

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 86

ADMINISTRATIVE LAW AND PROCEDURE - Applicability of Montana Administrative Procedure Act to school districts and local governments;

SCHOOL DISTRICTS - Disqualification of county school superintendent in school controversy, timeliness of affidavit;

SUPERINTENDENT OF PUBLIC INSTRUCTION - Authority to promulgate rules concerning timeliness of disqualification affidavits under section 20-3-211(3), MCA;

MONTANA CODE ANNOTATED - Sections 2-4-102(2)(b), 2-4-611(4), 20-3-210, 20-3-211;

ADMINISTRATIVE RULES OF MONTANA - Title 10, chapter 6.

- HELD: 1. The affidavit of disqualification of a county school superintendent in a school controversy is peremptory under the plain meaning of the statute.
2. The timeliness of an affidavit of disqualification in a school controversy may be regulated by the presiding officer in such a hearing.

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25 May 1988

David G. Rice
Hill County Attorney
Hill County Courthouse
Havre MT 59501

Dear Mr. Rice:

You have requested my opinion on the following question:

Must a county superintendent of schools automatically disqualify himself or herself from hearing a school controversy under section 20-3-210, MCA, when an affidavit alleging that the county superintendent is biased or prejudiced is filed pursuant to section 20-3-211(3), MCA?

The disqualification statute, in pertinent part, states:

A county superintendent may not hear or decide matters of controversy pursuant to 20-3-210 when:

....

(3) either party to the controversy makes and files with the county superintendent of schools an affidavit that he has reason to believe and does believe that he cannot have a fair and impartial hearing before the county superintendent by reason of the bias or prejudice of the county superintendent[.]

§ 20-3-211, MCA.

By the terms of the statute, disqualification is peremptory; that is, the allegation itself is sufficient to cause the disqualification. I am not, of course, allowed to go beyond the plain and clear meaning of the statute to substitute my view of good policy. Dunphy v. Anaconda, 151 Mont. 76, 438 P.2d 660 (1968); Keller v. Smith, 170 Mont. 399, 533 P.2d 1002 (1976). I am aware that there is a potential for abuse in this procedure and that frequent substitution can become costly for the county. However, any remedy will have to come in the form of statutory change by the Legislature.

You have referred to the disqualification of a hearing examiner under the Montana Administrative Procedure Act. According to section 2-4-611(4), MCA, such an affidavit

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must be both timely and sufficient. However, any application of the Montana Administrative Procedure Act to a school controversy is foreclosed by the negative definition of "agency" provided in section 2-4-102(2)(b), MCA: "'Agency' does not include a school district, unit of local government, or any other political subdivision of the state." Thus, although the Montana Administrative Procedure Act requires that an affidavit of disqualification be both timely and sufficient, the Act's requirement cannot be read into the proceeding conducted by the county superintendent of schools in Title 20.

The county superintendent can exercise some control over the timeliness of an affidavit of disqualification. While the statute is silent on a time requirement for the affidavit, a judicial officer typically has the discretion to require timely submission of motions for the orderly disposition of the matters before it. It would not be unreasonable for the county superintendent to require either party to file a disqualification affidavit by a certain date or forgo that right.

The Superintendent of Public Instruction, who is the appellate authority for these matters, has adopted some procedures and rules for the handling of school controversies. Tit. 10, ch 6, ARM. The rules do not currently address the timeliness of the disqualification affidavit, but they could appropriately do so.

THEREFORE, IT IS MY OPINION:

1. The affidavit of disqualification of a county school superintendent in a school controversy is peremptory under the plain meaning of the statute.
2. The timeliness of an affidavit of disqualification in a school controversy may be regulated by the presiding officer in such a hearing.

Very truly yours,

MIKE GREELY
Attorney General