

SCHOOL BOARDS - School board may delegate administrative nondiscretionary contracting responsibilities to the district superintendent;

SCHOOL DISTRICTS - District superintendent lacks the inherent authority to enter contracts on behalf of the school district;

MONTANA CODE ANNOTATED - Sections 20-4-402, 20-9-204(3), 20-9-204(4), 20-9-213;

OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 133 (1978).

- HELD: 1. A school district superintendent does not have the inherent power to enter a contract on behalf of the school district.
2. A school district board of trustees may delegate a portion of its exclusive power to contract if the delegated power involves only the performance of administrative nondiscretionary acts.

15 March 1984

Harold F. Hanser  
Yellowstone County Attorney  
Yellowstone County Courthouse  
Billings MT 59101

Dear Mr. Hanser:

You have requested my opinion on the following questions:

1. May a school district superintendent, without the prior approval of the district board of trustees, enter a contract for the provision of goods or services to the district if the amount of the contract does not exceed \$7,500?
2. May a school district board of trustees delegate its statutory power to execute contracts on behalf of the school district to the district superintendent?

Your questions arise under section 20-9-213, MCA, which provides in part:

The trustees of each district shall have the sole power and authority to transact all fiscal business and execute all contracts in the name of such district. No person other than the trustees acting as a governing board shall have the authority to expend moneys of the district. [Emphasis added.]

It is clear that this provision and section 20-9-204(3), (4), MCA, require the trustees to execute any contract for goods and services the value of which exceeds \$7,500. Such a contract may only be entered following competitive bidding. However, the situation regarding contracts for less than \$7,500 is less clear. Since such contracts are not covered by section 20-9-204(3), MCA, they need not be let for bids, see Missoula County Free High School v. Smith, 91 Mont. 419, 422-23, 8 P.2d 800, 802 (1932), and if the applicable statute of frauds permits, they need not be reduced to writing. Some of

these contracts cover small everyday purchases, while others may involve more substantial capital assets.

Your first question is whether the provisions of section 20-9-204(3), MCA, requiring contracts for more than \$7,500 to be let for bid, carry the negative implication that contracts for less than that amount may be entered by the school district superintendent without the prior approval of the board of trustees. Nothing in the statute suggests that the Legislature intended such a result. Moreover, section 20-9-213, MCA, states quite forcefully that the board of trustees possesses the "sole power and authority" to contract on behalf of the school district. The statutory powers of the district superintendent do not include the power to enter contracts without the approval of the trustees. I therefore conclude that the superintendent lacks the inherent statutory power to contract on behalf of the district.

Your second question is whether the trustees may delegate their statutory contracting power to the district superintendent. In 37 Op. Att'y Gen. No. 133 (1978), I noted that Montana law recognizes the power of a district board of trustees to delegate ministerial or administrative duties to the superintendent. Two Montana Supreme Court cases illustrate this principle. In School District No. 4 v. Colburg, 169 Mont. 368, 374, 547 P.2d 84, 87 (1976), the Court held that although a statute required the trustees to deliver notice of termination to a teacher, the notice was not invalid simply because the trustees directed the district superintendent to make the delivery instead. The Court relied on the fact that the substantive decision was made by the trustees and that the superintendent performed only the ministerial act of delivering notice of the trustees' decision. In Wibaux Education Association v. Wibaux County High School, 175 Mont. 331, 336, 573 P.2d 1162, 1165 (1978), in contrast, the Court held that the trustees' statutory power to decide whether to terminate a teacher's contract could not be delegated to an arbitrator through collective bargaining.

The distinction illustrated by these cases is described in 37 Op. Att'y Gen. No. 133 at 563. There, I quoted with approval the opinion of the Colorado Supreme Court in Big Sandy School District No. 100-J v. Carroll, 164

Colo. 173, 433 P.2d 325, 328 (1967), where the court held that duties involving an exercise of discretion or judgment may not be delegated, while duties "which are ministerial or administrative in nature, where there is a fixed or certain standard or rule which leaves little or nothing to the judgment or discretion of the subordinate" may be delegated. Applying this standard to the question of the delegation of the trustees' power to contract, it is my opinion that there are circumstances in which the power may be delegable. If the discretionary elements of the proposed contract are considered and determined by the board of trustees and the board provides "fixed and certain" direction in how the contract is to be formed, the board may delegate to the superintendent the formal responsibility for the negotiation and execution of the contract. The superintendent is the "executive officer" of the board, § 20-4-402, MCA, and in this circumstance he merely acts to execute the policy adopted by the board.

It would appear that there are classes of contracts for which the board could establish policy guidelines within which the superintendent could contract without the explicit direction of the board for each and every contract. For example, the district office may require certain fungible supplies such as pencils and paper. The board may determine that these supplies should be purchased on an "as needed" basis from a particular local merchant and allow the superintendent to contract for these purchases without requiring the superintendent to seek prior board approval for each and every purchase. In such a case, the board has performed its discretionary duty and left the ministerial performance of the duty to the superintendent.

It is clear that the Legislature intended to require the board of trustees to make the discretionary decisions in matters relating to school district contracts. Although the law allows the board to delegate the formalities of its contractual duties, it may be the better policy not to do so. Under Montana law, the board of trustees may refuse to pay a claim based on a contract unlawfully entered on the district's behalf by the superintendent, since such ultra vires contracts are legally unenforceable. Keller Brothers v. School District No. 3, 62 Mont. 356, 362, 205 P. 217, 219 (1922); see Sibert v. Community College, 179 Mont. 188, 191, 587 P.2d 26, 28 (1978). Unless the trustees establish

guidelines of unusual clarity, questions will continually arise whether particular contracts entered by the superintendent on behalf of the district are lawful or unlawful. A school board should therefore exercise great care in deciding to delegate any portion of its contracting power to the district superintendent.

THEREFORE, IT IS MY OPINION:

1. A school district superintendent does not have the inherent power to enter a contract on behalf of the school district.
2. A school district board of trustees may delegate a portion of its exclusive power to contract if the delegated power involves only the performance of administrative nondiscretionary acts.

Very truly yours,

MIKE GREELY  
Attorney General