

VOLUME NO. 37

OPINION NO. 133

CONTRACTS - School board's delegation of hiring and firing power; EMPLOYMENT - School board's delegation of power to employ principals; SCHOOL BOARDS - Delegation to district superintendent of hiring and firing power; SCHOOL DISTRICTS - Superintendent's power to hire and fire principals; REVISED CODES OF MONTANA, 1947 - Section 75-5933(1); 1972 Montana Constitution - Article X, section 8.

HELD: A school district board of trustees may not delegate its duty to employ or dismiss principals and vice-principals to the school district superintendent.

14 April 1978

Rae V. Kalbfleisch, Esq.  
Toole County Attorney  
Toole County Courthouse  
Shelby, Montana 59474

Dear Mr. Kalbfleisch:

You have asked my opinion on this question:

May a school district board of trustees, in a contract with the school district superintendent, delegate authority to the superintendent to hire and fire all school principals and vice-principals without the approval or rejection of the board, and provide that no person so fired may hold an administrative position in the school system for five years?

My opinion is that a school board may not bargain away its duties in this manner.

In Wibaux Education Association v. Wibaux County High School, Mont., 573 P.2d 1162 (1978), the Montana Supreme Court addressed the similar issue of whether a school board could provide by contract that a decision to terminate a teacher's services be subject to arbitration. The Court said:

The hiring and nonrenewal of teachers in Montana is recognized as a function that belongs to the school boards. School boards have constitutional status under Article X, section 8, 1972 Montana Constitution, which 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."

At the time the agreement here was negotiated the Legislature had given school boards the exclusive right to hire and terminate teachers. Chapter 59, Title 75 covered the powers and duties of school boards. Section 75-5933, R.C.M. 1947, provided in relevant part:

"As prescribed elsewhere in this title, the trustees of each district shall have the power and it shall be its duty to perform the following duties or acts:

(1) employ or dismiss a teacher, principal or other assistant upon the recommendation of the district superintendent, the county high school principal, or other principal as the board may deem necessary, accepting or rejecting such recommendation as the trustees shall in their sole discretion determine, in accordance with the provisions of the school personnel chapter of this title \*\*\*."  
(Emphasis added.)

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It is clear...that [the power of nonrenewal of a teacher's contract] was given only to the School Board. 573 P.2d at 1164-65.

The court found in Wibaux that this statutory provision, and another one that is no longer in effect each indicated that arbitration of the nonrenewal of nontenured teachers was not allowed by law.

The portion of section 75-5933 cited above, which is still the law in Montana, also makes clear that only a school board has the power to hire or fire principals and vice-principals.

The only power specifically given the district superintendent by the statute is to make hiring and firing recommendations to the school board.

Both of the contractual provisions you have asked about involve a delegation of the school board's power to make the final employment and dismissal decisions. The first provision directly delegates that power to the district superintendent on a case-by-case basis. The second also effectively delegates that power. The district superintendent, in deciding to fire a principal or vice-principal, decides

at the same time not to hire that person for a period of five years. The issue you have raised, then, is whether the school board's power to hire and fire may be delegated to the district superintendent.

In Big Sandy School District No. 100-J v. Carroll, 164 Colo. 173, 433 P.2d 325 (1967), the Colorado Supreme Court was presented with a similar issue involving a similar statute. The issue was "whether a school board may delegate to its superintendent of schools the 'power' and 'duty' to employ teachers." 433 P.2d at 326. The statute, CRS 1963, 123-10-19, said: "(1) every school board, unless otherwise especially provided by law, shall have power, and it shall be their duty: (2) to employ or discharge teachers..." Id. The court found that this power and duty was non-delegable, and gave the following explanation for its decision:

By way of background, the general rule is that a municipal corporation, or a quasi-municipal corporation such as the District, may delegate to subordinate officers and boards powers and functions which are ministerial or administrative in nature, where there is a fixed and certain standard or rule which leaves little or nothing to the judgment or discretion of the subordinate. However, legislative or judicial powers, involving judgment and discretion on the part of the municipal body, which have been vested by statute in a municipal corporation may not be delegated unless such has been expressly authorized by the legislature. See C.Rhyme, Municipal Law, 74, and E. McQuillan, Municipal Corporations, 845-49 (3d ed. 1966).

In our view the power to employ teachers and fix their wages is not a mere ministerial or administrative matter, where little or no judgment or discretion is involved, but on the contrary is a legislative or judicial power involving the exercise of considerable discretion. Hence, under the general rule, such power cannot be delegated. The power to employ teachers has been conferred by the legislature exclusively on the school board, and therefore it cannot be delegated. To hold to the contrary would thwart the obvious intent of the legislature and would amount to nothing more than pure judicial legislation.

For general background information as to the mode of employing school teachers, see 78 CJS Schools and School Districts section 171, p.994, et seq. where the following appears:

Only such persons as are authorized by the constitution or statute have power to appoint teachers, principals, and superintendents. Under various statutes this power is conferred on school boards, on boards of trustees of school districts or boards of directors of subdistricts, on boards of education of cities or counties, and on school committees.

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Some statutes confer on the designated officer or body exclusive power to appoint teachers and other school employees. Such power, when conferred on a particular body, cannot be delegated, and an applicant for appointment is chargeable with knowledge of such fact. Accordingly, the duty of the board to make the selection cannot be delegated to the superintendent, even though the statute makes it obligatory on the board to select teachers from nominations made by him. (Emphasis added.)

433 P.2d 328. See also University of Colorado v. Silverman Colo. \_\_\_, 555 P.2d 1155 (1976); Bunger v. Iowa High School Athletic Association, \_\_\_ Iowa \_\_\_, 197 N.W.2d 555 (1972).

Montana follows the general rule that ministerial functions of a school board may be delegated to a district superintendent, while discretionary functions may not. Cf. School District No. 4 v. Colburg, \_\_\_ Mont. \_\_\_, 547 P.2d 84, 87 (1976). Colburg held that delivery of a statement of reasons for a teacher's termination was a ministerial action properly performed by the district superintendent. There is no doubt that the hiring and firing of principals and vice-principals are discretionary duties. Section 75-5933 states specifically that such a determination is in the trustees' "sole discretion."

THEREFORE, IT IS MY OPINION:

A school district board of trustees may not delegate its duty to employ or dismiss principals and vice-principals to the school district superintendent.

Very truly yours,

MIKE GREELY  
Attorney General