

VOLUME NO. 44

OPINION NO. 26

SCHOOL DISTRICTS - Authority of school district to make compensatory advances to employees;
MONTANA CODE ANNOTATED - Title 39, chapter 3, part 2; sections 20-3-324, 20-4-201, 20-9-213, 39-31-303;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 30 (1985), 37 Op. Att'y Gen. No. 113 (1978).

HELD: A school district may advance the annual premium for a tax-sheltered annuity on behalf of its participating employees and then recover the amount advanced by means of salary withholding.

February 27, 1992

Keith D. Haker
Custer County Attorney
1010 Main Street
Miles City MT 59301

Dear Mr. Haker:

You have requested my opinion on a question concerning the authority of a school district to make compensatory advances for its employees. I have rephrased the question as follows:

May a school district advance the annual premium for a tax-sheltered annuity on behalf of its participating employees and then recover the the amount advanced by means of salary withholding?

The school district sponsors a tax-sheltered annuity program which is made available to its teachers and other employees. The school district advances the annual premium for the annuity contract on behalf of the participating employees and then withholds the premium from the employees' checks over the course of the year. Your question concerns the authority of the district to make such advances of salary for the benefit of its employees.

Initially, I note that the underlying question of whether a school district may offer tax-sheltered annuities to its employees requires an interpretation of federal tax law and thus does not lend itself to an opinion by a state attorney general. This opinion does not address the issue of whether the district's program qualifies under federal law as an exempt "governmental plan." Nor does the opinion address the practical problems associated with recovery of premium advances on behalf of employees who terminate their employment during the course of the year. The opinion is limited to the question of the school district's authority to make what amounts to a compensatory advance on behalf of employees who participate in a district-sponsored annuity program.

Generally, the trustees of a school district may exercise only those powers conferred upon them by statute and such as are necessarily implied in the exercise of those expressly conferred; the statute granting the power must be regarded as both a grant and a limitation upon the powers of the board. See 41 Op. Att'y Gen. No. 30 at 110, 115 (1985), citing McNair v. School District No. 1, 87 Mont. 423, 288 P. 188 (1930); Sibert v. Community College of Flathead County, 179 Mont. 188, 587 P.2d 26 (1978).

Subsections (1) and (2) of section 20-3-324, MCA, authorize the trustees of a school district to "employ" teachers, principals, administrative personnel, and other employees as the trustees consider necessary, in their discretion, to carry out the various services of the district. Section 20-4-201, MCA, gives the trustees express authority to employ teachers and specialists by contract and under certain conditions. Section 20-9-213, MCA, provides that the trustees "shall have the sole power and authority to transact all fiscal business and execute all contracts in the name of the district." However, none of these statutes addresses the specific question of compensatory advances or prescribes any particular form of compensation for district employees.

Despite the restrictive language in such cases as McNair and Sibert, the Montana Supreme Court has consistently recognized the broad managerial powers conferred upon a school district by statutes such as section 20-3-324, MCA, and section 39-31-303, MCA, which concern management rights of public

employers with respect to collective bargaining. Savage Education Association v. Trustees of Richland County, 214 Mont. 289, 692 P.2d 1237 (1984). Wide discretion is reposed in the board of trustees. Yanzick v. School District No. 23, 196 Mont. 375, 641 P.2d 431 (1982). A school district has general authority over a teacher's employment in matters such as severance pay. Booth v. Argenbright, 225 Mont. 272, 731 P.2d 1318 (1987). The Court has accorded school districts considerable authority and discretion with respect to the fiscal business of the district and the expenditure of school funds for teachers and employees as part of their salaries and compensation. See Sorlie v. School District No. 2, 205 Mont. 22, 667 P.2d 400 (1983); Knox v. School District No. 1, 171 Mont. 521, 559 P.2d 1179 (1977); Duffy v. Butte Teacher's Union, 168 Mont. 246, 541 P.2d 1199 (1975).

In 37 Op. Att'y Gen. No. 113 at 486 (1978), the legality of severance pay provisions in collective bargaining agreements between school districts and their employees was examined and upheld. That opinion noted that the amount and specific form of compensation which districts may pay teachers and other district employees are not mandated by statute. Relying upon the general rule which permits any reasonable mode and manner of exercising a duty or power given to a political subdivision where the mode and manner of execution are not expressly prescribed, the opinion concluded that a provision for the payment of severance pay is a reasonable form and manner of compensation.

I find no significant basis for distinguishing the severance pay provision at issue in 37 Op. Att'y Gen. No. 113 and the compensatory advance at issue here. Both concern the manner (in particular, the timing) of compensating district employees, a matter which is left largely to the discretion of the trustees. While the payment of wages may be subject to certain statutory restrictions (see Title 39, chapter 3, part 2, MCA), I have found no statutory prohibition concerning the kind of compensatory advance involved in the district's payment of an annuity premium at the beginning of a school year. Although your inquiry does not indicate what advantages -- financial, administrative, or otherwise -- the district obtains as a result of the payment of the annuity premium in such a manner, I conclude that compensatory advances for this purpose are a reasonable form and manner of compensation.

THEREFORE, IT IS MY OPINION:

A school district may advance the annual premium for a tax-sheltered annuity on behalf of its participating employees and then recover the amount advanced by means of salary withholding.

Sincerely,

MARC RACICOT
Attorney General