MINUTES OF THE MEETING
LOCAL GOVERNMENT COMMITTEE
MONTANA STATE SENATE

February 14, 1985

The twelfth meeting of the Local Government Committee was called to order at 12:30 p.m. on February 14, 1985 by Chairman Dave Fuller in Room 405 of the Capitol Building.

ROLL CALL: All members were present with the exception of Senator Crippen, who was excused.

FURTHER CONSIDERATION OF SENATE BILL 204: Karen Renne explained the proposed amendments to the bill. Amendments three, four, and six were previously adopted on February 12, 1985. Amendments one and two would make the mill levy permissive. Amendment five would make the voter requested mill levy last for one year.

Senator Mazurek stated his concern with going through the petition process every year. Senators Harding and McCallum suggested having it coincide with the general election. Karen explained that general election was already in the bill. She suggested changing the amendment to read "for the two subsequent fiscal years".

ACTION TAKEN ON SENATE BILL 204: Senator Harding moved amendment five be adopted as changed. The motion passed unanimously.

Senator Eck moved amendment one be adopted. The motion passed unanimously.

Senator Mohar moved amendment two be adopted. The motion passed unanimously.

Senator Harding moved the Committee recommend a DO PASS on SB 204 as amended. The motion passed with Senators Story, McCallum, and Mohar voting no. Senators Regan and Crippen were not present for the vote.

CONSIDERATION OF SENATE BILL 183: Senator Joe Mazurek, District #23, is the sponsor of this bill. The bill was introduced to require the remaining commissioners to fill a vacancy on the Board of County Commissioners. Senator Mazurek distributed copies of a constitutional statute and a copy of an early veterans preference decision (O'Sullivan regarding SB 183. These are attached as Exhibit A to these minutes.

PROPONENTS

Henry Loble, District Judge of the First Judicial District in Helena, spoke in favor of the bill. His written testimony is attached as Exhibit B to these minutes.

Gordon Morris, representing the Montana Association of Counties, spoke in favor of the bill. His only concern is to appoint someone in the same political party as the person leaving the office. He is also concerned about the procedure to follow if there is a deadlock.

OPPONENTS

There were no opponents to SB 183.

Questions from the Committee were called for.

Senator Story suggested the bill be amended to read that the person to be appointed be from the same political party as the person leaving the office.

Senator Regan suggested that, in the case of a deadlock, the remaining commissioners strike names from a list of five and the person left would get the office.

Karen Renne will prepare the amendments.

The hearing was closed on SB 183.

CONSIDERATION OF SENATE BILL 265: Senator John Mohar, District #1, is the sponsor of this bill. The bill was introduced at the request of the Department of State Lands. The purpose of the bill is to generally revise the law regarding leasing of state-owned city and town lots and land valuable for commercial development, to eliminate the requirement that city and town lots and commercial lands be subject to sale, to clarify that commercial property may be leased for the same period as city and town lots, and to extend the maximum lease period from 25 to 40 years.

PROPONENTS

Dennis Hemmer, Commissioner of the Department of State Lands, spoke in favor of the bill. His written testimony is attached as Exhibit C to these minutes.

OPPONENTS

There were no opponents to SB 265.

Questions from the Committee were called for. There were no questions from the Committee on SB 265.

The hearing was closed on SB 265.

ACTION TAKEN ON SENATE BILL 265: Senator McCallum moved that the Committee recommend a DO PASS on SB 265. The motion passed unanimously.

CONSIDERATION OF SENATE BILL 278: Senator Paul Boylan, District #39, is the sponsor of this bill. The bill was introduced to authorize the city police to dispose of abandoned vehicles seized on city streets.

PROPONENTS

John Scully, representing the Sheriffs and Peace Officers Association, spoke in favor of the bill. He said this bill would authorize police instead of just county sheriff officers to handle abandoned vehicles.

OPPONENTS

There were no opponents to SB 278.

Questions from the Committee were called for.

Senator Fuller expressed his concern that no representatives from the police force were here to represent their opposition or support of the bill.

The hearing was closed on SB 278.

ACTION TAKEN ON SENATE BILL 278: Senator Pinsoneault moved that the Committee recommend a DO PASS on SB 278. The motion passed unanimously.

CONSIDERATION OF SENATE BILL 260: Senator Kermit Daniels, District #25, is the sponsor of this bill. The bill was introduced to change from mandatory to optional the grant of longevity payments to undersheriffs and deputies, to provide that the compensation of undersheriffs and deputies may not exceed that of the sheriff or applicable percentages when base salaries and longevity are considered, and to grandfather the salaries of persons presently receiving more compensation than that allowed by this act.

PROPONENTS

Gordon Morris, representing the Montana Association of Counties, spoke in favor of the bill. He said the current longevity provision allows undersheriffs and deputies salaries to surpass those of sheriffs.

Howard Schwartz, representing Missoula County, spoke in favor of the bill. He said longevity pay costs sheriff departments an extreme amount of money.

Tom Beck, President of the Montana Association of Counties, spoke in favor of the bill. He said this needs to go back under the authority of counties to insure that the sheriff remains the top paid elected county official.

OPPONENTS

Nadiean Jensen, representing AFSCME and the Montana State AFL-CIO, spoke in opposition to the bill. Her written testimony is attached as Exhibit D to these minutes.

John Scully, representing the Sheriffs and Peace Officers Association, spoke in opposition to the bill. This bill would mean no matter how long a deputy has served or how well trained they are, they will never make more than an elected official. It will cost more money because seven to ten thousand dollars will be spent training new deputies when older officers choose not to remain on the force.

Questions from the Committee were called for.

Senator Fuller asked Mr. Morris if he agreed that the figure of seven to ten thousand dollars to train a deputy was correct. Mr. Morris agreed that it was.

Senator Harding asked Mr. Morris if he thought collective bargaining agreements would be affected. Mr. Morris said more and more counties are organizing and he thinks this should become a local issue.

Senator Eck asked if sheriffs receive longevity pay. Mr. Scully said they do not receive longevity pay specifically, but do receive extra pay on top of their base salaries.

The hearing was closed on SB 260.

CONSIDERATION OF SENATE BILL 266: Senator Mike Halligan, District #29, is the sponsor of this bill. The bill was introduced to allow for the adjustment of boundaries of rural fire districts at the hearing on the petition to create such a district, and requiring such adjustments to be made in response to written requests received prior to the hearing.

PROPONENTS

Howard Schwartz, representing Missoula County, stated his support of the bill.

Lyle Nagel, representing the Montana State Voluntary Firemen's Association, stated his support of the bill.

OPPONENTS

There were no opponents to SB 266.

Questions from the Committee were called for.

Senator Story asked that an amendment be prepared to clarify that the "land owner" would petition to be in or out of a district.

Senator Regan asked what would happen when an established rural fire district meets the city boundaries. Mr. Nagel said that once a district has been established for ten years, the city cannot annex it.

The hearing was closed on SB 266.

FURTHER CONSIDERATION OF SENATE BILL 241: Karen Renne prepared a memo regarding SB 241. The memo is attached as Exhibit E to these minutes.

Further action was deferred on SB 241 until the proposed amendments can be researched by Karen. The proposed amendments are attached as Exhibit F to these minutes.

FURTHER CONSIDERATION OF SENATE BILLS 25 AND 142: Karen Renne explained the proposed amendments to Senate Bills 25 and 142. They are attached as Exhibit G to these minutes.

Senator Mohar moved the Committee adopt the amendments to SB 25. The motion passed unanimously.

Senator Mohar moved the Committee adopt the amendments to SB 142.

Senator McCallum made a substitute motion that SB 142 DO NOT PASS. The substitute motion failed with Senators McCallum, Hirsch, and Story voting yes and Senators Fuller, Harding, Eck, Regan, Pinsoneault, and Mohar voting no.

Senator Mohar's original motion passed with Senator McCallum voting no.

Senator Eck moved that SB 142 be amended to have an effective date of July 1, 1985, which is the same effective date as SB 25 has. The motion passed unanimously.

Senator Mohar moved the Committee recommend a DO PASS on SB 142, as amended. The motion passed with Senators Hirsch, McCallum, Story, and Regan voting no and Senators Fuller, Harding, Eck, Pinsoneault, and Mohar voting yes.

There was a great deal of discussion as to whether an appropriations bill was necessary for SB 25. Senator Mohar suggested the Committee hold the Standing Committee Report on SB 142 until this matter could be clarified.

ACTION TAKEN ON SENATE BILL 244: Senator McCallum moved the Committee recommend a DO PASS on SB 244. The motion passed unanimously.

Gordon Morris, representing the Montana Association of Counties, and Dave Cole, representing the Department of Commerce, requested the Committee sponsor proposed legislation authorizing counties to furnish assistance in the rehabilitation of private dwellings. Karen Renne will prepare a Committee bill for the Committee to consider.

The meeting adjourned at 2:20 p.m.

Senator Dave Fuller, Chairman

ROLL CALL

LOCAL GOVERNMENT COMMITTEE

49th
~~XXXX~~ LEGISLATIVE SESSION -- 1985 Date 2-14-85

SENATE SEAT #	NAME	PRESENT	ABSENT	EXCUSED
13	Senator Crippen, Bruce	Came in at end		✓
18	Senator Eck, Dorothy	✓		
11	Senator Harding, Ethel	✓		
47	Senator Hirsch, Les	✓		
4	Senator McCallum, George	✓		
28	Senator Mohar, John (V.Chair)	✓		
14	Senator Pinsoneault, Dick	✓		
19	Senator Regan, Pat	✓		✓
21	Senator Story, Pete	✓		
43	Senator Fuller, Dave (Chair)	✓		

Each day attach to minutes.

DATE 2-14-85

COMMITTEE ON LOCAL GOV'T

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Lyle P. Nagel	Vol Firefighters Assn	266	✓	
Howard Schwartz	Missoula Co	266	✓	
"	"	260	✓	
BJ Ward	League Women Voters	Observer		
Vadrian Jensen	AFSCME	260		X
Dianne Donnelly	Mont. Assoc of Counties	266	—	—
Tom Beck	" " "	260	✓	

(Please leave prepared statement with Secretary)

STANDING COMMITTEE REPORT

February ~~22~~ 14 19 85

MR. PRESIDENT

We, your committee on LOCAL GOVERNMENT

having had under consideration SENATE BILL No. 62

FIRST reading copy (WHITE color)

PROVIDE DISABILITY BENEFITS FOR POLICE UNDER PERS REGARDLESS OF YEARS SERVED

Respectfully report as follows: That SENATE BILL No. 62

1. Title, line 5.
Following: "POLICE OFFICERS"
Insert: "FORMERLY"

2. Title, line 7.
Following: "SERVICE;"
Insert: "REQUIRING ALL CITIES NOT HAVING A LOCALLY ADMINISTERED POLICE RETIREMENT FUND TO PARTICIPATE IN THE MUNICIPAL POLICE OFFICERS' RETIREMENT SYSTEM;"

3. Page 1, line 11.
Following: line 10
Strike: section 1 in its entirety

PCISB62.SCR

~~DO PASS~~

~~DO NOT PASS~~

CONTINUED

Chairman.

February 14 19 85

4. Page 2, line 13.
Strike: section 2 in its entirety
Insert: "Section 1. Section 19-9-104 is amended to read:
"19-9-104. Definitions. Unless the context requires otherwise, the following definitions apply in this chapter:
(1) "Administrator" means the public employees' retirement division of the department of administration.
(2) "Base salary" means the sum of the monthly compensations for each month in a given calendar year.
(3) "Board" means the retirement board described in 2-15-1009.
(4) "Credited service" means the aggregate of a member's prior service and membership service.
(5) "Dependent child" means a child of a deceased member:
(a) who is unmarried and under 18 years of age; or
(b) who is unmarried, under 24 years of age, and attending an accredited postsecondary educational institution as a full-time student in anticipation of receiving a certificate or degree.
(6) "Employer" means any city which participated in a prior plan or which elects or is required to join this plan under 19-9-107.
(7) "Employer annuity" means monthly payments for life derived from employer and state contributions.
(8) "Final average salary" means the monthly compensation of a member, averaged over the last 36 months of his active service or, in the event he has not been a member that long, over the period of his membership.
(9) "Fund" means the pension trust fund in the treasury system designated for the use of the plan.
(10) "Mandatory retirement date" means the first day of the month coinciding with or immediately following, if none coincides, the date on which a member attains age 65.
(11) "Member" means a person who is employed by an employer as a police officer or who is entitled to a retirement allowance by virtue of his service to an employer as a police officer.
(12) "Member contributions" means the total of the deductions from the compensation of a member, either made during a period of active membership hereunder or made under a prior plan and transferred to this plan, standing to his credit, together with the interest thereon.
(13) "Member's annuity" means monthly payments for life derived from member contributions.
(14) "Membership service" means a period of employment with an employer occurring after June 30, 1977, during which the withholdings required by this chapter have been made from a member's monthly compensation and credited to his member contributions account. Pro rata credit shall be granted for employment on a part-time basis or

CONTINUED

for employment over a period of less than a complete fiscal year.

(15) "Minimum retirement date" or "normal retirement date" means the first day of the month coinciding with or immediately following, if none coincides, the date on which a member becomes both age 50 or older and completes 20 or more years of credited service.

(16) "Monthly compensation" means the wage, excluding overtime, holiday payments, shift differential payments, compensation time payments, and payments in lieu of sick leave and annual leave, a member receives as an active police officer.

(17) Any reference to "municipality", "city", or "town" includes these jurisdictions which, prior to the effective date of a county-municipal consolidation, were incorporated municipalities, subsequent districts created for urban law enforcement services, or the entire county included in the county-municipal consolidation.

(18) "Plan" means the municipal police officers' retirement system created by this chapter.

(19) "Police officer" means a law enforcement officer employed by an employer.

(20) "Prior plan" means the local police reserve or retirement fund of a city which elects to join the plan under 19-3-107 or the statewide police reserve fund administered by the department of administration in accordance with Chapter 335, Laws of 1974.

(21) "Prior service" means a period of employment as a police officer for which credit was granted to a member under a prior plan and has been transferred to this plan.

(22) "Retirement allowance" means the employer annuity plus the member's annuity.

(23) "Retirement date" means the date on which the first payment of the retirement, disability, or survivor benefits of a member or a beneficiary is payable.

(24) "Surviving spouse" means the spouse married to a member at the time of the member's death.

(25) "Totally and permanently disabled" means that the board, upon certification by a licensed and practicing physician, has determined that a member's disability is of such a nature as to permanently impair his ability to discharge his normal duties as a police officer."

Section 2. Section 19-9-105 is amended to read:

19-9-105. Transfer of assets and liabilities from prior plans. (1) All funds and obligations constituting the assets and liabilities of prior plans, regardless of their form or who holds them, shall be transferred to the account provided for in 19-9-501. The board shall ascertain the amounts to be apportioned to each account

CONTINUED

on April 19, 1977, and the state treasurer shall transfer such amounts to the appropriate accounts on July 1, 1977.

(2) When a city elects to join the plan under 19-9-107(1), the trustees or other administrative head of the local retirement fund as of the effective date of the election shall certify the proportion, if any, of the retirement fund that represents the accumulated contributions of the active members and the relative shares of the members as of that date. Such shares must be charged to the employer and credited to the respective individual accounts of the members in the plan and administered as if the contributions had been made during membership in the plan. Any excess of employer credits over charges under this section will be offset, with interest, against future required employer contributions, for a period of 10 years or less as determined by the administrator.
(3) When a city is required to join the plan under 19-9-107(2), the board shall transfer to the account provided for in 19-9-501 all accumulated deductions paid into the public employees' retirement system coincident with such accumulated deductions by the state of Montana or any city. Any excess of employer charges over credits under this subsection is payable by the state auditor from the premium tax on motor vehicle property and casualty insurance policies.

Section 3. Section 19-9-107 is amended to read:

19-9-107. ~~Election to join~~ Participation in plan -- ~~transfer of assets~~. (1) Cities operating a police retirement fund under Title 19, chapter 10 ~~other than those participating in the statewide police reserve fund administered by the department of administration in accordance with Chapter 335, Laws of 1974, as of June 30, 1977,~~ may elect to join the plan by passing an ordinance stating the election and the consent of the city to be bound by the provisions of this chapter. Upon the enactment of such an ordinance, the provisions of this chapter become applicable to the city. Any city enacting such an ordinance shall send a certified copy thereof to the board and shall, as soon as possible thereafter, deposit with the board all cash and securities held by it in its local police reserve or retirement fund. The value of the securities shall be determined by the board.

~~(2) The trustees or other administrative head of the local system as of the effective date of the election shall certify the proportion, if any, of the funds of the system that represents the accumulated contributions of the active members and the relative shares of the members as of that date. Such shares shall be charged to the employer and credited to the respective~~

CONTINUED

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~~individual accounts of the members in the plan and administered as if the contributions had been made during membership in the plan. Any excess of employer credits over charges under this section will be offset with interest against future required employer contributions for a period determined by the administrator. Any excess of employer charges over credits under this section are payable by the employer, with interest, for a period of 10 years or less as determined by the administrator.~~ (2) A city other than a first- or second-class city that has not established a local police retirement fund under Title 19, chapter 10 by June 30, 1985, must join and participate in the plan commencing no later than January 1, 1986.

(3) A police officer hired before July 1, 1985, and employed on July 1, 1985, by a city required to join the plan under subsection (2) may retain membership in the public employees' retirement system by filing a written election of intent with the board before January 1, 1986. Police officers hired on or after July 1, 1985, are required to join the plan."

Renumber: subsequent sections

PC3SB62.SCR

AND AS AMENDED

DO NOT PASS

Senator Dave Fuller, Chairman

STANDING COMMITTEE REPORT

February 14 19 85

MR. PRESIDENT

We, your committee on LOCAL GOVERNMENT

having had under consideration SENATE BILL No. 204

FIRST reading copy (WHITE color)

COUNTY PARKS - FUNDING WITH OTHER COUNTY RECREATIONAL FACILITIES

Respectfully report as follows: That SENATE BILL No. 204

be amended as follows:

1. Title, line 8.
   Following: "FACILITIES"
   Strike: "MUST"
   Insert: "MAY"

2. Page 1, lines 17 and 18.
   Following: line 16
   Strike: line 17 in its entirety through "the" in line 18
   Insert: "The"

3. Page 1, line 25.
   Following: "parks"
   Insert: ", cultural facilities,"

4. Page 2, line 20.
   Following: "commissioners"
   Strike: "may"
   Insert: "shall"

5. Page 2, line 21.
   Following: "tax"
   Insert: "for the 2 subsequent fiscal years,"

6. Page 3, line 11.
   Following: "civic center,"
   Insert: "cultural facility,"

AND AS AMENDED

~~DO PASS~~

XXXXXXXX
~~DO NOT PASS~~

Senator Dave Fuller
Chairman.

STANDING COMMITTEE REPORT

February 14 19 85

MR. PRESIDENT

We, your committee on LOCAL GOVERNMENT

having had under consideration SENATE BILL No. 265

FIRST reading copy (WHITE color)

REVISES LAW RELATING TO LEASING OF CERTAIN STATE-OWNED LAND

Respectfully report as follows: That SENATE BILL No. 265

DO PASS

~~DO NOT PASS~~

Senator Dave Fuller
Chairman.

STANDING COMMITTEE REPORT

February 14 19 85

MR. PRESIDENT

We, your committee on LOCAL GOVERNMENT

having had under consideration SENATE BILL No. 278

FIRST reading copy (WHITE color)

CITY POLICE TO DISPOSE OF ABANDONED VEHICLES SEIZED FROM CITY STREETS

Respectfully report as follows: That SENATE BILL No. 278

DO PASS

XXXXXXXXX

Senator Dave Fuller Chairman.

STANDING COMMITTEE REPORT

FEBRUARY 20 19 95

MR. PRESIDENT

We, your committee on LOCAL GOVERNMENT

having had under consideration SENATE BILL No. 142

FIRST reading copy (WHITE color)

INCREASING LIGHT VEHICLE FEES - USING INCREASE FOR DISTRICT COURTS

SENATE BILL 142

Respectfully report as follows: That No.

be amended as follows:

1. Title, line 5.
   Following: "TAX ON"
   Insert: "AUTOMOBILES AND"
   Following: "LIGHT"
   Strike: "VEHICLES"
   Insert: "TRUCKS"

2. Title, line 9.
   Following: "PROVIDING"
   Strike: "A DELAYED"
   Insert: "AN"

3. Page 3, line 18.
   Following: "effective"
   Strike: "January 1, 1996"
   Insert: "July 1, 1995"

AND AS AMENDED

DO PASS

~~XXXXXXXXX DO NOT PASS~~

Senator Dave Fuller Chairman.

STANDING COMMITTEE REPORT

February 14 19 85

MR. PRESIDENT

We, your committee on LOCAL GOVERNMENT

having had under consideration SENATE BILL No. 244

FIRST reading copy (WHITE color)

SCHOOL DISTRICT FUNDS - DELETING SOME COUNTY TREASURER ACCOUNTING DUTIES

Respectfully report as follows: That SENATE BILL No. 244

DO PASS

~~DO NOT PASS~~

Senator Dave Fuller
Chairman.

motion of defendant to dissolve the restraining order in the respects stated in the motion.

Mr. Chief Justice Johnson and Associate Justices Adair and Cable concur.

APPLICATION OF O'SULLIVAN

No. 8526

Submitted March 22, 1945. Decided May 1, 1945.

158 Pac. (2d) 306

1. **Officers—Discretion of appointing power.**
Under the Veterans' Preference Act prior to the 1943 amendment giving veterans preference for public employment over others of equal qualifications, the appointing power had discretion in determining whether the veteran was qualified, and the province of the court was to determine whether the appointing power acted arbitrarily or otherwise abused its discretion.

2. **Officers—Amendment dispensed with notice.**
The amendment of 1943 manifested an intent to dispense with notice to the appointing power of proceedings instituted for the appointment of a veteran to public office and hearing before district court.

3. **Constitutional Law—Power of appointment is executive function—Cannot be delegated.**
Generally, the power of appointment of officers not connected with the judiciary is an executive function which cannot be delegated to the judiciary when not expressly provided for in the Constitution. The amendment of 1943 to the Veterans' Preference Act, in so far as amendment makes the court the appointing authority for public offices not connected with the judiciary, is void as delegating executive functions to the judiciary.

4. **Constitutional Law—Act held unconstitutional as deprivation of due process.**
Judicial proceedings without notice and opportunity for hearing are unconstitutional as a deprivation of rights without due process and the amendment of 1943 in so far as amendment dispenses with notice to appointing power of proceeding instituted by veteran for appointment and hearing is void, as denying due process of law.

5. **Statutes—Invalidity not affecting remainder of act.**
The invalidity of the portion of the amendment of 1943, in so far as it dispenses with notice to the appointing power of proceeding instituted by a veteran for appointment and hearing, does not affect the validity of the remaining portions of the amendment in view of the saving clause of section 2.

6. **Officers—Inclusion of men and women held valid.**
The portion of the amendment of 1943 purporting to include within its terms men and women who served in World War II is valid.

7. **Statutes—Invalidity does not affect prior statute.**
The invalidity of the portion of the 1943 amendment, in so far as it purports to dispense with notice or hearing of the proceeding for the appointment of a veteran, does not repeal the portion of the 1937 act with reference to issuance of an order to show cause and notice to the appointing authority in a proceeding for preference.

8. Officers—Appointment not retroactive.
The provisions of the 1943 amendment which allows compensation to date back to the time when the veteran's appointment should have been made relates to a matter of substantive right, and is not intended to be retroactive so as to apply to an appointment sought prior to the effective date of the amendment.

9. Municipal Corporations.
The Veterans' Preference Act applies to the office of city attorney.

See 10 Am. Jur. 927.

16 C. J. S. Constitutional Law, § 611.

Appeal from the District Court of Wheatland County; Lyman H. Bennett, Judge.

Proceeding in the matter of the application of Emmet O'Sullivan for appointment to the office of attorney for the city of Harlowton, wherein the mayor and members of the City Council filed a petition asking for leave to file an answer. From an order dismissing the proceedings, petitioner appeals.

Reversed and remanded, with directions.

Mr. Emmet O'Sullivan, of Harlowton, and Mr. Edmond G. Toomey, of Helena, for Appellant.

The court erred in holding Chapter 160 of the 1943 Montana Session Laws unconstitutional.

This act, generally known as the Veterans Preference Law, amended Chapter 66 of the 1937 Montana Session Laws, which was before this court in the case of Horvath v. Mayor of Anaconda, 112 Mont. 266. The amendment extended the preference provided for in the act to "Men and women who are and will be honorably discharged from the present conflict," and substituted the order to show cause procedure with the following:

"and upon the filing of such petition any judge in said court shall have original jurisdiction to determine whether said applicant shall be preferred for appointment and to issue its order directing and ordering said appointing authority to employ said applicant, and said applicant's compensation shall be effective as of the date his employment would have been effective if the appointing authority had employed him."

These were the only amendments made to said law.

The constitutionality of the 1937 law was not before the court in the Horvath case, apparently, for it is not mentioned

the opinion. Apparently all parties concerned were satisfied was constitutional. If said law was constitutional, and appel- submits that it was, the 1943 law likewise is constitu- nal, unless the provision therein eliminating notice and hear- to the appointing authority makes it otherwise. This court consistently held that "every law is presumed to be con- tional" and must be upheld if possible, and the question not whether it is possible to condemn it, but whether it is ible to uphold it," "and all doubts should be resolved in or of its validity; its invalidity must be shown beyond a sonable doubt, and should not be declared void unless its ation of the fundamental law is clear and palpable."

State v. Gallatin Co. H. S. Dist. et al., 102 Mont. 356.

State ex rel. Gebhart v. City Council, 102 Mont. 28.

Arps et al. v. State Highway Commission et al., 90 Mont. 152.

and this court has further held that "The legislature has the wer to do anything that is not expressly prohibited by the nstitution. * * * The legislature having the power, we may inquire into the wisdom of the legislation."

Willett vs. State Board of Examiners et al., 112 Mont. 317.

Thus premising it will be seen that said law is not obnoxious any constitutional provision, for it does not violate and is in conflict with any provision of the Constitution.

The city of Harlowton is a creature of the legislature under and by virtue of the implied provisions of Sec. 6, Article XVI the State Constitution, and thereunder the legislature is powered to provide for the election or appointment of such ficers to administer the government of cities and towns as rcumstances may require.

City of Butte v. Weston, 29 Mont. 215, 74 Pac. 415.

Under these conditions the uniform holding of the courts, cluding this one, is that the power of the legislature is preme, and that it can designate by whom and in what anner the person who is to fill the office shall be appointed; at it can modify, control, or abolish it; that it may prescribe e qualifications of public officers, the method of their election

or appointment, and their powers and duties; that these matters are within its control and supervision; that in the exercise of such control or supervision it may prescribe the manner for selection; that within said powers is embraced the right to change the mode of appointment to the office that in said matters cities and counties shall be governed by the legislative mandate.

Mr. John J. Cavan, of Harlowton, for Respondent.

The act is unconstitutional in that the same is an encroachment by the legislative department upon the judiciary. The act provides that upon the filing of the petition, by the veteran, the district court shall have original jurisdiction to determine whether such applicant shall be preferred. This determination must necessarily be a judicial determination, yet the act restricts the court to the testimony of the applicant and his own witnesses, and withholds from the court the right to make the investigation, necessary for a judicial determination of the question. This is apparent by the amendment of the 1937 law, by the act of 1943, which struck from the act, notice and right to be heard. It has in effect made the act of judiciary, a ministerial rather than a judicial act and is in violation of Sec. 1 of Article IV of the Constitution. The aid of the court cannot be had to compel the discretion of officers or board in the appointment to office.

MR. JUSTICE ANGSTMAN delivered the opinion of the court.

This proceeding was instituted by Emmet O'Sullivan to secure an order determining that he is entitled to preference for appointment as city attorney of Harlowton and directing the mayor and city council to employ him.

The petition alleges that Mr. O'Sullivan is a duly licensed attorney-at-law practicing his profession at Harlowton, and that because of military service in the first world war he is entitled to preference in the appointment of city attorney of Harlowton, which position he unsuccessfully sought by written application to the city, its mayor and city council, alleging

showing that he possessed all the qualifications entitling him to preference under Chapter 66, Laws of 1937, and Chapter 160, Laws of 1943. It further alleges that in addition to his written application petitioner appeared in person before the mayor and city council urging his appointment; that the mayor and city council wrongfully refused to appoint him and appointed a non-veteran instead.

Judge Husband, deeming himself disqualified, called in Judge Truman H. Bennett to hear the petition and entered an order setting the date for a hearing. Before the time set for hearing the mayor and members of the city council filed a petition asking leave to file an answer putting in issue the allegations of the petition of Mr. O'Sullivan. The court issued an order directing Mr. O'Sullivan to show cause why the petition of the mayor and members of the city council should not be granted. Mr. O'Sullivan filed objections to the order to show cause and a motion to strike it and the petition from the files upon the following, among other grounds: That the petitioners are not shown to be real parties in interest; that the petition does not state facts sufficient to describe any right in petitioners to intervene under Sec. 9088, Revised Codes; that the proceeding is not one wherein intervention may be had; and that the proceeding is ex parte in character.

The hearing consisted of legal argument only as to the construction of Chapter 66, Laws of 1937, and Chapter 160, Laws of 1943, and as to the validity of the latter.

The court held that Chapter 160, Laws of 1943, is unconstitutional and void in that it deprives the appointing power of notice and the right to be heard upon the application of petitioner, and that the petition filed by Mr. O'Sullivan was insufficient to vest in the court or judge jurisdiction to proceed upon the petition, and ordered its dismissal. Judgment was entered accordingly. The appeal is from the order of dismissal and from the judgment.

While the court's order does not so indicate, it is clear from what transpired at the hearing that the trial judge in entering

the order of dismissal believed that in proceedings under Chapter 160, Laws of 1943, the only issue before the court is whether the appointing power abused its discretion. Whether the court was right in so believing makes it necessary to consider the meaning of Chapter 160. In ascertaining that meaning we of course are permitted to consider the state of the law before the amendment was made in 1943 as an aid in arriving at the legislative intent.

Chapter 160 of the Laws of 1943 is in most respects a re-enactment of Chapter 66, Laws of 1937. We shall hereinafter allude to the changes made in 1943. Both acts in the identical language give preference to veterans for public employment "provided they possess the business capacity, competency and education to discharge the duties of the position involved" and "age, loss of limb or other physical impairment, which does not in fact incapacitate, shall not be deemed to disqualify them."

Under both acts the veteran is permitted to petition the court when he feels that the spirit of the act has been violated. Under Chapter 66, being the 1937 enactment, upon the filing of the petition, "any judge in said court shall forthwith issue an order to show cause to the appointing authority directing said appointing authority to appear in said court at a specified time and place, not less than five (5) nor more than ten (10) days after the filing of said verified petition, to show cause, if any he has, why said veteran or person entitled to preference should not be employed by him and that said district court shall have jurisdiction upon the proper showing to issue its order directing and ordering said appointing authority to comply with this law in giving the preference herein provided."

Under Chapter 160, Laws of 1943, the above-quoted language is omitted and in lieu thereof appears the following: "Any judge in said court shall have original jurisdiction to determine whether said applicant shall be preferred for appointment and to issue its order directing and ordering said appointing authority to employ said applicant, and said applicant's compensation

shall be effective as of the date his employment would have been effective if the appointing authority had employed him."

While Chapter 66 was in effect and before its amendment, [1] the case of Horvath v. Mayor of City of Anaconda, 112 Mont 266, 116 Pac. (2d) 874, was decided. In that case we held that the appointing power had discretion in determining whether the applicant was qualified within the meaning of the act and that the province of the court was to determine whether the appointing power acted arbitrarily or otherwise abused its discretion. Under the above-quoted part of Chapter 66 the appointing power was treated as an adverse party and entitled to show cause why the veteran should not be employed.

By eliminating the order to show cause provision, and substi- [2] tuting the above-quoted part of Chapter 160, the legislature evidently intended to dispense with notice and a hearing before the district court. The applicant contends that the amended statute makes the court the appointing power. The amendment gives the court original jurisdiction to determine whether the applicant shall be preferred for appointment and to issue its order commanding the appointing authority to employ the applicant. To all intents and purposes the amended statute makes the court the appointing authority. If the court issues its order under the statute it leaves no discretion in the appointing authority as to whom it may appoint. The court's order is equivalent to appointment and dates back to the time when the authority should have made the employment. The question then is: May the legislature place the power of appointment in the judiciary? The answer must be in the negative [3] where, as here, the appointment is in no manner connected with the operations of the judiciary. Generally speaking, the power of appointment is an executive function (In re Weston, 28 Mont. 207, 72 Pac. 512), which cannot be delegated to the judiciary. Sec. 1, Article IV of the Montana Constitution; 11 Am. Jur. pp 885, 886, 42 Am. Jur. p. 949.

In State ex rel. White v. Barker, 116 Iowa 96, 89 N. W. 204, 209, 57 L. R. A. 244, 93 Am. St. Rep. 222, the court stated the

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applicable rule as follows: "Generally speaking, appointment to an office is an executive function. True, not every appointment is executive in character, for appointments may be made by judicial officers in the discharge of their official duties, and the legislature may appoint the officers necessary to enable it to discharge its duties. But such appointments are necessary to enable them to properly discharge their duties, and to maintain their separate existence. These do not involve an encroachment on the function of any other branch. The appointments authorized by the Act in question are in no manner connected with the discharge of judicial duties, and to our minds clearly fall within the prohibition of the article of the constitution hitherto quoted. Much more might be said in support of the conclusion reached, but this opinion has already outgrown proper limits. Judges of courts created by the constitution should not be burdened with executive or administrative duties. They should, as nearly as possible, be freed from everything not judicial in character. Respect for the position has materially lessened whenever judges have attempted to discharge duties of an executive character. The judge should have no favors to grant, no patronage to dispose of, and no friends to reward. The spoils system should have no place in the selection of judicial officers. The manifest purpose of the legislature in passing the act in question and placing the appointing power in the hands of the judiciary is a compliment that speaks loudly of the integrity, fairness, and independence of judicial officers; but, if they are put on a plane with other officials, who are compelled to, or who, at least, in many instances do, use their appointing power to further their own interests, will they not sacrifice their standing as judges, and defeat the very objects intended to be secured? Let us adhere to the traditions and history of the past; let the judge be supreme in his field, the legislator in his, and the executive remain where the constitution placed him; let the three co-ordinate departments of government be preserved intact; let neither trench upon the other;

and our liberties will be preserved, and our rights duly maintained."

The fact that judges fill vacancies in the office of county commissioners by appointment does not militate against this view for that power is expressly provided for in the Constitution. Sec. 4, Article XVI; State ex rel. Dowen v. District Court, 50 Mont. 249, 146 Pac. 467. Were we to hold that the statute does not make the court in effect the appointing power, we still could not uphold the amended statute in all its provisions. If the statute be not construed as delegating executive powers to the judiciary, and were we to say that it merely imposes judicial duties upon the court, the statute as amended would have to fall because it fails to provide for notice and a hearing.

Judicial proceedings without notice and opportunity for [4] hearing are contrary to the State and Federal Constitutions as a deprivation of rights without due process. It is to be noted that Chapter 160 is silent as to notice and an opportunity for anyone to be heard. The significance of this omission is accentuated when it is remembered that Chapter 66 specifically provided for notice and a hearing by the appointing power, and these provisions are dropped by the amendment of 1943. This evidences a clear legislative intent to dispense with notice and a hearing. If we concede that the statute imposes judicial and not executive duties upon the court, then the court's only function would be to determine whether the appointing power abused its discretion, or acted arbitrarily or fraudulently as held in the Horvath case, and on that issue notice and opportunity for hearing are essential. Compare State ex rel. Dolin v. Major, 58 Mont. 140, 192 Pac. 618.

Under the statute a controversy may arise between two or more veterans and the issue before the court acting judicially would be limited to determining whether the appointing power acted arbitrarily or fraudulently or acted in abuse of its discretion, and as before stated notice and opportunity for hearing

are necessary to constitute due process of law. 16 C. J. S., Constitutional Law, Sec. 619, p. 1245 et seq.

The above-quoted portion of Chapter 160, so far as it purports to dispense with notice and hearing, must therefore be declared invalid, if we assume that the court's function was intended to be judicial.

This holding, however, does not affect the validity of the [5] remaining portions of that act. Section 2 of that Chapter provides: "If any section, sentence, clause or phrase of this act is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining positions [portions] of this act. The legislative assembly of the State of Montana hereby declares that it would have passed this act irrespective of the fact that any one (1) or more sections, sentences, clauses, or phrases may be declared unconstitutional or invalid."

Another amendment made by Chapter 160 was to include [6] within its terms men and women who served in World War II. Those provisions of the amended statute are valid.

Since the above-quoted portion of Chapter 160 is invalid, [7] it does not work the repeal of the above-quoted portion of Chapter 66 with reference to the order to show cause and notice which the amended statute was designed to supersede. It is well settled that an unconstitutional statute enacted to take the place of a prior statute does not affect the prior statute. Chicago, M., St. P. & P. R. R. Co. v. Harmon, 89 Mont. 1, 295 Pac. 762; State ex rel. Malott v. Board, 89 Mont. 37, 296 Pac. 1; Vennekolt v. Lutey, 96 Mont. 72, 28 Pac. (2d) 452; and see note in 102 A. L. R. 802. Chapter 160 contains a clause repealing all acts and parts of acts in conflict with it. Chapter 66 was not in conflict with Chapter 160 except as to the feature of notice and the order to show cause above noted.

Since the case must be remanded for further proceedings, [8] one other point must be considered. That point is whether the clause in Chapter 160, which allows compensation to date back to the time when the appointment should have been made is

valid. The application for appointment in this case was made in April, 1943, and Chapter 160 did not become effective until July 1, 1943. The appointment was sought as of May 17, 1943. There is nothing in Chapter 160 to indicate that it was intended to be made retroactive as to a time before it became effective. This feature of Chapter 160, it should be noted, is not a remedial or procedural matter, but is a matter of substantive right and changes what appears to be the majority rule in the absence of statute. See note in 55 A. L. R. p. 998, and compare Peterson v. City of Butte, 44 Mont. 401, 120 Pac. 483, Ann. Cas. 1913B, 538. We hold that the part of Chapter 160 which deals with compensation was not intended to be retroactive and thus to apply to an appointment sought at a time prior to the effective date of Chapter 160. To hold otherwise would render it unconstitutional in its retroactive operation. Mullane v. McKenzie, 269 N. Y. 369, 199 N. E. 624, 103 A. L. R. 758.

Some contention is made that our Veterans' Preference Act [58] has no application to the office of city attorney. We hold that it does apply to that office. See Dever v. Platt, 81 Kan. 299, 105 Pac. 445.

It follows that the clause above quoted in Chapter 160 so far as it attempts to confer authority upon the court to make an appointment is unconstitutional and void. So far as it undertakes to confer judicial power without notice and hearing it is also void. The court was right in holding Chapter 160 partially invalid. Under the circumstances, however, since Chapter 66 is valid and still in effect so far as notice and an order to show cause is concerned, we reverse the order dismissing the proceedings and remand the cause, with directions for the lower court to permit petitioner to amend his petition so as to bring it within Chapter 66 as interpreted in the Horvath case, and thereafter to proceed in accordance with the views herein stated. It is so ordered.

Mr. Chief Justice Johnson and Associate Justices Adair and Cardle concur.

Sec. 2. The legislative assembly shall have no power to remove the county seat of any county, but the same shall be provided for by general law; and no county seat shall be removed unless a majority of the qualified electors of the county, at a general election on a proposition to remove the county seat, shall vote therefor; but no such proposition shall be submitted oftener than once in four years.

Sec. 3. In all cases of the establishment of a new county it shall be held to pay its ratable proportion of all then existing liabilities of the county or counties from which it is formed, less the ratable proportion of the value of the county buildings and property of the county or counties from which it is formed; provided, that nothing in this section shall prevent the re-adjustment of county lines between existing counties.

Sec. 4. In each county there shall be elected three county commissioners, whose term of office shall be six years; provided that each county in the state of Montana shall be divided into three commissioner districts, to be designated as commissioner districts, numbers one, two and three, respectively.

The board of county commissioners shall in every county in the state of Montana, at their regular session, on the first Monday in May, 1929, or as soon thereafter as convenient or possible, not exceeding sixty days thereafter, meet and by and under the direction of the district court judge or judges of said county, divide their respective counties into three commissioner districts as compact and equal in population and area as possible, and number them respectively, one, two and three, and when such division has been made, there shall be filed in the office of the county clerk and recorder of such county, a certificate designating the metes and bounds of the boundary lines and limits of each of said commissioners districts, which certificate shall be signed by said judge or judges; provided, also that at the first regular session of any newly organized and created county, the said board of county commissioners, by and under the direction of the district court judge or judges of said county, shall divide such new county into commissioner districts as herein provided.

Upon such division, the board of county commissioners shall assign its members to such districts in the following manner; each member of the said board then in service shall be assigned to the district in which he is residing or the nearest thereto; the senior member of the board in service to be assigned to the commissioner district No. 1, the next member in seniority to be assigned to commissioner district No. 2, and the junior member of the board to be assigned to commissioner district No. 3; provided, that at the first general election of any newly created and organized county, the commissioner for district No. 1, shall be elected for two years, for No. 2, for four years, and for No. 3, for six years, and biennially thereafter there shall be one commissioner elected to take place of the retiring commissioner, who shall hold his office for six years.

That the board of county commissioners by and under the direction of the district court judge or judges of said county, for the purpose of equalizing in population and area such commissioner districts, may change the boundaries of any or all of the commissioner districts in their respective county, by filing in the office of the county clerk and recorder of such county, a certificate signed by said judge or judges designating by metes and bounds the boundary lines of each of said commissioner districts as changed, and such change in any or all the districts in such county, shall become effective from and after filing of such certificate; provided, however, that the boundaries of no commissioner district shall at any time be changed in such a manner as to affect the term of office of any county commissioner who has been elected, and whose term of office has not expired; and provided, further, that no change in the boundaries of any commissioner district shall be made within six months next preceding a general election.

Hazurek SB 183

At the general election to be held in 1930, and thereafter at each general election, the member or members of the board to be elected, shall be selected from the residents and electors of the district or districts in which the vacancy occurs, but the election of such member or members of the board shall be submitted to the entire electorate of the county, provided, however, that no one shall be elected as a member of said board, who has not resided in said district for at least two years next preceding the time when he shall become a candidate for said office.

When a vacancy occurs in the board of county commissioners the judge or judges of the judicial district in which the vacancy occurs, shall appoint someone residing in such commissioner district where the vacancy occurs, to fill the office until the next general election when a commissioner shall be elected to fill the unexpired term.

Compiler's Comments

1927 Amendment: Section 4 of article XVI, is given as amended by act approved March 7, 1927 (chapter 72, Laws of 1927); adopted at the general election of November 6, 1928; effective under governor's proclamation December 8, 1928.

Sec. 5. There shall be elected in each county the following county officers who shall possess the qualifications for suffrage prescribed by section 2 of article IX of this constitution and such other qualifications as may be prescribed by law:

One county clerk who shall be clerk of the board of county commissioners and ex-officio recorder; one sheriff; one treasurer, who shall be collector of taxes, provided, that the county treasurer, shall not be eligible to his office for the succeeding term; one county superintendent of schools; one county surveyor; one assessor; one coroner; one public administrator. Persons elected to the different offices named in this section shall hold their respective offices for the term of four (4) years, and until their successors are elected and qualified. Vacancies in all county, township and precinct offices, except that of county commissioners, shall be filled by appointment by the board of county commissioners, and the appointee shall hold his office until the next general election; provided, however, that the board of county commissioners of any county may, in its discretion, consolidate any two or more of the within named offices and combine the powers and the duties of the said offices consolidated; however, the provisions hereof shall not be construed as allowing one (1) office incumbent to be entitled to the salaries and emoluments of two (2) or more offices; provided, further, that in consolidating county offices, the board of county commissioners shall, six (6) months prior to the general election held for the purpose of electing the aforesaid offices, make and enter and order, combining any two (2) or more of the within named offices, and shall cause the said order to be published in a newspaper, published and circulated generally in said county, for a period of six (6) weeks next following the date of entry of said order.

Compiler's Comments

1937 Amendment: Section 5 is given as amended by act approved March 12, 1937 (chapter 93, Laws of 1937), and adopted at the general election November 8, 1938, effective under governor's proclamation December 2, 1938.

Sec. 6. The legislative assembly may provide for the election or appointment of such other county, township, precinct and municipal officers as public convenience may require and their terms of office shall be as prescribed by law, not in any case to exceed two years, except as in this constitution otherwise provided.

Sec. 7. The legislative assembly may, by general or special law, provide

LOCAL GOVERNMENT COMMITTEE
FEBRUARY 14, 1985
EXHIBIT B

SB 183

PRESENTATION OF HENRY LOBLE, A DISTRICT JUDGE OF THE FIRST JUDICIAL DISTRICT, ON THE QUESTION OF THE UNCONSTITUTIONALITY OF SECTION 7-4-2106 MCA WHICH REQUIRES MONTANA DISTRICT JUDGES TO FILL BY APPOINTMENT A VACANCY WHICH OCCURS IN THE OFFICE OF COUNTY COMMISSIONER.

Question:

Is Section 7-4-2106, MCA unconstitutional insofar as it requires district judges to fill, by appointment, a vacancy which may occur in the office of county commissioner?

This question has already been answered in a case entitled "Application of O'Sullivan," 117 Mont. 295, 158 P.2d 306 (1945).

In that case Mr. O'Sullivan was an attorney at law in Harlowton. He applied to the city, its mayor and city council to be appointed as city attorney. He claimed a veteran's preference under Chapter 66, Laws of 1937, and Chapter 160, Laws of 1943. He was not appointed as city attorney and brought an action to enforce his veteran's preference. At that time the veteran's preference law (Chapter 160, Laws of 1943) stated:

> "'Any judge in said court shall have original jurisdiction to determine whether said applicant shall be preferred for appointment and to issue its order directing and ordering said appointing authority to employ said applicant, and said applicant's compensation shall be effective as of the date his employment would have been effective if the appointing authority had employed him.'"
> (Emphasis supplied.)

The question for the Supreme Court to decide was whether the legislature could constitutionally require a district judge to appoint a city attorney under the circumstances and facts of the case. On page 305 of 117 Mont., the court answered this question succintly as follows:

"It follows that the clause above quoted in Chapter 160 so far as it attempts to confer authority upon the court to make an appointment is unconstitutional and void." (Emphasis supplied.)

The reasoning for the court's ruling is set forth on pp. 302 and 303 of 117 Mon. where the court quoted with approval from an Iowa case as follows:

"Generally speaking, appointment to an office is an executive function. True, not every appointment is executive in character, for appointments may be made by judicial officers in the discharge of their official duties, and the legislature may appoint the officers necessary to enable it to discharge its duties. But such appointments are necessary to enable them to properly discharge their duties, and to maintain their separate existence. These do not involve an encroachment on the function of any other branch. The appointments authorized by the Act in question are in no manner connected with the discharge of judicial duties, and to our minds clearly fall within the prohibition of the article of the constitution hitherto quoted. Much more might be said in support of the conclusion reached, but this opinion has already outgrown proper limits. Judges of courts created by the constitution should not be burdened with executive or administrative duties. They should, as nearly as possible, be freed from everything not judicial in character. Respect for the position has materially lessened whenever judges have attempted to discharge duties of an executive character. The judge should have no favors to grant, no patronage to dispose of, and no friends to reward. The spoils system should have no place in the selection of judicial officers. The manifest purpose of the legislature in passing the act in question and placing the appointing power in the hands of the judiciary is a compliment that speaks loudly of the integrity, fairness, and independence of judicial officers; but, if they are put on a plane with other officials, who are compelled to, or who, at least, in many instances do, use their appointing power to further their own interests, will they not sacrifice their standing as judges, and defeat the very objects intended to be secured? Let us adhere to the traditions and history of the past; let the judge be supreme in his

> field, the legislator in his, and the executive remain where the constitution placed him; let the three co-ordinate departments of government be preserved ~~intact~~; let neither trench upon the other; and our liberties will be preserved, and our rights duly maintained."
> (Emphasis supplied.)

A further quotation in the O'Sullivan case deals directly with the question presented here where the court said:

> "The fact that judges fill vacancies in the office of county commissioners by appointment does not militate against this view for that power is expressly provided for in the Constitution. Sec. 4, Article XVI; State ex rel. Dowen v. District Court, 50 Mont. 249, 146 Pac. 467."

However, the power referred to is not contained in our 1972 Constitution. District judges no longer have this constitutional authority. Our Supreme Court has expressly ruled that were it not for the constitutional power previously contained in the 1889 Constitution, but now eliminated, it would be equally unconstitutional for a statute to require district judges to fill a vacancy in the office of county commissioner by appointment.

There is no reason for any further citation of authority. The matter is crystal clear. Section 7-4-2106 MCA is unconstitutional insofar as it requires district judges to fill, by appointment, a vacancy which may occur on the board of county commissioners.

Since the above was written, our Montana Supreme Court has again and recently affirmed the principle announced in the O'Sullivan case. In Jensen v. State of Montana, 41 St.Rep. 1971, 1976, decided on October 25, 1984, our Court said:

> "In summary, the remedy the District Court granted Jensen was once provided by statute and this Court found the law unconstitutional. The precedent of O'Sullivan controls: the legislature cannot place the power of appointment in the judiciary. Under the enforcement statute and the Constitution, the District Court may order the Department to grant Jensen the

veteran's absolute preference. Beyond this statutory relief, the judiciary lacks any power to appoint a particular petitioner to a job." (Emphasis provided)

LOCAL GOVERNMENT COMMITTEE
FEBRUARY 14, 1985
EXHIBIT C

TESTIMONY ON SENATE BILL 265

DENNIS HEMMER, COMMISSIONER, DEPARTMENT OF STATE LANDS

The Department of State Lands supports passage of Senate Bill 265 that would extend the maximum lease term to 40 years for commercial leasing of state-owned property. State lands are becoming increasingly valuable for leasing for other uses other than grazing and agriculture due to the growth of urban centers in Montana. The Department estimates that there are approximately 25,000 acres of state lands within 3 miles of the 10 most populated cities in Montana. Many of these lands may be utilized for commercial development thus realizing an increased revenue to the trust.

The passage of the legislation gives the Board the flexibility to issue commercial development leases for up to 40 years. Many lending institutions will not grant loans to interested parties on a lease that is issued for 25 years. A 40 year lease term would conform to the policy and requirements of lending institutions.

The statute would also be changed to ensure that if the state decided to sell the property the lease would go with the sale. This is necessary before a developer is going to place a structure on leased property.

The Board of Land Commissioners has been consulted regarding these purposed changes to the law and by motion has supported them. I would ask your passage of S.B. 265 as a means of increasing the income to the school trust.

LOCAL GOVERNMENT COMMITTEE
FEBRUARY 14, 1985
EXHIBIT D

rm CS-34
9

NAME Nadiean Jensen BILL NO. SB 260

ADDRESS POB 5356 Helena DATE 2-14-85

WHOM DO YOU REPRESENT AFSCME, AFL-CIO

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I have some serious concerns about Section 1; Sub-section 2(b). If this clause is intended To freeze the compensation ~~of~~ of a long Term deputy Sheriff who, because of longevity, receives a higher salary than a sheriff Then I would oppose SB 260.

Longevity is a reward for ~~length~~ length of service and an incentive To retain ~~the~~ employees.

I would ask the committee to oppose SB 260

LOCAL GOVERNMENT COMMITTEE
FEBRUARY 14, 1985
EXHIBIT E

13 February 1985

MEMORANDUM

TO: Senate Local Government Committee

FROM: Karen Renne
Researcher

RE: Senate Bill 241, permitting counties to assess fees for fire protection

Because this bill resembles HB 318, killed by this committee in the 1983 session, attention should be called to the differences between the two bills. These are as follows.

1. This bill (SB 241) provides for a fee assessed on improvements in areas not in rural fire districts. It does not apply to all areas or to all property, and it would mean that large landowners would pay proportionately less, not more, of the cost of fire protection in areas outside rural fire districts.

   HB 318 in the 1983 session imposed a tax on all property in areas not in rural fire districts, and it did not limit the amount of tax that could be imposed.

2. This bill gives county commissioners the power to establish a fee schedule, with provision for public protest. HB 318 had no provision for protest.

3. This bill retains but does not increase the levy allowed a county to raise as much as $15,000 for fire control activities in general. This is a countywide levy already in the code. HB 318 raised the limit to $40,000.

The amendment requested by Mr. Scully would add a phrase to 7-33-2109, reproduced below, allowing counties to charge the fee imposed by SB 241. This amendment is not appropriate. Section 7-33-2109 authorizes a tax levy in rural fire districts, whereas 7-33-2209 (amended by SB 241) refers only to areas not in rural fire districts.

7-33-2109. Tax levy authorized. At the time of the annual levy of taxes, the board of county commissioners may levy a special tax upon all property within such districts for the purpose of buying or maintaining fire protection facilities and apparatus for such districts or for the purpose of paying to a city, town, or private fire service the consideration provided for in any contract with the council of such city, town, or private fire service for the purpose of furnishing fire protection service to property within such district. Such tax must be collected as are other taxes.

LOCAL GOVERNMENT COMMITTEE
FEBRUARY 14, 1985
EXHIBIT F

Amend SB 241 (February 13, 1985)

1. Title, line 7.
Following: "ACTIVITIES"
Insert: "BY FIRE COMPANIES"

2. Page 1, line 24.
Following: "activities"
Insert: "of fire companies existing [on the effective date of this act] or the expansion of such companies, for the purposes"

3. Page 2, line 6.
Following: "area"
Insert: "and all mobile homes not taxed as an improvement under 15-24-202,"

4. Page 2, line 7.
Following: "improvements"
Insert: "and mobile homes"

5. Page 2, line 15.
Following: "property"
Insert: "or mobile home"
Following: "with the"
Insert: "applicable"

LOCAL GOVERNMENT COMMITTEE
FEBRUARY 14, 1985
EXHIBIT G

PROPOSED AMENDMENTS TO SB 25

1. Title, line 9.
Following: "7-6-2426,"
Insert: "7-6-2427,"

2. Title, line 10.
Following: "46-14-202,"
Insert: "46-14-221,"

3. Page 6, lines 9 through 19.
Following: "counties."
Strike: remainder of line 9 through "session." in line 19

4. Page 10, line 3.
Following: line 2
Insert: "Section 8. Section 7-6-2427, MCA, is amended to read:

"**7-6-2427. Special provisions for certain charges related to criminal prosecutions.** (1) Notwithstanding 7-6-2426, all costs of a criminal prosecution, including attorneys' fees, of an offense committed in the state prison are not charges against the county in which the state prison is located. Such costs shall be paid by the department of institutions.

~~(2) When a criminal action is removed before trial, the costs accruing upon such removal and trial must be a charge against the county in which the indictment was found or information filed.~~" "

Renumber: subsequent sections

5. Page 13, line 6.
Following: line 5.
Insert: "Section 14. Section 46-14-221, MCA, is amended to read:

"**46-14-221. Determination of fitness to proceed — effect of finding of unfitness — expenses.** (1) The issue of the defendant's fitness to proceed may be raised by the defendant or his counsel or by the county attorney. When the issue is raised, it shall be determined by the court. If neither the county attorney nor counsel for the defendant contests the finding of the report filed under 46-14-203, the court may make the determination on the basis of the report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon the hearing, the parties have the right to summon and cross-examine the psychiatrists who joined in the report and to offer evidence upon the issue.

(2) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsection (4) of this section, and the court shall commit him to the custody of the director of the department of institutions to be placed in an appropriate institution of the department of institutions for so long as the unfitness endures. The committing court shall, within 90 days of commitment, review the defendant's fitness to proceed. If the court finds that he is still unfit to proceed and that it does not appear that he will become fit to proceed within the reasonably foreseeable future, the proceeding against him shall be dismissed, except as provided in subsection (4) of this section, and the county attorney shall petition the court in the manner provided in chapter 20 or 21 of Title 53, whichever is appropriate, to determine the disposition of the defendant pursuant to those provisions.

(3) If the court determines that the defendant lacks fitness to proceed because he is developmentally disabled as provided in 53-20-102(4), the proceeding against him shall be dismissed and the county attorney shall petition the court in the manner provided in chapter 20 of Title 53.

(4) The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible to fair determination prior to trial and without the personal participation of the defendant.

(5) The expenses of sending the defendant to the custody of the director of the department of institutions to be placed in an appropriate institution of the state department of institutions, of keeping him there, and of bringing him back are chargeable to the state ~~but the state may recover them from the estate of the defendant~~ and payable as provided in section 2." "

Renumber: subsequent sections

PROPOSED AMENDMENT TO SB 142

1. Title, line 5.
Following: "TAX ON"
Insert: "AUTOMOBILES AND"
Following: "LIGHT"
Strike: "VEHICLES"
Insert: "TRUCKS"