

VOLUME NO. 37

OPINION NO. 4

SCHOOLS - Annual vacation leave for Superintendents; ELECTED OFFICIALS - County School Superintendents; PUBLIC EMPLOYEES - Elected officials as being public employees; STATUTES - Repeal by implication not favored; REVISED CODES OF MONTANA, 1947 - Section 59-1007.

- HELD: 1. Section 59-1007.1(2), R.C.M. 1947, defining "employee" as any person employed by state, county or city governments does not repeal by implication section 59-1007, R.C.M. 1947, which excludes elected officials or school teachers from the definition of "employees."
2. An elected county superintendent of schools is not an "employee" within the meaning of Title 59, chapter 10, Revised Codes of Montana.

24 February 1977

Keith B. Haker, Esq.
 Custer County Attorney
 Custer County Courthouse
 Miles City, Montana 59301

Dear Mr. Haker:

You have requested my opinion on the following question:

Whether a county superintendent of schools is eligible for annual vacation leave under the provisions of Title 59, chapter 10, R.C.M. 1947, and whether section 59-1007.1(2) repeals by implication section 59-1007, R.C.M. 1947.

This question arises due to an apparent discrepancy between two statutes concerning "eligible employees." Section 59-1007 states:

The term "employees" as used herein, does not refer to or include elected state, county, or city officials, or school teachers.

This section was enacted in 1949 as part of the original act relating to vacation and sick leave for public employees.

In 1973 the Legislature enacted section 59-1007 which is a definition section. Subsection (2) of that section provides:

"[E]mployee" means any person employed by the state, county, or city governments.

You asked if section 59-1007.1(2) repeals by implication section 59-1007, thereby bringing elected officials such as county school superintendents within the purview of the vacation and sick leave act.

It is settled in Montana that repeals by implication are not favored. State v. Winter, 129 Mont. 207, 220-221, 285 P.2d 149 (1955). In order for a subsequent statute to repeal a previous statute by implication, the two must be inconsistent and incompatible. Teamsters, et al. v. The Montana Liquor Control Board, 155 Mont. 300, 303, 471 P.2d 541 (1970). The unstated rationale for holdings such as this is explained in Volume 1A Sutherland, Statutory Construction, 4th Edition, section 23.10, page 231:

The bent of the rules of interpretation and construction is to give harmonious operation and effect to all of the acts upon a subject, where such a construction is reasonably possible, even to the extent of superimposing a construction of consistency upon the apparent legislative intent to repeal where two acts can, in fact, stand together and both be given consonant operation. Where the repealing effect of a statute is doubtful, the statute is strictly construed to effectuate its consistent operation with previous legislation.

There is not substantial conflict between the two sections to satisfy the standards of implied repeal. These statutes reasonably may be read together, i.e., an "employee" under the act is any person employed by the state, county or city government, except elected officials or school teachers. By this interpretation, an elected county school superintendent would not be entitled, as a matter of right, to the vacation and sick leave benefits enjoyed by public employees.

THEREFORE, IT IS MY OPINION:

1. Section 59-1007.1(2), R.C.M. 1947, defining "employee" as any person employed by state, county

or city governments does not repeal by implication section 59-1007, R.C.M. 1947, which excludes elected officials or school teachers from the definition of "employees."

2. An elected county superintendent of schools is not an "employee" within the meaning of Title 59, chapter 10, Revised Codes of Montana.

Very truly yours,

MIKE GREELY
Attorney General