

VOLUME NO. 54

OPINION NO. 1

ATTORNEYS GENERAL - Attorney General not bound to follow prior district court opinion;

COUNTY OFFICERS AND EMPLOYEES - County Superintendent of School not entitled to receive hourly fees in addition to salary for serving as substitute in another county;

EXPENSES - County Superintendent of School not entitled to receive hourly fees in addition to salary for serving as substitute in another county;

FEES - County Superintendent of School not entitled to receive hourly fees in addition to salary for serving as substitute in another county;

PUBLIC OFFICERS - County Superintendent of School not entitled to receive hourly fees in addition to salary for serving as substitute in another county;

SUPERINTENDENTS OF SCHOOLS - County Superintendent of School not entitled to receive hourly fees in addition to salary for serving as substitute in another county;

MONTANA CODE ANNOTATED - Sections 2-2-104(3)(a), 2-15-501(7), 7-4-2511(2), 20-3-203(1), -210, -211, -212, (1), (2);

OPINIONS OF THE ATTORNEY GENERAL - 45 Op. Att'y Gen. No. 14 (1993), 41 Op. Att'y Gen. No. 33 (1985).

HELD: A county superintendent of schools is not allowed to charge an hourly fee for performing services as a substitute superintendent under Mont. Code Ann. § 20-3-211.

January 18, 2011

Ms. Kristin Hansen
Chief Deputy Hill County Attorney
315 Fourth Street
Havre, MT 59501

Dear Ms. Hansen:

[P1] You have requested an opinion of this office on the question of the ability of a county superintendent of schools to charge hourly fees in addition to her salary when

deciding administrative contested cases in another county by invitation pursuant to Mont. Code Ann. § 20-3-212. Nearly 20 years ago this office issued a letter of advice indicating that such a practice was permissible. On further consideration, I have determined that the letter of advice was in error. For the following reasons, I conclude that serving as a substitute superintendent under Mont. Code Ann. § 20-3-212 is part of a county superintendent's statutory job responsibilities. The only compensation she may receive for performing her duties is her regular salary paid by the county in which she is elected.

[P2] The general rule is that a county official may receive no compensation for the performance of official duties other than her county salary. Mont. Code Ann. § 7-4-2511(2); 45 Op. Att'y Gen. No. 14 (1993) (City attorney may not receive fee from private entity for work on city bond issue); *cf.* Mont. Code Ann. § 2-2-104(3)(a) (“[A] public officer . . . may not receive salaries from two separate public employment positions that overlap for the hours compensated . . .”). When questions have arisen as to whether additional compensation may be received, the Montana Supreme Court has looked to the applicable statutes to find whether the service for which the compensation is paid is part of the officer's official duty. *Platz v. Hamilton*, 201 Mont. 184, 188, 653 P.2d 144, 147 (1982) (no statute requires district court clerk to collect passport fees, ergo, she may retain the fees), *citing Anderson v. Hinman*, 138 Mont. 397, 357 P.2d 895 (1960) (no statute requires supreme court clerk to remit uncertified copies of court opinions to West publishing, ergo, she may retain fees).

[P3] In this matter, the power to serve as a substitute county superintendent of schools is statutory. Montana Code Annotated § 20-3-212 provides:

(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).

By statute, the disqualified superintendent “must appoint” another county superintendent. The substitute has the power to act in the matter only by reason of the fact that she is clothed with the statutory authority to do so.

[P4] The statutory provisions controlling the calling in of a substitute support the conclusion that the substitute may not claim additional compensation for serving as

substitute. When a county superintendent appoints a substitute, the appointing county is responsible for “the actual costs of travel, room, and board as a result of the appointment.” Mont. Code Ann. § 20-3-212(2). Significantly, the statute goes on to provide that the substitute superintendent “is entitled to expenses *as provided in 20-3-203(1)*.” (Emphasis added.) Montana Code Annotated § 20-3-203(1) provides, in pertinent part: “The county superintendent must be paid from the county general fund all necessary traveling expenses actually *incurred in discharging duties*, after the expenses have been audited by the board of county commissioners.” (Emphasis added.)

[P5] If service as a substitute were not part of the substitute’s duties, but rather was a private arrangement between the substitute and the appointing county, it would make little sense for the Legislature to involve itself in determining the substitute’s expenses and putting both counties to the trouble of paying and auditing them. Moreover, Mont. Code Ann. § 20-3-203(1) applies to payment of expenses for performance of “official duties.” The Legislature could hardly have been clearer in expressing its intent to treat substitution as an official duty of the substitute superintendent.

[P6] On March 8, 1994, an attorney in this office issued a nonbinding letter of advice in which he concluded that a county superintendent may receive additional compensation for acting under Mont. Code Ann. § 20-3-212 as a substitute for a disqualified superintendent. Having reviewed the reasoning of this letter I find that its decision overlooks a major consideration in deciding the question. The 1994 letter reviewed whether there was a specific statute *prohibiting* the substitute from receiving additional compensation. It does not discuss the related but separate question whether service as a substitute is part of the official duties of the superintendent. It does not consider the effect of Mont. Code Ann. §§ 20-3-212 and 20-3-203(1) in expressing the intention of the Legislature to treat substitution as an official duty. On further review the letter of advice is incomplete in its reasoning. It therefore should be considered overruled by this opinion.

[P7] You have provided a copy of the decision of the Montana Thirteenth Judicial District Court in Isbell v. Stillwater County, et al., Stillwater County Docket No. DV 94-076. In that case, the district court held that a contract between the Stillwater County Superintendent and the Hill County Superintendent, under which the latter agreed to substitute for the former in consideration of the payment by the county to the latter of an hourly fee plus expenses incurred, was enforceable and authorized by law. Its reasoning went no further than to adopt the March 24, 1994 letter of advice overruled above. For the reasons stated there, I find the district court’s decision unpersuasive and choose not to follow it. See 41 Op. Att’y Gen. No. 33 (1985) (district court declaratory judgment does not displace Attorney General opinion unless it specifically overrules it); Mont. Code

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Ann. § 2-15-501(7) (if attorney for state agency or local government disagrees with Attorney General opinion, the opinion “is controlling *unless overruled* by a state district court or the supreme court.”). (Emphasis added.)

THEREFORE, IT IS MY OPINION:

A county superintendent of schools is not allowed to charge an hourly fee for performing services as a substitute superintendent under Mont. Code Ann. § 20-3-211.

Sincerely,

STEVE BULLOCK
Attorney General

sb/cdt/jym