

VOLUME NO. 37

OPINION NO. 29

BOARD OF HOUSING - Conflict of interest, statutory exemption; PUBLIC CONTRACTS - Board of Housing, conflict of interest, statutory exemption; CONFLICT OF INTEREST - Board of Housing, statutory exemption; REVISED CODES OF MONTANA, 1947 - Sections 59-501, 59-1702, 59-1706, 59-1706(3), 59-1710, 82A-907, 82A-907(7).

HELD: The members of the Board of Housing who were determined by 37 OP. ATT'Y GEN. NO. 2 to possess potential conflicts of interest under section 59-501, R.C.M. 1947, because of their status as officers and stockholders in lending institutions participating in the board's programs, are now specifically exempted from section 59-501 by House Bill 230 which amends section 82A-907, R.C.M. 1947.

27 May 1977

W. A. Groff, Chairman
Montana Board of Housing
Department of Community Affairs
Capitol Station
Helena, Montana 59601

Dear Mr. Groff:

You have requested my opinion on the following question:

What is the status of 37 OP. ATT'Y GEN. NO. 2 in view of the amendatory language in section 2 of House Bill 230?

Opinion No. 2 referred to in your question was rendered on February 23, 1977, prior to the Legislature's consideration or enactment of House Bill 230. The opinion construed section 59-501, R.C.M. 1947, prohibiting conflicts of interest, to include certain members of the Board of Housing based upon their status as officers and stockholders of lending institutions dealing with the board. At the time the opinion was written, section 82A-907 creating the board merely provided that its members be "informed and experienced in housing, economics, or finance."

House Bill 230 amends section 82A-907 to provide a new subsection (7):

A member of the board shall not be deemed to have a conflict of interest under the provisions of 59-501 merely because the member is a stockholder, officer or employee of a lending institution who may participate in the Board's programs.

The enactment of this amendment was clearly within the Legislature's power. Article XIII, section 4 of the Montana Constitution mandates the Legislature to enact a code of ethics for public servants, but does not specify the contents of that code, which is left to legislative discretion. Section 59-501 already excludes the interest represented by a minority stockholder and interests in certain types of contracts. Therefore, the Legislature had previously created certain exceptions to the scope of section 59-501.

House Bill 230 intended to create a new specific exception to section 59-501. The meaning of the bill is clear on its face: it is not a prohibited conflict of interest for a member of the Board of Housing to be a stockholder, officer or employee of a lending institution participating in the board's programs. This obviously has a significant effect upon the prior opinion. The board member who is the president and majority stockholder in a bank is exempted from section 59-501 since being an officer or stockholder is now permitted by section 82A-907(7). The same is true as to the board member who is an officer and minority stockholder in a bank. The board member who is a chief executive officer of a mutual savings and loan association is likewise removed from section 59-501 since he is either an officer or an employee, both of which are now permitted by section 82A-907(7).

Your attention should be called to chapter 569 of the Montana Session Laws of 1977, enacted to implement Article XIII, section 4 of the Montana Constitution by providing a comprehensive code of ethics for public servants. Section 6 of the Act (enacting section 59-1706, R.C.M. 1947) provides that a state employee (which term includes board members) violates his or her fiduciary duty to the public by performing:

an official act directly and substantially affecting to its economic benefit a business or

other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative or agent.

"Financial interest" is defined in section 2 of the Act (section 59-1702) to include ownership interest in a business, employment and directorship or offership in a business. This is obviously a substantial overlap with the existing provisions of section 59-501, and thus would likely apply to the Housing Board members who are the subject of this opinion.

Unlike the direct prohibition of section 59-501, however, section 6(3) (section 59-1706(3)) of the Act provides that a board member may perform an official act notwithstanding the prohibition set out above:

if his participation is necessary to the administration of a statute and if he complies with the voluntary disclosure procedures under 59-1710.

Section 59-1710 (section 10 of the Act) provides that the member may act in a manner which "may impinge his fiduciary duty" if he discloses his conflicting interest in writing to the Secretary of State, and further if he states his interest for the record when he undertakes the official act in question. Therefore, this Act should not adversely affect the board members who are the subject of this opinion if they comply, when necessary, with the voluntary disclosure provisions.

THEREFORE, IT IS MY OPINION:

The members of the Board of Housing who were determined by 37 OP. ATT'Y GEN. NO. 2 to possess potential conflicts of interest under section 59-501, R.C.M. 1947, because of their status as officers and stockholders in lending institutions participating in the board's programs, are now specifically exempted from section 59-501 by House Bill 230 which amends section 82A-907, R.C.M. 1947.

Very truly yours,

MIKE GREELY
Attorney General