

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 50

PUBLIC OFFICERS - High school district superintendent as employee rather than public officer for purposes of recall statute;

SCHOOL DISTRICTS - High school district superintendent as employee rather than public officer for purposes of recall statute;

MONTANA CODE ANNOTATED - Sections 2-16-602(1), 2-16-603(1), 20-4-401, 20-4-402;

OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 46 (1984), 40 Op. Att'y Gen. No. 41 (1984).

HELD: A high school district superintendent, appointed under section 20-4-401, MCA, does not hold a "public office" within the scope of the Montana Recall Act.

5 January 1988

John C. McKeon  
Phillips County Attorney  
Phillips County Courthouse  
Malta MT 59538

Dear Mr. McKeon:

You have asked my opinion on the following question:

Does a high school district superintendent, appointed under section 20-4-401, MCA, hold a "public office" within the scope of the Montana Recall Act?

The Montana Recall Act (Recall Act), §§ 2-16-601 to 635, MCA, provides that "[e]very person holding a public office of the state or any of its political subdivisions, either by election or appointment, is subject to recall from such office." § 2-16-603(1), MCA.

"Public office," in turn, is defined in the Recall Act as follows:

(1) "Public office" means a position of duty, trust, or authority created by the constitution or by the legislature or by a political subdivision through authority conferred by the constitution or the legislature that meets the following criteria:

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(a) the position must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public;

(b) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the constitution, the legislature, or by a political subdivision through legislative authority;

(c) the duties must be performed independently and without control of a superior power other than the law, unless the legislature has created the position and placed it under the general control of a superior office or body; and

(d) the position must have some permanency and continuity and not be only temporary or occasional.

§ 2-16-602(1), MCA. (Emphasis added.)

The above-quoted definition was first developed in Montana by the Supreme Court in State ex rel. Barney v. Hawkins, 79 Mont. 506, 528-29, 257 P. 411, 418 (1927). The definition has been applied frequently in Montana case law as well as in Attorney General's Opinions. A lengthy discussion of those precedents is contained in 40 Op. Att'y Gen. No. 46 at 184 (1984). See also 53 A.L.R. 595, 602-06 (1928).

The seminal case on the meaning of "public office" or "civil office" is State ex rel. Barney v. Hawkins, supra, which involved the question of whether an auditor for the State Board of Railroad Commissioners was a public (civil) officer or an employee, subject to the direction of others. Among the many authorities cited in Barney is a case which determined that a school superintendent was an employee rather than a public officer, since the superintendent exercised power derived from and through the board of trustees that appointed him. Mayor of Baltimore v. Lyman, 92 Md. 591, 48 A. 145 (1901), cited in State ex rel. Barney v. Hawkins, 257 P. 411 at 414-15. An examination of relevant Montana law demonstrates that the position of high school district superintendent appointed pursuant to section 20-4-401, MCA, is similar to that of the superintendent in Mayor of Baltimore v. Lyman, supra.

Under existing Montana statutes, district superintendents are appointed by school trustees, pursuant to section 20-4-401, MCA. A superintendent must enter into

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an employment contract with the trustees and is subject to termination of employment by them. Compensation and duration of employment are set by the trustees rather than by statute. While a superintendent has general supervisory responsibilities, the statutes make clear that the trustees exercise control over the superintendent's duties in the areas of policy implementation and administration, curriculum development, and textbook and library book selection, as well as control over "any other duties prescribed by the trustees." § 20-4-402(2) to (5), (8), MCA. Thus, a district superintendent's powers, for the most part, are derived from and through the board of trustees, as was true in the Mayor of Baltimore case. See also 40 Op. Att'y Gen. No. 41 at 164 (1984), wherein it was concluded that a school district superintendent does not have the power to enter into a contract on behalf of the school district; Farley v. Board of Education, 62 Okla. 181, 162 P. 797, 799 (1917) (school superintendent, whose employment arose out of a contract whereby he acted under the direction or control of others and the duration and extent of his employment depended upon the terms of the contract, was an employee rather than an officer); State ex rel. Rusch v. Board of County Commissioners, 121 Mont. 162, 165-66, 191 P.2d 670, 672 (1948) ("one who holds a position at the will of the appointing power is not usually classed as a public officer"). Under these circumstances, the position of district superintendent does not fit within part of the definition of "public office" (§ 2-16-602(1)(c), MCA) which requires that duties be performed independently and without control of a superior power.

Because a district superintendent of schools is not a "public officer" within the scope of the Recall Act, the recall procedure is inapplicable. Rather, it is within the province of the school trustees to determine whether the employment of a district superintendent should be terminated, pursuant to section 20-4-401(4), MCA.

THEREFORE, IT IS MY OPINION:

A high school district superintendent, appointed under section 20-4-401, MCA, does not hold a "public office" within the scope of the Montana Recall Act.

Very truly yours,

MIKE GREELY  
Attorney General