides in pertinent part:

... Unless otherwise provided by law, special school elections may be conducted at such times as determined by the trustees.

Thus, when the regular school election has resulted in a tie vote, the board of trustees is authorized to call a special school trustee election pursuant to section 75-6404, supra. It should be noted that this special election shall be a new election and not just a runoff election between the two candidates whose election had resulted in a tie.

THEREFORE, IT IS MY OPINION:

When an election for school trustee results in a tie vote, the board of trustees of the school district should conduct a special school election to fill the trustee position.

Very truly yours,

ROBERT L. WOODAHL
Attorney General