

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 54

HUMAN RIGHTS ACT - Age discrimination provisions affecting maximum age qualifications for teachers and specialist certification;

SUPERINTENDENT OF PUBLIC INSTRUCTION - Certification of teachers after age 70;

TEACHERS - Eligibility for teacher and specialist certification after age 70;

MONTANA CODE ANNOTATED - Sections 20-4-101, 20-4-103, 20-4-104(1), 20-4-104(1)(a), 20-4-203(2), 49-2-303, 49-2-308, 49-2-308(1), 49-3-201, 49-3-204.

HELD: The age limitation established in section 20-4-104(1)(a), MCA, as a qualification for certification to teach is repealed by implication by sections 49-2-308 and 49-3-204, MCA.

25 February 1982

Ed Argenbright  
Superintendent of Public Instruction  
State Capitol  
Helena, Montana 59620

Dear Mr. Argenbright:

You have requested my opinion on the following question:

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Is the provision of section 20-4-104(1)(a), MCA, establishing age limitations for issuance of teacher and specialist certificates, repealed by implication by the Montana Human Rights Act?

Your question arises from the recent decision of the Montana Supreme Court in Dolan v. School District No. 10, 38 St. Rptr. 1903, 636 P.2d 825 (1981), in which the Court unanimously held that section 20-4-203(2), MCA, was repealed by implication by the Human Rights Act to the extent that section 20-4-203(2), MCA, established a mandatory retirement age for teachers.

Montana law provides that a teacher may not be employed in a public school unless certified by the Superintendent of Public Instruction. § 20-4-101, MCA. The superintendent is empowered to issue certificates to teachers and is explicitly prohibited from certifying a teacher who does not meet certain statutory qualifications. § 20-4-103, MCA. The qualifications are set forth in section 20-4-104(1), MCA, and include the following: "Any person may be certified as a teacher when he satisfies the following qualifications: (a) He is 18 years of age or older but is not more than 70 years of age." It is clear that under the law the superintendent may not issue or renew a certificate for a teacher who has reached the age of 70.

The decision in Dolan involved statutes prohibiting discrimination based on age by a school district as a public employer. The Supreme Court held that the provisions of the Human Rights Act prohibiting discrimination in employment, § 49-2-303, MCA, and discrimination by a public employer, § 49-3-201, MCA, repeal by implication any prior legislation establishing or authorizing mandatory teacher retirement policies based solely on age as an arbitrary limitation. Your inquiry is somewhat different than the one decided by the Court in Dolan. Section 20-4-104(1), MCA, does not deal directly with employment. Rather, it provides the qualifications for a teaching certificate, which is a privilege or license granted by the State. The hiring practice statutes relied on by the Court in Dolan therefore do not control. However, analogous statutes prohibit the State from denying any person "advantages, or privileges because of...age,...unless based on

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reasonable grounds." § 49-2-308(1), MCA. Further, section 49-3-204, MCA, provides that "[n]o state or local governmental agency may grant, deny, or revoke the license or charter of a person on the grounds of...age...." Under Dolan, these enactments must be held to supersede prior inconsistent legislation.

Dolan held that age alone is not a valid predictor of job performance for teachers, 636 P.2d at 830. It follows that age alone may not serve as "reasonable grounds" under section 49-2-308, MCA, to deny a teacher the certificate needed to secure a teaching job. This is especially true in light of the legislative finding in section 20-4-101, MCA, that certification is required to assure "quality education" and "maintenance of professional standards." The Court's conclusion in Dolan was apparently one of fact based on the expert testimony presented in that case. 636 P.2d at 827. I express no opinion as to the factual issue of the validity of age as a predictor of performance in any other job or profession.

THEREFORE, IT IS MY OPINION:

The age limitation established in section 20-4-104(1)(a), MCA, as a qualification for certification to teach is repealed by implication by sections 49-2-308 and 49-3-204, MCA.

Very truly yours,

MIKE GREELY  
Attorney General