

VOLUME NO. 36

Opinion No. 100

STATE ELECTED OFFICIALS, EMPLOYEES, AND APPOINTEES — Appointed state officials are state employees for purposes of the vacation, sick leave and working hours statutes — VACATIONS, PUBLIC EMPLOYEES — Appointed state officials are state employees for purposes of the vacation statutes — SICK LEAVE, PUBLIC EMPLOYEES — Appointed state officials are state employees for purposes of the sick leave statutes — WORKING HOURS, PUBLIC EMPLOYEES — Appointed state officials are state employees for purposes of the working hours statutes — STATE TAX APPEALS BOARD — STAB members are public officials, but for the specific purposes of vacation leave, sick leave, and working hours statutes, they are state employees. Section 59-510(1), 59-1001, 59-1007, 59-1008, Revised Codes of Montana, 1947.

HELD: State Tax Appeals Board members may generally be considered public officers, but for the specific purposes of determining the applicability of Montana vacation, sick leave, and working hour statutes, they are to be considered state employees who are subject to the provisions of Chapter 10, Title 59, R.C.M. 1947, and §59-510(1), R.C.M. 1947.

September 14, 1976

Mr. Morris L. Brusett
Legislative Auditor
State Capitol
Helena, Montana 59601

Dear Mr. Brusett:

You have requested my opinion concerning the following questions:

1. Are members of the State Tax Appeals Board (STAB) employees of the state or officers of the state?
2. Do vacation and sick leave laws apply to STAB members or are they free to work whatever hours they please?

STAB members consider themselves state officials rather than state employees. They do not receive vacation, compensatory time, or sick leave, but keep their own hours. They are paid a yearly salary with no consideration given to the actual number of hours worked.

One board member, prior to his appointment, was employed by another state agency. Upon his appointment to the board he received a lump sum payment for accrued vacation and sick leave. This action was taken upon receipt of an opinion from the board's attorney finding the board member became a public officer rather than an employee upon appointment to the board.

In *State ex rel. Barney v. Hawkins*, 79 Mont. 506, 257 P.2d 411 (1927), the Montana Supreme Court stated:

... we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they are those of an inferior or subordinate officer, created or authorized by the Legislature and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. 79 Mont. at 528.

These five elements were reaffirmed in *State ex rel. Running v. Jacobson*, 140 Mont. 221, 370 P.2d 483 (1962).

STAB is creature of the legislature, created pursuant to §84-701, R.C.M. 1947, with a continuing life and six year terms for board members; therefore, the requirements of the first and fifth elements are met. Section 84-708, R.C.M. 1947, sets forth the power and duties of STAB and provides that the board does

exercise a portion of the sovereign power of the state without control of a superior power. Therefore, the requirements of the second, third and fourth elements are met. For general purposes, STAB members are public officers.

Notwithstanding the above general statement regarding the status of STAB members, it is necessary to review the specific provisions relating to vacation and sick leave to determine whether they apply to STAB members.

Section 59-1001, R.C.M. 1947, provides in pertinent part:

- (1) Each full-time employee of the state ... is entitled to and shall earn annual vacation leave credits...

Section 59-1007, R.C.M. 1947, provides:

The term "employee" as used herein, does not refer to or include **elected state, county or city officials**, or schoolteachers. (Emphasis added)

Both sections 59-1001 and 59-1007, R.C.M. 1947, were originally enacted by Chapter 131, Session Laws of 1949.

Section 59-1008, R.C.M. 1947, provides in part:

- (1) Each full-time employee of the state ... is entitled to and shall earn sick leave credits...

In determining which employees are excluded from the sick leave provisions of the Montana statutes, Vol. 34, Opinions of the Attorney General, No. 12, states:

Therefore ... it is my opinion that the exclusion of certain employees provided in section 59-1007, R.C.M. 1947, is applicable to the statute providing for sick leave, Chapter 93, Session Laws of 1971, section 59-1008, R.C.M. 1947.

Therefore, in determining who is excluded from the coverage of vacation and sick leave laws, §59-1007, R.C.M. 1947, is controlling.

In Teamsters v. Cascade County School District, No. 1, 162 Mont. 277, 511 P.2d 339 (1973), the Montana Supreme Court, interpreting the Montana employee vacation statutes, stated:

The legislature used the term "employee" in its generic sense to include all employees of the state or employees of the state agencies of which a school district is included. This interpretation is given further support by the language of section 59-1007 R.C.M. 1947, wherein schoolteachers are specifically excluded. The non-teaching school district employees are included by the definition of employees as used in section 59-1001, R.C.M. 1947. 162 Mont. at 280, 281.

"Elected state officials" are specifically excluded from Montana vacation and sick leave laws by §59-1007, R.C.M. 1947. However, there is no similar exclusion for appointed state officials. It is a rule of statutory construction that express mention of one thing in a statute implies exclusion of another under the maxim "expressio unis est exclusio alterius". **Helena Valley Irrigation**

District v. State Highway Commission, 150 Mont. 197, 433 P.2d 791 (1967). **Stephens v. City of Great Falls**, 119 Mont. 368, 175 P.2d 408 (1947). Applying this rule with the rationale of the court in the **Teamsters** case above, by only excluding elected officials, the legislature is presumed to have intended to include appointed public officials under the vacation and sick leave laws. Therefore, STAB members are also subject to the Montana vacation and sick leave laws and regulations.

Sections 59-1003 and 59-1008(5), R.C.M. 1947, pertaining respectively to vacation and sick leave, provide that accrued vacation and sick leave transfer with an employee who transfers between agencies within the state government. Therefore, since appointed public officers are not excluded from the coverage of these statutes, any lump sum payment of such previously accrued benefits to a board member upon his appointment to the board would be contrary to law.

The hours of work of state employees are specified by section 59-510(1), R.C.M. 1947, which provides in part:

All salaried state employees shall work a minimum of forty (40) hours a week.

There is an exception to elected officials, in that they are not required to maintain specific working hours, but are required to perform their statutory duties. Vol. 21 Opinions of the Attorney General, No. 198. As stated above, STAB members do not qualify for the elected officials' exception. Qualifications of members of STAB are set forth in §84-702, R.C.M. 1947, which provides in part:

He shall devote his entire time to the duties of the office and shall not hold any position of trust or profit, nor engage in any occupation or business interfering or inconsistent with his duties.

Thus, STAB members are considered full time state employees, and as such, are subject to the requirements of §59-510(1), R.C.M. 1947, requiring a 40 hour work week.

THEREFORE, IT IS MY OPINION:

State Board of Tax Appeals members may generally be considered public officers, but for the specific purposes of determining the applicability of Montana vacation, sick leave, and working hour statutes they are to be considered state employees who are subject to the provisions of Chapter 10, Title 59, R.C.M. 1947, and §59-510(1), R.C.M. 1947.

Very truly yours,
ROBERT L. WOODAHL
Attorney General