

VOLUME NO. 43

OPINION NO. 69

COUNTIES - Fees for county superintendent of schools in addition to salary;
COUNTY OFFICERS AND EMPLOYEES - Fees for county superintendent of schools in addition to salary;

PUBLIC OFFICERS - Fees for county superintendent of schools in addition to salary;

SALARIES - Fees for county superintendent of schools in addition to salary;

MONTANA CODE ANNOTATED - Sections 20-3-201(2), (3), 20-3-212;

OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 33 (1985), 41 Op. Att'y Gen. No. 12 (1985), 39 Op. Att'y Gen. No. 7 (1981), 37 Op. Att'y Gen. No. 63 (1977), 37 Op. Att'y Gen. No. 13 (1977), 36 Op. Att'y Gen. No. 110 (1976), 36 Op. Att'y Gen. No. 63 (1976), 35 Op. Att'y Gen. No. 32 (1973), 35 Op. Att'y Gen. No. 31 (1973), 34 Op. Att'y Gen. No. 15 (1971).

HELD: A qualified county superintendent of schools entering into a contractual agreement pursuant to section 20-3-201(3), MCA, to provide services in a county lacking a qualified county superintendent of schools is entitled to additional compensation for services rendered.

July 31, 1990

Arnie A. Hove
McCone County Attorney
P.O. Box 184
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Dear Mr. Hove:

You have requested my opinion on the following question:

Does section 20-3-201(3), section 20-3-212, MCA, or any other section prohibit a qualified county superintendent of schools from receiving a fee for services provided pursuant to a contract authorized under section 20-3-201(3), MCA?

You have indicated that the offices of county superintendent of schools and county treasurer have been consolidated in McCone County. The holder of the consolidated office lacks the statutory qualifications associated with the office of county superintendent and is therefore unable to conduct hearings involving contested school matters. You further indicate that your county has difficulty locating a qualified county superintendent willing to enter into a contract to conduct such hearings due to the unsettled question of whether such officer is entitled to receive a fee for services rendered.

The context in which your question arose is quite clear. Prior to 1979, the consolidation of the office of county superintendent with any other county office "carr[ie]d with it the minimum qualification for each office as prescribed by statute." Thus, "[a]n individual must meet the minimum qualification for each office to be eligible for the consolidated county office." 35 Op. Att'y Gen. No. 31 at 72 (1973). The minimum qualifications required for the office of county superintendent are set forth in section 20-3-201(2), MCA, which provides as follows:

- (2) Any person shall be qualified to assume the office of county superintendent who:
 - (a) is a qualified elector;
 - (b) holds a valid teacher certificate issued by the superintendent of public instruction; and
 - (c) has not less than 3 years of successful teaching experience.

In 1979, legislation was enacted removing the mandatory qualifications set forth in section 20-3-201(2), MCA, when the office of county superintendent was consolidated with another county office. 1979 Mont. Laws. ch. 355. Following further amendment in 1985, section 20-3-201, MCA, currently provides in pertinent part as follows:

- (3) When the office of county superintendent of schools is consolidated with another county office within the county, the officeholder shall have the qualifications of subsection (2) or he shall, with the approval of the governing body, contract for the services of another county superintendent, with approval of the governing body of that county, to perform the duties required of a county superintendent in 20-3-207 and 20-3-210. The

officeholder may contract for the services of another county superintendent to perform other duties required by law of a county superintendent. The superintendent of public instruction shall prescribe a contract form to be used.

The legislative history of the 1985 amendment indicates that the Legislature failed to resolve the issue of whether a qualified county superintendent is entitled to additional compensation pursuant to a contract to perform the functions of a county superintendent in another county. See Minutes of the House Education and Cultural Resources Committee hearing on Senate Bill 168, held March 18, 1985, at 4.

The appropriate analysis for the resolution of your question is provided in a prior Attorney General's Opinion:

The Montana Supreme Court addressed itself to a similar situation in Anderson v. Hinman, 138 Mont. 397, 357 P.2d 895 (1960), a case concerning increased responsibilities for the clerk of the supreme court. The Montana Supreme Court, in that decision, allowed additional compensation to the clerk for services rendered which were not provided by law. The court said, at page 412:

The Clerk of the Supreme Court is paid a salary under Section 25-501, R.C.M. 1947, which is to compensate him "for all services required of him or which may hereafter devolve upon him by law." (section 25-501.1). This does not preclude him from receiving compensation for services he may provide which are not required by law. The general rule of law is stated in [67 C.J.S. Officers § 227, at 727-28]:

"... an officer is not obliged, because his office is salaried, to perform all manner of public service without additional compensation, and for services performed by request, not part of the duties of his office, and which could have been as appropriately performed by any other person, he may recover a proper remuneration." [Emphasis theirs.]

34 Op. Att'y Gen. No. 15 at 132, 133-34 (1971).

The foregoing is merely an outgrowth of the familiar principle that public officers may not receive additional compensation for discharging the duties associated with their office beyond that provided by their regular salary. Thus, because in each instance the act in question constituted a duty

associated with the office, it has been held that: a clerk and recorder is not entitled to additional compensation for serving as election administrator, 41 Op. Att'y Gen. No. 33 at 124 (1985); 39 Op. Att'y Gen. No. 7 at 27 (1981); a court reporter is not entitled to additional compensation when court is held in another judicial district, 41 Op. Att'y Gen. No. 12 at 42 (1985); a county attorney is not entitled to additional compensation for prosecuting the appeal of a decision of the county tax appeal board, 37 Op. Att'y Gen. No. 63 at 256 (1977).

The converse is equally true. Unless specifically prohibited by law, a public officer is entitled to additional compensation for the rendition of services beyond those required by the duties associated with his office. Thus, because in each instance the service in question was beyond the scope of the duties associated with the office, it has been held that: a deputy sheriff is entitled to additional compensation for operating the county ambulance, 37 Op. Att'y Gen. No. 13 at 51 (1977); a court reporter is entitled to additional compensation for recording grand jury proceedings, 36 Op. Att'y Gen. No. 110 at 564 (1976); a deputy clerk and recorder is entitled to additional compensation for serving as registrar, 36 Op. Att'y Gen. No. 63 at 438 (1976); the director of the Montana Water Resources Board is entitled to additional compensation for performing additional duties not required by law, 34 Op. Att'y Gen. No. 15 at 132 (1971).

However, a public officer may not accept additional compensation when specifically prohibited by law. Thus, it has been held that district judges may not accept additional compensation for services beyond the scope of judicial duties in view of the specific prohibition set forth in Article VII, section 9 of the Montana Constitution, 35 Op. Att'y Gen. No. 32 at 72 (1973).

The resolution of your question therefore depends upon whether the statutory duties of a qualified county superintendent include performing the functions thereof in another county which lacks a qualified county superintendent and whether additional compensation therefor is prohibited by law.

The duties of a county superintendent are specified in Title 20, chapter 3, part 2, MCA. The statutory provisions therein do not require a qualified county superintendent to act as such in any county other than the county in which he or she holds office. Therefore, a qualified county superintendent entering into a contractual agreement pursuant to section 20-3-201(3), MCA, to provide services in a county lacking a qualified county superintendent is entitled to additional compensation.

You have asked whether section 20-3-212, MCA, prohibits additional compensation where contracts pursuant to section 20-3-212, MCA, are involved. Section 20-3-212, MCA, provides as follows:

20-3-212. The county superintendent to appoint another county superintendent. (1) When a county superintendent is disqualified pursuant to 20-3-211, that county superintendent must appoint another county superintendent to hear and decide the matter of controversy arising pursuant to 20-3-210.

(2) The county in which the controversy was initiated shall reimburse the county served by the county superintendent appointed pursuant to subsection (1) for actual costs of travel, room, and board as a result of the appointment. Such county superintendent is entitled to expenses as provided in 20-3-203(1). [Emphasis added.]

The application of section 20-3-212, MCA, is limited by its terms to instances where an otherwise qualified county superintendent is disqualified pursuant to section 20-3-211, MCA, from hearing or deciding contested matters. The latter statutory provision has application where an otherwise qualified county superintendent is a party or is related to a party, has personal interest or bias in the result, or the contested matter involves a handicapped child. Thus, section 20-3-212, MCA, has no application to contracts under section 20-3-201(3), MCA.

THEREFORE, IT IS MY OPINION:

A qualified county superintendent of schools entering into a contractual agreement pursuant to section 20-3-201(3), MCA, to provide services in a county lacking a qualified county superintendent of schools is entitled to additional compensation for services rendered.

Sincerely,

MARC RACICOT
Attorney General