



Decisions of the Montana Supreme Court and the Federal courts for the District of Montana and their effect upon postsecondary education
by Michael August Devich

A thesis submitted in partial fulfillment of the requirements for the degree of Doctor of Education
Montana State University
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Abstract:

This study of the decisions of the Montana Supreme Court and the Federal courts for the District of Montana was performed to examine the effects of the courts' decisions upon postsecondary education.

The study was delimited to three areas: (1) control and governance; (2) faculty and staff; and (3) students. Two central research questions directed the focus of the study; (1) what was the impact of judicial decisions upon the article providing for postsecondary education in the Montana Constitution of 1889; and, (2) what was the impact of judicial decisions upon the article providing for postsecondary education enumerated in the Montana Constitution of 1972? A literature review and a study of postsecondary education law presented the general development of the law as it applied throughout the United States and Montana. All of the cases involving postsecondary education which were presented to the Montana Supreme Court and the federal courts for the District of Montana were presented in chronological order in the three areas. The facts of the case, the court's opinion, and the reasoning for the court's decision were presented for each case.

The cases showed that the Montana Supreme Court was guided by several principles in its deliberations: (1) upholding the constitutionality of the state Constitution; (2) a reasonable presumption in favor of a legislative action; (3) what constituted "due process" in actions involving faculty and students; and (4) the doctrine of "academic abstention" under which the court would not interfere with the discretion of school officials in matters which the law had conferred to their judgment unless there was a clear abuse of this discretion, or arbitrary or unlawful action.

Under the Constitution of 1889 the Court ruled that control of the University System could be exercised by the legislature. The Constitution of 1972 removed the legislature from control and created a constitutional Board of Regents to manage postsecondary education. The Montana Supreme Court has upheld the power of the regents to manage and control the operations of postsecondary education in Montana.

DECISIONS OF THE MONTANA SUPREME COURT AND THE FEDERAL
COURTS FOR THE DISTRICT OF MONTANA AND THEIR
EFFECT UPON POSTSECONDARY EDUCATION

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Michael August Devich

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APPROVAL

of a thesis submitted by

Michael August Devich

This thesis has been read by each member of the thesis committee and has been found to be satisfactory regarding content, English usage, format, citations, bibliographic style, and consistency, and is ready for submission to the College of Graduate Studies.

11/26/97
Date

John W. Kahl
Chairperson, Graduate Committee

Approved for the Major Department

12/1/97
Date

David Hagg
Head, Major Department

Approved for the College of Graduate Studies

12/4/97
Date

Joseph Fedorchak
Graduate Dean

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ABSTRACT

This study of the decisions of the Montana Supreme Court and the Federal courts for the District of Montana was performed to examine the effects of the courts' decisions upon postsecondary education.

The study was delimited to three areas: (1) control and governance; (2) faculty and staff; and (3) students. Two central research questions directed the focus of the study: (1) what was the impact of judicial decisions upon the article providing for postsecondary education in the Montana Constitution of 1889; and, (2) what was the impact of judicial decisions upon the article providing for postsecondary education enumerated in the Montana Constitution of 1972?

A literature review and a study of postsecondary education law presented the general development of the law as it applied throughout the United States and Montana. All of the cases involving postsecondary education which were presented to the Montana Supreme Court and the federal courts for the District of Montana were presented in chronological order in the three areas. The facts of the case, the court's opinion, and the reasoning for the court's decision were presented for each case.

The cases showed that the Montana Supreme Court was guided by several principles in its deliberations: (1) upholding the constitutionality of the state Constitution; (2) a reasonable presumption in favor of a legislative action; (3) what constituted "due process" in actions involving faculty and students; and (4) the doctrine of "academic abstention" under which the court would not interfere with the discretion of school officials in matters which the law had conferred to their judgment unless there was a clear abuse of this discretion, or arbitrary or unlawful action.

Under the Constitution of 1889 the Court ruled that control of the University System could be exercised by the legislature. The Constitution of 1972 removed the legislature from control and created a constitutional Board of Regents to manage postsecondary education. The Montana Supreme Court has upheld the power of the regents to manage and control the operations of postsecondary education in Montana.

CHAPTER 1

INTRODUCTION

Purpose of Study

The purpose of this study was to review, analyze, and delineate how the decisions of the Montana Supreme Court and the Federal courts for the District of Montana have affected postsecondary education in Montana. The study was delimited to three areas: (1) control and governance; (2) faculty and staff; and (3) students. Two central research questions directed the focus of this study: (1) What was the impact of judicial decisions upon the article providing for postsecondary education set forth in the Montana Constitution of 1889; and (2) What is the impact of judicial decisions upon the article providing for postsecondary education enumerated in the Montana Constitution of 1972? These questions established the parameters of the central questions:

1. What guided the courts in the issuance of their opinions that determined how the constitutional provisions concerning postsecondary education were to be interpreted?
2. What aspects of postsecondary education did the decisions of the court affect?
3. What group, or groups, were affected by the decisions of the court?

Study Methods and Procedures

Data Collection

This study examined and reviewed data obtained from primary and secondary sources. A primary source is one prepared by an individual who was a participant in or a direct witness to the event being described while a secondary source is a document prepared by an individual who was not a direct witness to the event, but who obtained his or her description of the event from someone else (Cohen & Manion, 1985).

Data collection of the relevant court decisions involved a multi-step process. Initially, the Montana Digest and the Pacific Digest, both containing a listing of all decisions of the Montana Supreme Court reported in the Montana Reporter and the Pacific Reporter, were researched to provide a chronicle of the court's decisions which were considered to involve postsecondary education. As part of this process the Federal Digest, containing a listing of all of the decisions of the Federal courts reported in the Federal Supplement for District Courts opinions and the Federal Reporter for the opinions of the Courts of Appeals, was researched to produce all decisions of Federal courts which involved postsecondary education in Montana. The cases thus produced were then examined to determine if the postsecondary education issues reported in the cases were the primary focus of the court's opinion or were incidental in nature. If the educational issues were directly related to the purposes of this study, determination of the import attached to the decisions by the courts was the next step in the inquiry. This inquiry, using Sheppards Montana Citations, was undertaken to ascertain if the decision of a court was

used in a later decision by the court itself or by any other court. Additionally, this inquiry was conducted to determine if the opinion of a court had been modified, changed, or overruled by later decisions. After all of the cases had been researched to determine if they had been cited in any manner in a later case by any court, any case so cited was researched to determine what effect, if any, the later decision had upon the original opinion. The process culminated in the production of the court opinions which will be presented in Chapter 2, "Control and Governance;" Chapter 3, "Faculty and Staff;" and Chapter 4, "Students."

Primary Sources

This study examined and reviewed data obtained from the following primary sources: the Montana constitutions of 1889 and 1972 as they relate to postsecondary education and the decisions of the Supreme Court of Montana, the Federal District Court for the District of Montana, and the Federal Court of Appeals for the Ninth Circuit as they relate to postsecondary education in Montana. This research contains the written opinions of the courts for their decisions, including concurring and dissenting opinions. The opinions include the statement of facts, precedents followed in deciding the outcome of the case, the decision of the court and the reasoning of the court for reaching its opinion.

Records of the Montana Constitutional Convention of 1972 which consist of the verbatim transcripts of the convention delegates during their discussions, debates, and votes on the provisions of the Montana Constitution of 1972 as it relates to postsecondary

education were reviewed to determine the impact of court decisions and the Convention's response to the impact of these opinions.

The Policy and Procedures Manual of the Montana University System; Board of Trustees Policy Manual and Collective Bargaining Agreement of Flathead Valley Community College; Collective Bargaining Agreement, and Bylaws of the Academic Senate of Montana State University-Billings; Faculty Handbook of Montana State University-Bozeman; and the Personnel Policies, Collective Bargaining Agreement, 1997-1998 University Catalog, School of Law Bulletin, and Law Student Handbook of the University of Montana were examined to determine the effect of the court decisions upon the control and governance, faculty and staff, and students at these institutions.

Secondary Sources

The literature review for this research examined areas of studies previously conducted in order to avoid duplication and present the results from research efforts which had been previously conducted. Sources for the review included journal articles, textbooks, legal treatises, and legislative and judicial documents that deal with postsecondary education issues similar to those found in Montana, legal indexes and case reports.

Review of the Literature

Postsecondary Education Law in the United States

During their formation in the twelfth and thirteenth centuries the concept of autonomy for universities was established when it was stated "[t]hey appealed to king or council against pope, to pope against king or bishop, and to kings and popes alike against truculent town government" (Edwards & Nordin, 1979). Being a nation of laws the legal rights and responsibilities of universities in America developed from three sources: constitutions, statutes and court decisions (Alexander & Solomon, 1972).

Within the United States postsecondary education has developed not with extensive central direction from the federal government, but on a state-by-state basis. Until the creation of the Department of Education during the administration of President Carter there was no national ministry controlling or directing the system of postsecondary education (Hobbs 1978). Since each state's political system is different, the impact of its legal scheme varies widely (Young, 1981).

Initially, there were few legal requirements governing the educational administrator's functions, and those that existed were not an important factor in many administrative decisions. Postsecondary education operated best by operating autonomously and it thrived on the privacy afforded by such autonomy. It was considered delicate and complex, so much so that an outsider would not understand its operations, especially lawyers and judges.

The special environment of postsecondary education carried over to its personnel. The faculties and administrators had knowledge and training beyond that of the general populace, and, as such, were responsible for guarding that knowledge for future generations. This special expertise, combined with their special mission—often at a financial sacrifice—produced the perception that outside monitoring was unnecessary.

To a great extent the law reflected such attitudes. There was not extensive federal and state regulation of postsecondary education. Legislatures and administrative agencies imposed few legal obligations and provided few opportunities for their activities to be legally challenged.

Historically, American courts viewed postsecondary education as a unique enterprise and accorded it great autonomy. This independence included virtually all employment, admission, teaching, and research activities. This doctrine of “academic abstention” reflected the basis of academic autonomy and freedom established during the formation of universities in medieval times and rested on the foundation of the special expertise of the academician (Kaplin & Lee, 1995). As part of this doctrine courts generally deferred their judgment to that of the institution in matters of student qualifications, faculty qualifications, student substantive rights, faculty substantive rights, and discovery of information (Leas, 1991).

In matters concerning students, the courts using the *in loco parentis* doctrine, permitted the institutions to exert almost untrammelled authority over students’ lives.

While predominately a phenomenon of elementary and secondary education, *in loco parentis* had a strong legal basis in postsecondary education. The leading postsecondary education case adopting this theory was a 1928 Kentucky case which said: “[C]ollege authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils, and . . . may make any regulation for . . . betterment of their pupils that a parent could for the same purpose” (Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913)). This theory placed the school in the place of the parent and afforded school control over students commensurate with that of the parent in all matters pertaining to functions of the school.

Courts began to intervene in traditional university internal discretionary matters after the Second World War, specifically in the area of the First Amendment. It was not until after the Second World War that anyone invoked court action to bring academic freedom under its protection. It was also during this period that First Amendment freedoms were extended to students as well as to faculty (Brubacher, 1971).

Beginning in the 1960's courts substituted a constitutional standard for the relationship between the university and the student for the previous standard of *in loco parentis* (Millington, 1979). The key case in forging new student status was Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.) (1961). The court in this case rejected the notion that education in state schools is a “privilege” to be dispensed on whatever conditions the state in its sole discretion deems advisable; it also implicitly

rejected the *in loco parentis* concept. The court held that the student had a right to notice and a hearing in university disciplinary proceedings when the charges could lead to suspension or expulsion. The Dixon approach became a part of U. S. Supreme Court jurisprudence in cases such as Tinker v. Des Moines School District, Healy v. James and Goss v. Lopez.

The involvement of the federal government in postsecondary education law continued to reflect social movements in postsecondary education and in the world outside the campus: Viet Nam, equality, civil rights, consumerism, and issues on a college education as "Necessary" (Chambers, 1964). Although the federal Constitution has no specific provision related to education it does have a number of provisions that directly affect postsecondary education. Three amendments of the Constitution are of particular concern: the First, Fourth, and the Fourteenth Amendments. The First Amendment provides for freedom of religion, speech, press and assembly. The Fourth Amendment provides protection against unreasonable searches and seizures. The Fourteenth Amendment provides for equal protection under the law and requires due process of law. Using the federal Constitution and these amendments, Congress has enacted statutory provisions dealing with postsecondary education including aliens and nationality (Immigration and Nationality); commerce and trade (Toxic Substances Control); education (Teaching of Agricultural, Trade, Home Economics and Industrial Subjects; Foreign and Exchange Students; Higher Education Resources and Student Assistance; Basic Education for Adults; General Provisions Concerning Education; Education of

Individuals with Disabilities; Discrimination Based on Sex or Blindness; Vocational Education; Career Education and Career Development); labor (Fair Labor Standards; Age Discrimination in Employment; Vocational Rehabilitation and Other Rehabilitation Services; Employee Retirement Income Security Program; Family and Medical Leave); public contracts (Drug Free Workplace); public health and welfare (Elective Franchise [The Voting Rights Act]; Civil Rights; Religious Freedom Restoration; Equal Opportunity for Individuals with Disabilities [American with Disabilities Act]); the Civil Rights Act of 1964; and Section 504 of The Rehabilitation Act of 1973 (Levin, 1997). The growth of college athletic programs has resulted in courts reviewing the nature of athletic scholarships and the relationship between universities and student athletes (Davis, 1991).

Prior to 1965, the courts had adjudicated only thirty-two landmark cases affecting student development in postsecondary education (Barr, 1983). Since that time, issues involving student discipline, student press, admission standards, liability of administration in supervision of activities, and provision of health and counseling services have led to a dramatic increase in litigation in postsecondary education.

In 1972-1974, the United States Supreme Court decided four highly significant cases in postsecondary education, more decisions on postsecondary education than it had made in the previous two decades (Edwards & Nordin, 1979). Two of these decisions, Healy v. James, 408 U.S. 169 (1972) and Vlandix v. Kline, 412 U.S. 441 (1973) dealt with students' rights of expression and association under the First Amendment in the

former case and with residency status and its attainment in the latter case. The other two cases, Perry v. Sinderman, 408 U.S. 553 (1972) and Vlandis v. Kline, 412 U.S. 441 (1973) dealt with the rights of faculty members, both tenured and non-tenured, to procedural due process under the Fourteenth Amendment.

The legal relationship between a college and its faculty has essentially three characteristics: (a) individual rights or freedoms; (b) statutory requirements; and (c) contractual conditions of employment (Alexander & Solomon, 1972).

The first of these, individual rights or freedoms, involves the wide range of individual freedoms guaranteed by both federal and state constitutions. Intertwined with these freedoms is the concept of academic freedom which presumably bestows upon a teacher the additional freedom of intellectual thought, learning, and teaching, a freedom which cannot be restricted or abrogated by institution or government. The idea of academic freedom as we now view it was formulated in Germany during the nineteenth century and is summed up by the words *Lernfreiheit* and *Lehrfreiheit*, the freedom to learn and the freedom to teach (Harvard Law Review, 1968). *Lehrfreiheit* allowed the professor to conduct research and convey his findings to his students without fear of retribution.

In the United States academic freedom differs from its predecessor in Germany because of the differences in individual rights. In Germany, *Lehrfreiheit* and *Lernfreiheit* were extended to only faculty and students in the university, while in the United States the

individual freedoms granted by the Constitution of the United States guarantees all persons *Lehrfreiheit* and *Lernfreiheit* regardless of whether they are in universities or not. Accordingly, the proposition that academic freedom should be considered a right has not been generally accepted as a legal principle in the United States (Tisdell, 1968).

Loyalty oaths have involved many legal battles between teachers and the state. While the justification for loyalty oaths seems quite simple, the Supreme Court of the United States has in recent years gradually diminished most of the content of such oaths. In 1971, in Connell v. Higgenbotham, 91 S.Ct. 1772, the Court held that a teacher could not be summarily dismissed from public employment for failure to sign a loyalty oath. And in Keyishian v. Board of Regents of University of State of New York, 385 U.S. 589 (1967), the Court had limited the state's power to restrict a teacher's freedom of association and pronounced the relationship between academic freedom and constitutional rights within the loyalty oath context.

Within the context of political activity teachers in colleges are frequently restrained from participation in political activities. Relatively few cases have reached the courts; however, those that have do give some insight as to the teacher's constitutional right to participate in politics.

In Pickering v. Board of Education, 391 U.S. 563 (1968), the Supreme Court held that a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

In addition to the constitutional protections, teachers also possess statutory and contractual protections against dismissal or other specified sanctions by a governing board or administrator. Tenure is not peculiar to education; federal judges have tenure for life and federal and state employees are generally protected by some type of tenure system after serving designated probationary periods. Generally, tenured faculty can only be dismissed by following certain statutory procedural steps and any deviation from the procedure invalidates the dismissal. Additionally, a teacher can only be dismissed for statutorily specified reasons including such causes as incompetency, insubordination, and immorality.

Incompetence is the most frequently stated cause for dismissal and is probably the most difficult to define. The Supreme Court has broadly defined the teacher's standard of fitness in Beilan v. Board of Public Education of Philadelphia, 357 U.S. 399 (1958).

Insubordination is more specific than incompetency and is generally considered to constitute repeated refusal to abide by rules or regulations of the organization or to follow reasonable directions of a superior. Immorality or immoral conduct is activity inconsistent with moral rectitude.

Because of the unique development of education on a state by state basis court decisions affecting governance have been limited with most cases involving the power and authority of the governing boards. In several states the university governing board is constitutionally made subject to legislative intervention in any or all of its affairs. Prior to 1972, Idaho and Montana were the only two states making the state Board of Education

the governing board of all postsecondary educational institutions (Elliott & Chambers, 1936).

Postsecondary Education Law in Montana

Prior to 1972 the Montana Supreme Court had given little effect to Article XI, Section 11 of the Montana Constitution of 1889 which vested the general control and supervision of the state university in the Board of Education. Generally the court decisions said that the Board of Education was a part of the executive branch of state government (Waldoch, 1972).

Under the Constitution of 1972 the Board of Regents for the Montana University System was transformed from a purely legislative creation to a constitutional department (Schaefer, 1974).

Definition of Terms

1. Board of Regents was established in the Montana Constitution of 1972 and vested with the governance and control of the Montana University System. It has full power, responsibility, and authority to supervise, coordinate, manage and control the Montana University System and other public educational institutions assigned by law. The board consists of seven members appointed by the governor, and the governor and superintendent of public instruction are ex officio non-voting members of the board.

2. Constitutional Convention was the meetings of the delegates from January 17, 1972 through March 24, 1972, to draft a new state constitution to replace the Montana Constitution of 1889.

3. Federal Circuit Court of Appeals for the Ninth Circuit encompasses the states of Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, and Hawaii and the territory of Guam, with twenty-eight judges holding court in San Francisco, Los Angeles, Portland, and Seattle. Its jurisdiction consists of appeals from all final decisions of the district courts within the circuit.

4. Federal District Court for the District of Montana consists of one judicial district with three judges holding court at Billings, Butte, Glasgow, Great Falls, Havre, Helena, Kalispell, Lewistown, Livingston, Miles City and Missoula. It exercises original jurisdiction in all civil actions arising under the Constitution, laws or treaties of the United States, any Act of Congress regulating commerce or trade, and civil rights.

5. Postsecondary Education is divided into two systems. Higher Education; defined by the Montana Legislature in 1995 and codified in the Montana Code Annotated in §20-25-201, is entitled the Montana University System and divided into two elements. One element is the University of Montana with facilities at Missoula, Butte, Dillon, and Helena. The other element is Montana State University with facilities at Bozeman, Billings, Havre, and Great Falls. Community Colleges, codified in the Montana Code Annotated in Chapter 15 of Title 20, Education, is entitled Community College Districts

and deals with the organization of the community college system. The elements of this system are located in Glendive, Miles City, and Kalispell.

6. Montana State University-Billings began operations in 1928 as the Eastern Montana Normal School in Billings. In 1949 it became Eastern Montana College of Education, in 1965 its name was changed to Eastern Montana College, and in 1995 it assumed its present title.

7. Montana State University-Bozeman, commenced operations in Bozeman in 1893, as the Montana College of Agriculture and Mechanic Arts. In 1897 its name was changed to the Montana State College of Agriculture and Mechanic Arts. In 1921 its name was changed to Montana State College. In 1965 it was changed to Montana State University, and in 1995 it assumed its present title.

8. University of Montana-Dillon began operations in 1907 as Montana State Normal College. In 1948 its title was changed to Western Montana College of Education. In 1965 it was changed to Western Montana College, and in 1995 it assumed its present title.

9. The State Board of Education in the Montana Constitution of 1889 was given the general control and supervision of the state University and the various other state educational institutions. The board consisted of 11 members to include the governor, state superintendent of public instruction, the attorney general, and eight members appointed by the governor. The powers and duties of the board were prescribed and regulated by law.

10. The Supreme Court of Montana consists of one chief justice and six associate justices. It is the highest state court having appellate jurisdiction from lower state courts and may issue, hear, and determine writs and exercises original jurisdiction to issue, hear, and determine writs of habeas corpus.

11. University of Montana-Missoula began operations in 1895 in Missoula as the University of Montana. In 1913 the title was changed to State University of Montana; in 1935 it became Montana State University; in 1965 its name was changed to The University of Montana; and in 1995 it assumed its present title.

Organization of the Study

Chapter 1. Outlines the background and nature of the problem.

Chapter 2. The second chapter, "Control and Governance," discusses and analyzes the impact of the court's opinions upon the administration of postsecondary education under the Montana Constitution of 1889 including the constitutional and statutory provisions for control. The chapter reviews funding and the receipt, control, and disposition of property and funds. Also, under the Constitution of 1889, court interpretation of the power of governing boards and officers was developed. The chapter then discusses the changes in the governing of postsecondary education as a result of the Constitutional Convention and looks at how the courts have interpreted the constitutional provisions contained in the Montana Constitution of 1972. It then focuses attention on

the powers and liabilities enumerated for the University System and lastly, presents and discusses the power of governing boards and officers as defined by the courts.

Chapter 3. "Faculty and Staff" begins with a general discussion of the decisions which the courts have rendered involving members of the professoriate in academic areas. The majority of the opinions of the courts have been rendered in areas dealing with employment, tenure, termination, and compensation. Accordingly, the balance of the chapter is devoted to an analysis of these opinions and their effect upon the professoriate.

Chapter 4. This chapter investigates the impact of the judiciary upon students involved in postsecondary education within the state. The majority of the opinions handed down in cases in this area have been presented by the United States Supreme Court and are outside the scope of this discussion; consequently, the cases presented for this study are concerned with issues involving admission, suspension, contracts, domicile, and conduct.

Significance of the Study

The significance of this study lies in the indisputable fact that law remains an indispensable consideration in all activities within postsecondary education. Legal issues, arising on and off campuses, continue to be heard not only on campus, but also in other forums. Litigation has extended into every area of educational activity involving students, faculty, administrators, and governing officials.

Students have sued for cancellation of classes, failure to graduate, admission to graduate school, the right to participate in various campus activities, scholarship selection, and testing (Barr, 1983). Faculty members have sued because of class size increases, salary structure, hiring, tenure, selection, sex discrimination, and sexual harassment (Kaplin & Lee, 1995).

Increasingly, courts are entering into educational areas in which they traditionally deferred. The passage of new laws and regulations and the generation of new issues have resulted in expanded judicial interpretation and influenced the way in which faculty, administrators, and governing boards do their jobs. With this perceived encroachment into the academic domain has come criticism of the law's role on the campuses. Much of the criticism concerns the cost in money, time, and energy expended in dealing with legal issues that divert postsecondary education from its primary mission of teaching and scholarship.

While these criticisms continue we must not look only to the financial expenditures but consider a number of other questions. Are the issues raised frivolous or are they justified? Is the University system providing adequate mechanisms for dealing with claims and complaints, thus avoiding the necessity of turning to outside forums? Are the courts looking at the mission of postsecondary education when they render their opinions or devise remedies? And in those cases where the law has appeared to conflict with the interests of the campus community, how has education responded?

The challenge of the law is to keep pace with education's changing mission.

Concurrently, the challenge of postsecondary education is to understand and respond to the changes in the law while focusing on its many purposes and constituencies.

CHAPTER 2

CONTROL AND GOVERNANCE

Introduction

Between its admission to the Union on November 8, 1889, and the approval and passage by voters of a new constitution in 1972, postsecondary education in Montana was provided for in Section 11, Article XI, Montana Constitution of 1889. This article provided: "The general control and supervision of the state university and the various other state educational institutions shall be vested in a state board of education, whose powers and duties shall be prescribed and regulated by law" The cases presented below will indicate that the Montana Supreme Court had given little effect to this article during the eighty-four years it was used to control and supervise postsecondary education. They will also show that while the court had protected postsecondary education from encroachment upon the statutory authority which it had been granted by the legislature there were no cases in which the legislature had been limited in its direction of postsecondary education.

Following World War II the changing roles of local, state, and federal governments, citizen activism, and the uncertainties of the mid-twentieth century began to bring about an evaluation of our governmental framework and seemed to indicate that

major constitutional changes would have to be made in the Montana Constitution. During the latter part of the 1960's, the Forty-first Legislative Assembly created a Constitution Revision Commission to study methods of revising the Constitution. At the conclusion of its study the body recommended that a constitutional convention be called.

Following passage of Referendum 67, calling for a constitutional convention, the Forty-second Legislature established a Constitutional Convention Commission. The Convention first met on January 17, 1972, and completed its deliberations on March 24, 1972. During the Convention five proposals were introduced by delegates concerning postsecondary education and its control and supervision. The delegates rejected one proposal, adopted the intent of two proposals and incorporated in part two of the proposals into the educational provisions of the new constitution. Recognizing that the educational system and its administration were fundamentally different in 1972 than 1889, delegates drafted the educational provisions of the new constitution to provide for a board of public education and a board of regents. As additional reasoning for establishing the separate boards the delegates stated that postsecondary education was not simply another state service and could not be considered as an ordinary state agency (Constitutional Convention, Vol. 1, 8). Accordingly, control and supervision of postsecondary education in Article X, Section 9 (2) (a), of the Constitution of 1972 provides: "The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system"

The Constitution of 1972 resulted in the changing of the focus of the cases presented to the Montana Supreme Court for determination. Now the court would be called upon to decide what powers were conferred upon the Board of Regents and the limitations upon these powers.

The cases affecting postsecondary education can be segmented into four time frames: statehood through War I; from World War I through World War II; end of World War II through 1972; and, the new constitution.

Statehood through World War I

Control of Funds

In October, 1895, less than six years after statehood, the Montana Supreme Court was called upon to render its first decision on the authority of the Board of Education. In State v. Wright (1895) the treasurer of the agricultural college brought an action against the state treasurer to compel him to turn over the proceeds derived from the sale of bonds sold by the land commissioners under authority of the political code of 1895. Sections 1635 and 1636 of the code provided that immediately upon the receipt of the money, the state treasurer was to turn over to the treasurer of the agricultural college the proceeds which were to be used to erect, furnish and equip buildings for the use and benefit of the agricultural college in Bozeman under the general supervision of the state Board of Education.

The court, in a one paragraph decision, stated the state treasurer was required to turn over the money to the treasurer of the agricultural college immediately upon receipt. While the court did not delve into the authority of the Board of Education its decision gave notice of the broad authority given the board to carry out its constitutional duties.

In State v. Collins (1898) the court was called upon to render a decision involving the payment of warrants issued by a building commission created by the legislature in 1895 providing for the erection, completion, furnishing and equipment of the buildings for the University of Montana. The building commission issued a warrant to the contractor which was presented to the state treasurer who refused to pay the warrant claiming that it had not been approved by the state Board of Examiners.

The court discussed the statute providing for the sale of the bonds, creating the "University Bond Fund," and creating the building commission whose duties were to contract, supervise, and pay the contractors for their work out of this fund. It went on to state that the act of the legislature providing for the erection of the university buildings did not contemplate that claims arising under the terms of the contracts for the building should be subject to examination or approval by the state Board of Examiners. Their rationale for this determination was that the University Bond Fund was a trust fund entirely different from one arising from taxation, and not a state fund over which the Board of Examiners would have control. The court also noted in its decision the legislature had provided that the building commission should report from time to time to the state Board of Education on the progress of the work and the expenditures therefore.

The authority of the Board of Education to control university funds came into question again in 1901 in State v. Barret (1901). Peter Koch, Treasurer of the Executive Board of Montana State College of Agriculture and Mechanic Arts filed an action to force the state treasurer to pay a warrant drawn upon him as the Treasurer of the Executive Board. He alleged that the funds in the hands of the state treasurer had been derived from rents of lands leased by the state land commission belonging to the grant of lands made by the United States government in aid of the agricultural college. The state treasurer answered that the legislature had not appropriated the money for the maintenance of the agricultural college, and there was no law authorizing the payment to Koch of money derived from the leasing of land donated to the state of Montana for the use and support of the agricultural college.

The court entered into a lengthy discussion of the "Enabling Act" approved as an Act of Congress on February 22, 1889, providing for the admission of Montana into the Union as a state. Under the provisions of this act there were granted to the state certain lands for the use and benefit of state agricultural colleges. These lands were to be sold and the proceeds invested to form a permanent endowment fund; and the interest was to be devoted to the support of the colleges established pursuant to the declared purpose of the grant. Article XI, Section 12, of the Montana Constitution required funds derived from the sale of lands in the grants to be preserved for the purposes for which they were dedicated, but directed that the interest be devoted to maintenance and perpetuation of the institutions to which the grants belonged.

The court then discussed the powers and duties of the Board of Education as created by the legislature. These included (1) the general control and supervision of the state university and the various state educational institutions; (2) the adoption of rules and regulations for its own government, necessary for the execution of the powers and duties conferred upon them by law; (3) to prescribe rules and regulations for the government of the various state educational institutions; . . . and (10) to receive any and all funds, incomes and other property to which any of the said institutions may be entitled, and to use and appropriate the same for the specific purpose of the grant or donation, and to have general control of all receipts and disbursements of any of said institutions.

The authority of the Board of Education to control university funds was again upheld when the court stated that the board was vested with the exclusive power to receive, invest, manage and control the funds derived from the sale of the lands granted to the state for the use and support of the agricultural college, and that the income therefrom is subject to the orders of the board to meet the current expenses of the institution.

Quoting from its decision in State v. Collins (1898), above, the court held that the legislature, in defining the powers and duties of the Board of Education, with a view of following the spirit and intention of the act of congress creating the trust, intended that this board should be endowed with the special and exclusive power of executing it free from the limitations and restrictions of the constitution as to the expenditure of the ordinary revenues of the state.

The Court was again called upon in State v. Rice (1906) to consider the constitutionality of a law to enable the Normal School Land Grant to be utilized to provide additional building and equipment for the Montana State Normal College in Dillon. The act authorized the state Board of Land Commissioners to issue bonds and apply the proceeds for the erection, furnishing, and equipment of an addition to the Montana State Normal College building at Dillon and pledged as security for the payment of the bonds the lands granted by section 17 of the Enabling Act which provided lands to the state for the state normal school.

The court discussed Section 12 of Article XI of the Constitution providing that the funds of the State University and of all other institutions of learning, from whatever source, should remain inviolate; and, that only the interest of the funds, together with the rents from leased lands or premises, should be devoted to the maintenance and perpetuation of the respective institutions. It reasoned that if the funds must be invested to draw interest, then the principal could not be used to pay off the principal or interest on the bonds which the legislature had authorized. Additionally, since the interest from the Normal School Land Grant could only be devoted to the maintenance and perpetuation of the normal school, the legislature's act, in diverting the moneys received from the sale of normal school lands, or the sale of timber therefrom, to pay the bonds, was void.

Completing the rationale for its decision the court stated that it seemed that early sessions of the legislature understood that Congress meant for the state to build the

buildings for a state normal school out of its own funds and that the trust lands were to be an endowment for the maintenance and perpetuation of such school for all time.

Donations and Bequests

The last case which the court was called upon to decide during this period was In re Beck's Estate (1912). Josiah Beck died in Silver Bow county in 1909, leaving an estate valued at approximately \$80,000. After bequests to his wife and others he left the residue of his estate to the "Orphans Home" located at Twin Bridges, Montana. A controversy arose as to the power of the state to receive the bequest which Beck had provided. In its decision affirming that the law did not allow the state to be the beneficiary of the bequest because under the law only natural persons and corporations formed for scientific, literary or solely educational purposes could receive property through testamentary disposition and the "Orphans Home" did not fall into any of these categories. The court then turned its attention to an analysis of who could receive property under the statute and the powers conferred upon them by statute.

The court first considered the state Board of Education, setting out the composition of its members, then its control over the State University. It went on to state that while not specifically authorized to accept gifts, devises and bequests for the benefit of the university, the implication was that the board may do so and that any person contributing not less than \$15,000 could have the privilege of endowing a professorship, or any department of it, subject to the power of the board to designate the name and object of the gift.

The act creating the State School of Mines declared it to be a body corporate, with power to sue and be sued, and to take and hold real and personal property by gift, bequest, devise or purchase from the state, and dispose of the same when authorized by law to do so. The court went on to state that all of the state educational institutions were later declared to be under the exclusive control of the state Board of Education.

Accordingly, the control of the funds belonging to the state educational institutions, from whatever source derived or from whatever they may be derived, was vested in the board with the power to authorize and regulate all expenditures by any of the institutions.

The power of the state Board of Education to accept gifts of land and money to aid in the purchase of a site for the agricultural college and establishing the experimental station was recognized as well as the law establishing the normal school which authorized bequests to be made to the state board of education for the benefit and exclusive use of the school. The court concluded that, but for these specific provisions conferring the power to receive property upon the different agencies, they would be governed by the general law and unable to receive testamentary dispositions.

Summary

While the results of these early decisions do not specifically mention the authority of the Board of Education with regards to postsecondary education the language of the court would seem to indicate that the constitutional provisions relating to their authority was broad and very extensive. The board had the authority to receive and disburse the proceeds of the sale of bonds; was exempted from having its warrants approved by the

Board of Examiners; was the exclusive manager of income from the lands granted to establish an agricultural college; and, by implication, had the authority to accept gifts, devises and bequests for the benefit of the state university.

In each of these cases it is also apparent that the court was influenced in its determination of the scope of authority of the board because legislative enactments granted such authority.

End of World War I through World War II

Postsecondary Education and its Purpose

It was not until 1926 that the court was again called upon to render a decision concerning postsecondary education. The case was State v. Erickson (1926) and arose when a taxpayer brought an action to have the court declare that the proceeds from a state tax levy should be used exclusively for the support, maintenance and improvement of the four teaching units of the University of Montana and to enjoin the use of the funds for any other purpose by the state Board of Examiners.

The initiative which proposed the levy stated that its purpose was for the support, maintenance and improvement of the State University at Missoula, the State College of Agriculture and Mechanic Arts at Bozeman, the Montana State School of Mines at Butte, and the Montana State Normal College at Dillon, which comprised the University of Montana, and that the Board of Examiners had declared that the Agricultural Experiment

Station and the Agricultural Extension Service were parts of the agricultural college and entitled to share in the levy.

What was termed "The Greater University" was created by law and from July 1, 1913, the State University at Missoula, the College of Agriculture and Mechanic Arts at Bozeman, the Montana State School of Mines at Butte, and the Montana State Normal College at Dillon, and such departments of said institutions as thereafter organized, constituted the University of Montana. Prior to this time each of these units existed as separate and distinct institutions created by law, and each had been placed under the supervision and control of the Board of Education.

The inception of agricultural colleges was found in an act of congress approved July 2, 1902. The Agricultural Extension Service was created by an act of congress approved May 8, 1914. The work of the extension service was to give instruction and practical demonstrations in agriculture and home economics to persons not attending or resident in agricultural colleges carried on by mutual agreement between the Secretary of Agriculture and the state agricultural college.

The experiment stations were provided for by acts of congress approved March 2, 1887, and March 16, 1906. The scope of work of this "department," disseminated to persons not attending or resident in the colleges, consisted of research work and scientific experiments for the purpose of discovering the cause of, and remedy for, diseases in plants and animals. The supervision of the stations was vested in the United States Secretary of Agriculture.

In 1893, the legislature passed an act providing for the Agricultural College of the State of Montana and an agricultural experimental station in connection therewith. The first six sections of this act provided for the site, management, organization, and the supervision and control by the Board of Education. The act, in Sections 7 and 8, then provided for the establishment of the experiment station. By providing for the creation of the two in separate parts of the act the court reasoned that the legislature indicated its intention that the experiment station should not be a part of, or a department in, the agricultural college. Additionally, it reasoned that since the Secretary of Agriculture had control and direction of the extension service it was not a part of the agricultural college. The court then ruled that the extension service and experiment station were not part of the "Greater University" and could not share in the proceeds of the levy.

In Mills v. Stewart (1926) the court stated that an appropriation of money to encourage education by means of public schools and colleges is for a public purpose and that whatever contributes to make that system of education effective is also a public purpose.

The case arose when George Rietz was injured while a student at the university at Missoula. He registered and was assigned a room on the second floor of the "South Hall" dormitory. On this floor near his room were two doors about two feet apart, one of which led into the bathroom and the other into the elevator shaft; neither door was locked and neither one was marked or labeled. The hall was dimly lighted, and in attempting to enter the bathroom he instead opened the door leading into the elevator shaft. He fell to the

bottom of the shaft and sustained serious, permanent injuries. To partially compensate Reitz for his injuries the legislature passed a law providing that if he presented a claim to the state Board of Examiners within three months of the passage of the act, he could collect damages, not exceeding \$7,500, as a claim against the state of Montana.

In upholding the act the court stated that in order to encourage education the state had provided money to assist in defraying the traveling expenses of students attending any of the units of the university and provided free textbooks to children attending the public schools, and both were considered to be a public purpose. It reasoned that compensating a student who, while attending the university, was seriously injured through the negligence of the state, contributed directly to encourage attendance at such institutions. The court declared that whether an act of the legislature was wise or unwise was a matter for legislative decisions and not one which was open to consideration by the court and that it was not in the province of the court to run a race of opinion with the legislature upon questions of policy or expediency.

Authority of the Board

State v Brannon (1929) was the first case in which the court, clarifying its earlier decisions on the powers of the Board of Education, declared the board to be a part of the executive department of state government and one of its agencies, and, as such, subject to legislative control.

In 1927 the legislature passed a law which provided for the collection of fees from gasoline dealers, required the Public Service Commission to enforce the law, and

designated the head or chairman of the Department of Chemistry of the State College of Agriculture and Mechanic Arts as the state chemist and directed him to analyze and test gasoline samples for quality and strength. The act further provided that the chemist was to receive no compensation for his services, nor charge any fee, for the tests. During the month of August, 1929, the commission presented samples to the chemist which he refused to analyze.

The court stated that the legislature could have created another bureau or department to perform the analyses but it did not do so and, instead, it created as state chemist the Head of the Department of Chemistry at the state college. The Board of Education argued that the university was established by the Montana Constitution, and since the management of the university was vested in the board by the Montana Constitution, the legislature was without power to impose a noneducational and antagonistic function upon one of the university units and also asserted that it was "within the scope of its functions, coordinate and equal with the legislature." After setting forth Section 11 of Article XI of the Montana Constitution: "The general control and supervision of the state university . . . shall be vested in a state board of education, whose powers and duties shall be prescribed and regulated by law." the court denied both contentions stating that the powers of the government of the state were divided into three distinct departments: the legislative, executive and judicial. Further it ruled that the Board of Education was a part of the executive department, and that the legislature may describe the extent of the powers and duties to be exercised by the board and could broaden the

functions of the university, or any of its units. It went on to state that a law may be enacted by the people exercising the initiative or by the people acting through the legislature and in either case the power to enact a law was illimitable. The legislature could require research and experimental work to a greater degree than was being carried on, and for the public benefit could require the discharge of functions in new fields, or in other words, the state could extend, and add power to, its developmental arm.

Although the court was correct to reject the argument that the board was "equal with the legislature" in its decision, it failed to consider whether the legislature, in designating the Head of the Chemistry Department as state chemist, had infringed upon the authority of the Board of Education to control and supervise the state university.

The court's analysis also presents the question of whether the legislature was prescribing the powers and duties of the board, or controlling and supervising the university. Arguably, the legislature's power to prescribe the duties of the board did not include the power to carry out these duties by assigning specific duties to a professor.

Another factor which the court failed to consider was that by placing so much emphasis on the authority of the legislature to dictate the duties and responsibilities of the board it could have had the effect of eliminating the clause granting the board "general control and supervision" from the Montana constitution. If this clause was not present in the Montana constitution, the legislature would have had the authority to create a state university and the board to administer it. However, the constitutional provision creating a state university and providing for its control acted as a restraint upon the authority of the

legislature to create a state university and a board to administer it without restraint. And, under such a situation there would be no restraint upon the legislature in prescribing or even eliminating the authority of the board which it had created.

Campus Expansion

Barbour v. State Board of Education (1932) was the first of a series of cases arising out the "Great Depression" of the 1930's. The court was called upon to decide the authority of the board to erect buildings to be used for residence halls upon the campuses at Missoula and Butte. The legislature enacted a law which included the borrowing of money with the security for repayment to be the pledging of the net revenue from the operation of the residence halls, together with the net revenue from residence halls already erected and in use. The complaint alleged this was an unconstitutional delegation of power by the legislature.

The court reasoned that the act only authorized the board to carry out the expressed will of the legislature, even though the procedural directions and the things that needed to be done were specified only in general terms and therefore it was not a delegation of legislative power.

The court placed emphasis on the fact that the faith and credit of the state was not involved in the issuance of the bonds and the taxpayers of the state would never be burdened or called upon to undertake to repay the obligations which were to be created.

State v. State Board of Education (1934) (Veeder) was an action to stop the Board of Education from erecting and maintaining a students' union building at the

university in Missoula. In 1933, the legislature, during the Extraordinary Session of 1933-34, enacted a law to take advantage of the "National Recovery Act," which permitted the advance of federal funds for the construction of public works. Under the state law the Board of Education was empowered to erect student union buildings on the various campuses with all principal and interest payable solely from funds from the operation of the buildings and from income derived from student fees.

The university had always exacted from the students matriculation, registration and certain other fees, and, in 1929, the student body at Missoula voted to increase the student fees by \$1 a quarter for the purpose of creating a fund with which to erect a students' union building. The fee had been collected for several years and was being held in a special fund for that purpose.

The Board of Education completed a plan to erect a building at Missoula financed by a loan of \$240,000 from the federal government, for which the board would issue bonds amortized over a thirty-year period, and a grant of \$60,000 from the government. To pay for the upkeep of the building, payment of the interest, and the creation of a sinking fund for the retirement of the bonds at maturity, the board established a student union building fee of \$5.00 per student per year to be in effect as long as the bonds were outstanding.

It was contended that the board had no authority to charge a student union fee, or, if such authority existed, that it could not be done without the consent of the student body. The authority granted the board by the legislature for the control and supervision of

the institutions included the right to receive from the United States and from state boards or persons funds, income, and property to which the institutions were entitled and to have general control and supervision over all receipts and disbursements of the institutions.

While the legislative grant contained no direct authorization to the board to impose fees of any kind upon the student, it does contain the restriction that "tuition shall ever be free to all students who shall have been residents of the state for one year.

The court reasoned that the power to manage and control the business and finances of the institutions carried with it the implied power to do all things necessary and proper in the exercise of the general powers, to include the exaction of fees, if the fees were necessary to the conduct of the business of the institutions. Also, unless these fees were for "tuition" they were no different than the fees already charged and required no vote of the student body for their enactment. Accordingly, the provision respecting free tuition did not bar the state board from collecting the fee as a condition precedent to entry into the university.

As for the argument that the board could not bind its successors the court stated that all governing boards exercised two distinct classes of powers: the one legislative and governmental, the other proprietary, or in the nature of business managers for the public they serve. In the exercise of the first class of powers, a board could not bind its successors, but in the second it could enter into valid contracts extending far beyond the term of office of the members. The members were acting as a board and not as individual

members, and the fact that the term of office of the individuals would expire before the termination of their contract did not in any way affect the validity of the contract.

The court also ruled that the \$1.00 fee "Student Union Building Fund" collected each quarter and held in a "special fund" in the custody of the president and business manager of the university was in the nature of a gift, or grant, or donation to the institution of which the board was the trustee and the board could use or appropriate this fund for the purpose for which it was raised and no other. Since there was no difference in the use of the money for the purpose of erecting a building and in using it to repay money borrowed for the immediate construction of the building, the board had authority to pledge this fund along with the future fees to be paid by the students to pay for the bonds issued to construct the building.

State v. State Board of Education (1934) (Blume) raised the question of the authority of the Board of Education to issue bonds for the erection and construction of buildings for Eastern Montana State Normal School in Billings. These funds were to provide for two buildings: one housing administration offices, classrooms, laboratories, and the library; and the other housing the auditorium and gymnasium. The act, passed during the Extraordinary Session of 1933-34, specifically provided that the state would not be liable for payment of the bonds and that they were payable solely from the Eastern Montana State Normal School fund.

The court noted that the site for the campus was purchased by citizens of Billings and donated to the state and that no buildings had been erected during the seven years that

the school had been in existence. The court then ruled, using the reasoning set forth in State v. State Board of Education (1934) (Veeder), State v. Barret (1901), and Barbour v. State Board of Education (1932), that the law did not violate the provisions of the constitution.

State v. State Board of Education (1936) (Wilson), presented the court with the question of the authority of the Board of Education to act under a law passed by the legislature during the Extraordinary Session of 1933-34, and utilize funds of the Federal Emergency Administration of Public Works to construct a journalism building at the university in Missoula. The action arose when a university student brought an action to enjoin the board from pledging the income from the federal land grant to the state of Montana as security for a loan. The court reasoned that while the legislative act did not specifically say in so many words just what things were necessary for its purpose, the broad language used justified the belief that the authority was given to the board to do the lesser things required to do the major things. While the act did not say the board could borrow money or issue bonds, these two things were necessary steps that had to be taken before construction. It stated that everyone knew the purpose of the university was to educate the youth of Montana and that in order to achieve this purpose, buildings, laboratories, equipment, and teachers were necessary. And, quoting its previous decisions in State v. State Board of Education (1934)(Veeder) and State v. State Board of Education (1934) (Blume), the court again made reference to the fact that the state of

Montana would not be liable for the bonds, and that the board had complete and final authority over the income in the funds established with the federal land grants.

The last case dealing with construction, State v. State Board of Education (1936) (Dragstedt), again called into question the authority of the Board of Education to construct and equip a chemistry-pharmacy building at the university in Missoula using a loan and grant from the Federal Emergency Administration of Public Works under a law passed by the legislature during the Extraordinary Session of 1933-34.

The court noted that the legislature did not provide by a specific act for the erection of a chemistry-pharmacy building, as it did for the erection of the student union building State v. State Board of Education ((1934) (Veeder) and the journalism building State v. State Board of Education (1936) (Wilson) in Missoula, and the buildings at Eastern Montana State Normal School State v. State Board of Education (1934) (Bloom). Quoting from its decision in State v. Brannon (1929) the court stated that the board is a governmental agency and, therefore, the loan was within its powers. It upheld the authority of the board to issue the bonds since their repayment did not involve an obligation of the state of Montana.

Regulations of the Board

In State v. Ayers (1939) the court was asked to rule on several issues involving the reinstatement of Philip O. Keeney to his position as Librarian and Professor of Library Economy at the university in Missoula. The issue with which we are concerned in this chapter deals with the authority of the Board of Education to adopt rules. In particular,

the board had adopted regulations, which had been in force for approximately twenty-one years, providing that reappointment of a professor after three years of service was deemed a permanent appointment.

The court stated the regulations adopted by the board were within its authority under Article XI, Section 11, Constitution of Montana and the provisions of the revised codes of Montana. Additionally, the court ruled that the regulations of the Board of Education, made within its jurisdiction, have the force of law, and become part of the contracts that were made thereunder.

The case of State v. Ford (1944) again involved the regulations of the board, and again, the status of a faculty member. Within the context of this chapter we are only concerned with the authority of the board and its officers. Paul C. Phillips, Professor of History and Political Science, delivered his letter of resignation from his position to the president of the university in Missoula, on October 2, 1937. On December 12, 1937, Phillips signed a withdrawal of his resignation. It was delivered to President Simmons on December 12, one day prior to the meeting of the Board of Education. On December 13, 1937, the board accepted his resignation.

The court ruled that the relationship between the board and Phillips was that of employer and employee and that he held his position under what was known as permanent tenure. It also ruled that under a provision of the regulations of the board in force, the president acted as a medium of communication between the board and the officers and organization of the university and that it was his duty to convey the withdrawal to the

board before it acted on the resignation. Further, the court ruled that the president, under the regulations of the board, could only make nominations and reports of appointments, promotions, salaries, transfers, suspensions, dismissals and resignations of administrative officers, members of the instructional and scientific staffs and other employees of . . . the university. Accordingly, as far as resignations were concerned the president must report them to the board, and he had no authority to accept them.

Summary

The period from World War I through World War II was one of change in postsecondary education. Based on its decisions during earlier years in cases involving the authority of the Board of Education it would have been thought the court would have, at a minimum, maintained the status quo of the authority of the board. Instead, the court declared the authority of the board to be only that which was bestowed upon it by the legislature, no more and no less. This period saw the court affirm that postsecondary education was a public purpose of the state, define college and university, and provide for the interpretation of the rules and regulations of the board as law. During the "Great Depression" the court played an instrumental part in upholding the emergency powers granted to the Board of Education by the legislature resulting in the expansion of existing campuses and providing for a new campus for the Eastern Montana State Normal School in Billings.

The cases show that while the court had held the Board of Education was merely an agency of the government and not a separate entity it still gave effect to the authority

which it had been given by the legislature. While the court was limiting the authority of the board it seemed to have given it during the preceding years it was at the same time, because of the national crisis brought about by economic conditions, allowing it to do all that it could to ameliorate the effects of the economy.

End of World War II to the New Constitution

The Right to Vote

In Thomas v. Board of Examiners (1949) the court was called upon to determine the validity of a referendum authorizing the Board of Examiners to issue bonds in order to obtain money to be used for construction and equipping of necessary buildings and the acquisition of grounds therefore at the six units comprising the University of Montana. The issues presented to the court involved the ruling of the election judges that only registered electors who were taxpayers upon property with the state and whose names appeared upon the last completed assessment roll for state, county and school district taxes could vote upon the referendum and by using the wording "there shall be a referendum on this act" that the entire act of the legislature was referred to the people in violation of the state Constitution.

The court found that the provisions allowing only property owners whose names were on the assessment rolls was required by the Constitution and that the section of the act requiring the referendum to be submitted to the people and qualified electors must be read in light of the Constitution. The only electors qualified under the Constitution to

vote upon the question were taxpayers whose names appeared on the last completed assessment roll. As to the other question the court stated that the voters were only asked to vote for or against the bond issue, and not for or against the act and, as such, having the title of the act on the ballot was only for the purpose of explaining the bond issue.

Legislative Authority

The court, in Meens v. State Board of Education (1954), was called upon to render its decision in an action by Richard Meens, a Professor of Mathematics at Eastern Montana College of Education in Billings, against the Board of Education to recover damages for breach of contract. The question presented was whether the board of education could be sued for a breach of the contract which it entered into with Meens.

The court discussed the control and supervision of the state university granted by the Constitution and the pertinent statutes enacted by the legislature relative to the Board of Education, including the authority to choose the faculty for each institution and to select the faculty, teachers and employees thereof.

The court traced its decisions in other cases in which it had been called upon to determine the power and authority of the board, including State v. State Board of Education (1934) (Veeder), wherein it stated "All governing boards exercise two distinct classes of powers; the one legislative and governmental, the other proprietary, or in the nature of business managers for the public they serve. If the exercise of the first class of powers, a board cannot bind its successors, but in the second it may enter into valid contracts extending far beyond the term of office of the members."

The court ruled that the law would allow the plaintiff to bring his action against the Board of Education to compel it to perform its clear, legal duty and that the board could be sued since the relationship between the board and plaintiff was that of employer and employee, that is, contractual in character.

Brown v. State Board of Education (1963) was the last case in which the court discussed the authority and power of the Board of Education. The plaintiff was a speech instructor at Eastern Montana College of Education in Billings employed from September 1, 1961, to June 30, 1962. She alleged that the board, acting by and through its authorized agents and employees, employed her to teach under contract the summer session, July and August of 1962. H. L. Steele, President of the college, testified that he was authorized by the board to seek instructional staff. He also said that he delegated the interviewing of applicants to heads of departments and that he, in turn, recommended to the board who should be hired. He testified that the board does the hiring and that he never told the heads of department they did not have authority to hire and that he had not considered it necessary to do so. The question presented to the court was whether the college officials had the power to enter into a contract with the plaintiff

The court looked at the express statute which the plaintiff asserted authorized the board to delegate to the President and faculty the selection of teachers and other employees at the college. It provided in part:

“Powers and duties, The state board of education shall have power and it shall be its duty:”

12. To choose and appoint a president and faculty for each of the various state institutions named herein, and to fix their compensation

14. To confer upon the executive board of each of said institutions such authority relative to the immediate control and management, other than financial, and the selection of the faculty, teachers, and employees, as may be deemed expedient, *and may confer upon the president and faculty such authority relative to the immediate control, and management, other than financial, and the selection of teachers and employees, as may by said board be deemed for the best interest of such institutions.* (Emphasis added.)

The plaintiff contended that the italicized portion of the statute is a legislative grant of power to delegate the selection of teachers to the president and faculty. On the other hand, the board asserted that the meaning was one of limitation; that is, that the board may not confer on the president and faculty the authority to select teachers. Brown also stated that "apparent authority" was all that was needed to establish a binding contract.

The court discussed its earlier decision in State v. Ford (1944) wherein it determined that the president did not have the authority to accept resignations and using the reasoning of that case concluded that the legislative act relied upon by the plaintiff restricted the board from delegating its powers if the position of the board was correct. It also ruled that there was no implied authority for the college officials to contract with her for the summer session.

The position taken by the board and its affirmation by the court are open to question. The phrase "other than financial" could be read as a modification of the terms "management" and "control" leading to the conclusion that president and faculty of the college could have been granted authority to select teachers and employees. The real

question, which was not raised nor discussed by the court, went to the issue of whether the board's authority to control academic personnel policies was included in "the general control and supervision of the state university . . ." under Article XI, Section 11 of the Montana Constitution. The board, by taking the position which it did, was harmful to its own interest. By arguing before the court that this question was controlled by statute would seem to indicate that the board failed to understand the nature of the grant of its authority set forth in the constitution:

Status of the Trust Funds

The last case in which the court was called upon to enter a decision under the Constitution of 1889 was In re Montana Trust and Legacy Fund (1964). The court was asked by the Montana Legislative Council to enter an advisory opinion as to the administration of the Montana Trust and Legacy Fund. Specifically the court was asked:

1. May securities held by the Montana Trust and Legacy Fund be sold or traded when the sale price is less than face value?
2. May securities held by the Montana Trust and Legacy Fund be sold or traded when the sale price is less than the price paid for such securities?

The Montana Trust and Legacy Fund was created by Article XXI, Constitution of Montana and consists of (1) the permanent funds created from inter vivos or testamentary donations from natural persons and . . . permanent revenue fund for the University of Montana. The court construed the constitutional provision establishing the original amount of the fund as inseparable and inviolable parts as meaning that the principal of

each of the three funds may not be reduced below the total amount of the donations from which the fund was established. The court ruled in answer to the first question that it would be permissible to sell the securities in the fund at less than face value if the price paid for the securities were less than their face value, provided the sales price was not less than the purchase price.

In answer to the second question the court stated that it did not construe the word inviolable as prohibiting the sale of securities at less than purchase price or face value or the purchase thereof at a premium, provided the income gain resulting from such transactions was partially used to restore the temporary loss of principle. However, the court added one qualification. Section 16 of the Enabling Act granted to Montana ninety thousand acres of land for the use and support of agricultural colleges. The Congressional Enactment of 1862 specifically provided that the principal of funds created by the sale of the granted land "should forever remain unimpaired and undiminished." Because of this language the court concluded that securities purchased with funds created from the sale of the lands granted by section 16 of the Enabling Act may not be sold for less than the purchase price.

Summary

Between 1945 and 1964, only four decisions affecting postsecondary education were decided by the Montana Supreme Court, and only two of these directly involved control and management. The others were concerned with who could vote and the sale and exchange of securities in the permanent revenue fund for the University of Montana.

The cases involving control and authority were decided using the rationale developed in previous cases and, in Brown v. State Board of Education (1963), the decision, upholding the board's position, is difficult to accept because its position was harmful to its own interest and brought into question its understanding of the nature of its authority under the constitution.

The New Constitution

Voting and College Trustees

In Melton v. Oleson (1974) the plaintiff was seeking restoration of his voting rights and to prevent his removal as a college trustee. In 1933, in the United States District Court in Montana Melton pled guilty to three violations of federal liquor laws. Forty years later the Flathead county attorney's office filed a certified copy of the 1933 conviction with the county clerk and recorder along with its opinion that Melton had been convicted of a felony. The clerk and recorder thereupon struck Melton's name from the voting rolls.

The county attorney's office then advised the Board of Trustees of Flathead Valley Community College that Melton was no longer a registered voter and that his position as college trustee should thereupon be vacant and the board so declared.

Under federal law the possible punishment that may be imposed determines whether a given crime was a felony or a misdemeanor without regard to the sentence

actually imposed. In Montana, the sentence actually imposed after conviction determined whether the defendant had been convicted of a felony.

Under the Montana Constitution it is the responsibility of the Montana legislature to establish qualifications for holding public office and voting qualifications. Accordingly, the court construed the state statutes relating to voter disqualification as meaning that a Montana voter cannot be denied the right to vote because of conviction of an offense in federal court that would not be a felony by Montana statutory definition and that the character of an offense, whether a felony or a misdemeanor, must be determined by the laws of the jurisdiction where the crime was committed. Therefore, Melton was not disqualified from voting and his position as college trustee was not vacant.

Powers in General

Montana State University v. Ransier (1975) involved the power of the university to require registration of vehicles on campus, to limit areas in which they could be parked, and to assess fines. Ransier was a student who received two parking tickets. Each contained a warning that if not paid within one week the fine would be doubled. He appealed to the Traffic Appeals Committee, which upheld the validity of the tickets. He then filed his action in district court.

The legislature passed an act providing that the regents of the Montana University System were authorized to make rules and regulations at each unit of the University System concerning the parking and operation of motor vehicles upon the grounds, streets, drives, and alleys of each unit. The act authorized the regents to assess fees for parking

on campus, assess fines for violations of motor vehicle regulations, and establish a system of appeals at each unit concerning parking violations.

The court held that the regulations Ransier allegedly violated were promulgated by the president of Montana State University under the express authorization of the Board of Regents and that the legislature may validly provide a criminal or penal sanction for the violation of the rules and regulations which it may empower administrative authorities to enact. It determined that the legislature had empowered the Board of Regents to promulgate regulations controlling vehicles on campus and provided a penalty for violations of those regulations.

By using the reasoning set forth above, the court avoided having to reach the constitutional considerations which had been raised by the university concerning the constitutional status of the Board of Regents. Specifically the court stated: "We recognize the board of regents attained constitutional status under the 1972 Montana Constitution, but definition of that status is unnecessary in the disposition of this appeal."

This case presents the first pronouncement by the court of the newly acquired status of the Board of Regents, that is, a constitutional department. During the next several years the court would be called upon to give substance to this status and to define the authority and limits of the Board of Regents and the legislature in the control and supervision of postsecondary education.

Separate Boards

The first case in which the court was called upon to determine the powers of the boards created by the Montana Constitution of 1972 was Board of Public Education v. Judge (1975) and was a proceeding to determine the constitutionality of a statute designating the State Board of Education as the State Board of Vocational Education.

The new constitution established three distinct boards concerned with state education. They were: (1) State Board of Education composed of the Board of Regents of Higher Education and the Board of Public Education with the responsibility for long-range planning, and for coordinating and evaluating policies and programs for the state's educational systems; (2) The government and control of the Montana University System was vested in a Board of Regents of Higher Education which has full power, responsibility, and authority to supervise, coordinate, manage and control the Montana University System; and (3) A Board of Public Education to exercise general supervision over the public school system.

Prior to the enactment of the contested law in 1975, the general supervision and control of vocational education was vested in the Board of Public Education. Under the new law the legislature attempted to take this responsibility away from the Board of Public Education by transferring it to the State Board of Education and requiring it to adopt policies to effect the development of a system of vocational educational.

The law also required the governor to appoint five persons from the State Board of Education, three from the Board of Public Education and two from the Board of

Regents, designated the Vocational Education Board. This board was to have the responsibility for the administration of the policies adopted and was to select an executive officer who was responsible for administering vocational education.

The court reviewed the history of the supervision of education in Montana as contained in the 1889 Montana Constitution Article XI, Section 11, which provided for only one board to deal with state educational institutions and under which the state legislature vested control and supervision of the state's vocational education system. The debate on Article X, Section 9, 1972 Montana Constitution, which established three boards, centered upon the issue of whether there should be a single board as in the 1889 Constitution, or two boards, one for postsecondary education and one for the public school system (Constitutional Convention, Vol. 8) and the concept of two boards prevailed. The third board, the State Board of Education, composed of the membership of the other two boards, was only to review matters for presenting a unified budget, long-range planning, coordination, and evaluation. The court determined that it was the intent to have a two board system with the third board to have no executive or administrative powers other than those expressed in planning, coordinating and evaluating.

Notwithstanding the fact that vocational education and vo-tech are referred to many times in the discussion and used interchangeably, the court observed that vocational education was included in the curriculum of nearly every high school in Montana while vo-tech generally referred to the separate centers located in major Montana communities, and it declared there was no question it was intended that vocational education was to be

a responsibility of the Board of Public Education. Additionally, the court declared that it was obvious the framers of the Constitution feared a super board and desired that the authority of the State Board of Education be limited to long-range planning, coordination and evaluation and that the attempted transfer of vocational education to the State Board of Education was unconstitutional.

An interesting point which the court included in its decision but upon which it did not expand was the court's recognition of the Education and Public Lands Committee of the Constitutional Convention report (Constitutional Convention, Vol. 4) that the responsibility for vocational education could be transferred to the Board of Regents from the Board of Public Education, but there was no indication it could be transferred to the Board of Education. This reading of the authority of the Board of Regents was obtained in Article X, Section 9(2) (a), 1972 Montana Constitution when, after providing for the authority of the Board of Regents, the framers of the constitution added: "... and shall supervise and coordinate other public educational institutions assigned by law."

Limits of Legislative Control

Board of Regents v. Judge (1975) is the only case where the court was called upon to rule upon the limitation of power of legislative acts in conflict with the Board of Regent's constitutional authority to control and supervise the University System. The specific provisions of two bills were at issue before the court: one appropriating monies to the University System for the biennium and the other providing for a legislative finance committee to approve budget amendments.

The law providing for the university budget contained a provision requiring the Board of Regents to certify that the university would comply completely with the following general and specific provisions: "... (4) All moneys collected or received by university system units ... shall be deposited in the state treasury; (6) Salary increases for presidents of units of the university system and for the commissioner of higher education shall not exceed five percent each year of the biennium using fiscal 74-75 salaries as the basis and the regents shall grant classified university employees salaries in accord with House Joint Resolution 37." The law also stated that all monies received from sources other than the general fund could only be expended through a budget amendment approved by the legislative finance committee. The other law set forth the definition of a budget amendment and provided for the process for obtaining approval of such an amendment.

Monies for the biennium were appropriated by various line items from various state operating funds. In addition, each of the units of the University System and the office of the Commissioner of Higher Education were each appropriated certain funds.

The Board of Regents urged the court to declare that line item appropriations of general fund monies by the legislature infringed on the board's authority granted by the Constitution. And, counsel for the board, during oral argument before the court, stated that the University System and its Board of Regents was a fourth branch of government.

The court stated that the other provisions of the Constitution negated this argument, specifically Article III, Section 1 providing for three distinct branches of

government: legislative, executive, and judicial; Article V, Section 1 providing for a legislature; and Article VIII, Section 12 requiring the legislature to insure strict accountability of all revenue received and money spent by the state. Proceeding in its evaluation of the Regent's proposition the court stated that its previous rulings have limited the scope of appropriation to the general fund and that the power to appropriate does not extend to private funds received by state government which are restricted by law, trust agreement, or contract to include the Montana Trust and Legacy Fund established by the 1889 Constitution.

The court then stated that based on the constitutional provisions the principle of regent independence was definitely intended by the drafters of the 1972 Montana Constitution. At the same time, legislative control of postsecondary education through the appropriations process remained. Therefore, the regents were a constitutional body in Montana government subject to the power of the legislature to appropriate and set the public policy of the state.

The court continued that the legislature could not do indirectly through the means of line item appropriations and conditions what was impermissible for it to do directly. And line item appropriations become constitutionally impermissible when the authority of the regents to supervise, coordinate, manage and control the University System was infringed by legislative control over expenditures. Therefore, the court continued, the conditioning of University System appropriations by the Montana legislature and the summary procedure for compliance were proper exercises of its appropriation powers to

the extent the conditions did not infringe on the constitutional power granted the regents. This meant the conditions must be individually scrutinized to determine their propriety.

Based on its earlier discussion of the legislative appropriation power, the court determined that certification could not be used as a boot-strapping devise to gain legislative control over private moneys since private money that was restricted by law, trust agreement, or contract were beyond the appropriation power.

The final issue upon which the court acted was the regent's challenge to the section limiting the salary increases for presidents of units of the University System and for the Commissioner of Higher Education. The regent's argued that this condition represented an effort to abrogate the powers and prerogatives granted expressly and absolutely to them by the 1972 Montana Constitution while the governor and Finance Committee asserted the condition was a proper exercise of the legislative appropriation power.

The court went on to assert that any decision with respect to appropriations affected the management of the University System to some degree. Specifically, the provision restricting the salary increases contained no legislative explanation. Nor was there any provision for the Regents to object. The regents either complied or had to forego the funds. Such seemingly minor conditions could ultimately affect academic administrative and financial matters of substantial importance to the University System.

Control over college president salaries was not a minor matter and dictated university personnel policy. This effect was reinforced by the final sentence of the section

stating that the regents shall grant classified university employees salaries in accord with House Joint Resolution 37 and a limitation on significant expenditures indicated a complete disregard for the regents' constitutional power. Inherent in the regents' power was the realization that the board was the competent body for determining priorities in postsecondary education. An important priority is the hiring and keeping of competent personnel and, therefore, the court declared that the provision denied the regents the power to function effectively by setting its own personnel policies and determining its own priorities and declared the provision unconstitutional.

The impact of this case and the preceding case are of immense importance to the control and governance of postsecondary education. With these rulings the court declared that the role of the legislature had been narrowed from one of defining all powers and duties of the board to one of only those powers which it had been granted in the constitution: appropriations, audit, terms of office of members of the Board of Regents, and assigning additional educational institutions to the control of the boards. The court further added to the board's significance when it declared that it was a constitutional body subject to the legislature's power to appropriate and make public policy for the state.

Privacy and the Public's Right to Know

In the Missoulia v. Board of Regents of Higher Education (1983) the court was faced with several issues: (1) Whether job performance evaluations of university presidents were matters of individual privacy protected by the Montana Constitution; (2) Whether the university presidents' privacy interest in job performance evaluations

exceeded the public's constitutional and statutory right to know; and (3) Was it necessary to close the meetings or are there other methods available for protecting privacy during evaluation meetings.

The board had adopted procedures for the annual and periodic evaluation of university presidents. In 1980, four presidents were evaluated under the annual review procedures and two were evaluated under the periodic review procedures.

The Missoulian, at the board's April, 1980, meeting, requested permission to attend the performance evaluation of University of Montana President Bowers and to review the evaluation document considered by the board. The request was denied on grounds that the demands of individual privacy clearly exceeded the merits of public disclosure. The Missoulian, at the Board's May, 1980, meeting requested access to each evaluation session. The request was denied.

The board noted that during consideration of the evaluation procedures prior to their adoption, a copy of the proposed procedures was circulated to the members of the press, including the Missoulian. No objection to the procedures was made by the Missoulian. Also, during the meetings, no policy decisions or directives were made.

The Missoulian argued that university presidents have no privacy interest in performance evaluations. It contended that presidents can have no reasonable expectation of privacy except in the narrow areas of personal health and family which do not affect job performance. It also argued that the president's job performance is a public matter which

society is unwilling to recognize as private and that the interweaving of public business with the small amount of private matters discussed compelled open evaluations.

The court used a two-part test to determine whether a person had a constitutionally protected privacy interest: whether the person involved had a subjective or actual expectation of privacy and whether society was willing to recognize that expectation as reasonable.

Applying the first part of the test the court found that the board's written evaluation policy stated that the self-evaluation would be confidential and the evaluation meeting would be conducted in "executive session." Therefore, the first part of the test was clearly satisfied.

The more difficult question was whether these actual expectations of privacy were reasonable. The Missoulain contended that much of the discussion concerned matters of public record or public policy in which the presidents could have no privacy interests. The court did not agree. The Missoulain argued further that the status of university presidents so diminished their privacy rights that job performance evaluations were not protected by the privacy clause. The court answered by stating that mere status did not control the determination. University presidents did not waive their constitutional protections by taking office and the sensitive nature of the presidential function also suggested all the more reason to expect confidentiality in presidential evaluations. The court noted that numerous administrative staff, faculty members and other university employees were discussed at these evaluations, the matters discussed were of a sensitive nature, and the

discussions would reasonably be expected to remain confidential. Accordingly, the court held that the university presidents' job performance evaluations were matters of individual privacy protected by Article II, section 10 of the Montana Constitution.

The court determined that the issue of the privacy interest of the presidents and other university personnel in confidential job performance evaluation sessions by the Board of Regents clearly exceeded the merits of public disclosure. The determination was based upon the fact that the Commissioner of Higher Education stated that public disclosure would inhibit candid evaluations from faculty, staff, and other interviewees, discourage presidents from making candid self-evaluations, and would damage the presidents' ability to govern. Additionally, allowing public disclosure of the comments of faculty, staff, and other interviewees whose names or comments were discussed would violate or jeopardize their privacy.

The final issue, alternative methods for protecting individual privacy in evaluation meetings, suggested by the Missouliau, were dismissed as impractical and the court stated that closure of meetings appeared to be the only practical and effective method of conducting job performance evaluations.

Duty of Care to Minor

Graham v. Montana State University (1988) presented the court with the question of the duty of care owed to a minor high school student who was participating in a summer program at the university.

Kimberly Graham, a 16-year old student at Hays-Lodgepole High School, participated in the Minority Apprenticeship Program (MAP) at the university during the summer of 1984. The students in the program lived on-campus in a university dormitory and worked as research assistants to university scientists. The university hired Vaschelle Laforge as a residence hall advisor/supervisor for MAP participants. Her job was to enforce the rules of conduct adopted by the university for program participants, including: "1. Consumption of alcoholic beverages in any form is strictly prohibited by all MAP participants."

Approximately two weeks after the program began Graham obtained LaForge's permission to visit the off-campus residence of Darryl J. Tincher. There was a party in progress at the residence and Graham drank beer. Later that day Graham accepted a ride on Tincher's motorcycle and they proceeded to Big Sky, stopped at a bar and drank a total of four mixed drinks between them. On the return trip to Bozeman, Tincher's motorcycle left the highway and Graham was seriously injured.

Graham's parents argued that the university assumed a duty to protect Kimberly because it took custody of her while she participated in the MAP program. The university was also bound to exercise due care in supervising Kimberly, a duty it undertook when it hosted the MAP program.

The court ruled that when the university undertook to have Kimberly live on its campus and supervise her during the MAP program, it assumed a custodial role similar to that imposed on a high school because Kimberly was a juvenile. Once the university

assumed that role, it was charged with exercising reasonable care in supervising the MAP participants.

The court went on to decide that Kimberly's drinking was not the proximate cause of her injuries and therefore the university was not responsible for her injuries.

Immunity from Suit

Mitchell v. University of Montana (1989) involved the status of the Board of Regents and its immunity from suit. The case arose when Sandy Mitchell filed an action for wrongful discharge against the University, its president, and its controller. She alleged that she was a certified public accountant and was employed by the University beginning in 1978 and that, prior to her termination in 1981, she worked as an accounting supervisor in the Controller's office.

On October 9, 1981, she received a letter of termination from Joseph Cotton, University Controller. She appealed her termination through the University Grievance Committee which found the termination was unwarranted and recommended to the University President and Cotton that she be reinstated.

She was reinstated, but in a new, allegedly difficult department. On February 22, 1983, the defendants terminated her from her employment a second time. Once again she brought a grievance before the committee; however, this time the committee found just cause for the termination.

The university asserted that the 1983 termination was based on just cause and asserted that (1) all the defendants were immune from suit, (2) Montana Law did not

permit judicial review of routine personnel decisions of the Board of Regents and, even if they were subject to review, they were not subject to review by a jury, and (3) the defendants did not breach their obligation to deal with the plaintiff in good faith.

The court discussed only the first issue of immunity. The statute granting immunity stated: "(1) As used in this section: (a) the term 'governmental entity' includes the state, counties, municipalities, and school districts; (b) The term 'legislative body' includes the legislature . . . and any local governmental entity given legislative powers by statute, including school boards.

Defendants argued that the Board of Regents, as the governing body of the University of Montana, was the legislative body of the Montana University System, and that President Bucklew and Cotton were officers and agents of that legislative body. Thus they contended that the statute granted them immunity.

The court stated: "We disagree." It declared that the Board of Regents was not a local governmental entity given legislative powers by statute and thus not a legislative body as contemplated by the language of the act. Additionally, the court quoted Article XI, Section 1 of the 1972 Constitution which stated that local government units included counties and incorporated cities and towns. The court looked at Title 7 of the Montana Code, "Local Governments" and found nowhere in the title where the Board of Regents or the University System was discussed. Rather, the court found the Board of Regents and the Montana University System to be controlled by the provisions of Title 20

"Education." Since the legislature chose not to include the Board of Regents in its definition of a local governmental agency it was subject to suit.

Arbitrarily and Capriciously

The last case presented to the court involving control was Petri v. Montana State University (1993). In June of 1991, the university requested bids for two construction projects, which were to be opened at 1:00 p.m. and 1:30 p.m. on June 20, 1991. The bid openings were conducted by Cecilia Vaniman, an architect for the university. Petri submitted a timely bid for one project, which was opened with the other bids at 1:00 p.m. When it was 1:30 p.m. by the clock in the bid opening room, Vaniman announced the closing of bids for the second project and the sole bid for the project was opened.

Minutes later Petri appeared in the room and attempted to submit a bid for the second project. Vaniman refused to accept the bid and confirmed that the bid room clock was accurate and Petri left the room. Several hours later he returned to Vaniman's office and asked her to reconsider. She again refused and he asked her to return his bid on the first project. She complied with his request.

Petri alleged that the clock in the bidding room was three minutes fast as compared with his watch. He obtained this information by having a retired U.S. West telephone employee verify that the clock in the bid opening room was three minutes and eight seconds fast according to a confidential U.S. West phone number for obtaining the correct time. The university claimed that it could not be held responsible for coordinating its clock with a time source not available to it. In addition, the U.S. West time source had

not been established as more accurate than the watches of the people in the bidding room or the clock in the bidding room.

Petri argued that Vaniman should have exercised her discretionary authority by accepting his bid on the second project rather than by allowing him to withdraw his bid on the first project. The university pointed out that, under federal government procurement regulation, hand-carried late bids were almost always rejected. And, although Montana state government contracts were not subject to the federal regulations, the record clearly reflected the rejection of late bids to be the industry-wide practice. Vaniman and two of her supervisors testified that in hundreds of bid openings they had never accepted a late bid.

The court ruled that treating lateness as a material irregularity in a government bid was not acting arbitrarily and capriciously in rejecting a bid. As an additional factor the court also noted that since Petri was not allowed to submit his bid on the second project, there was no proof that his would have been the lowest bid meeting the requirements for the project. Accordingly, the university had not violated a duty to award state contracts to the lowest possible bidder.

Summary

With the adoption and ratification of the Montana Constitution of 1972 control and governance of postsecondary education entered a new era. The new Constitution brought new challenges to its meaning and interpretation, not the least of which concerned the power and authority of the legislature and the newly created Board of Regents to

administer and supervise the university system. While the court again declared that the Constitution created three branches of government: legislative, executive, and judicial, it did recognize that the regents were a constitutional body in Montana government. And, at the same time, it stated that the power of the legislature, as defined by the new Constitution, had been limited to appropriations, audit, terms of office of members of the board, and assigning additional education institutions to the control of the board.

Following passage of the Constitution of 1972, the court has returned control and supervision of the university system to the board of regents, the status that apparently existed before the court's decision in State v. Brannon (1929) wherein it ruled that the board was part of the executive department and subject to legislative control. During this period the court also upheld the authority of the board to make rules concerning privacy and parking, allowed it to be sued, and determined that while the doctrine of *in loco parentis* did not apply to adult college students it did apply to minor high school students who were participating in on-campus university activities.

CHAPTER 3

FACULTY AND STAFF

Introduction

This chapter presents and analyzes the decisions of the courts which have affected employees of postsecondary education, both faculty and non-faculty. Interestingly, the first cases, all arising during a fifteen-year period, also involved related issues of control and governance.

During the period that the Montana Constitution of 1889 was in effect, the Supreme Court of Montana was presented with only three cases involving postsecondary education personnel issues. Two of these cases involved tenure and the other case involved the power to prescribe duties of university personnel.

It was not until the late 1970's that cases primarily involving personnel issues began to be heard by the court. During these years the court was presented with myriad issues involving faculty and staff. The cases described in this chapter will show the impact of the changes brought about by the transfer of the control and supervision of the University System from the legislature to the Board of Regents and the realignment of control of the community colleges from high school districts to the Board of Regents.

The cases will be presented in two phases: those which occurred under the Montana Constitution of 1889, and those arising under the Montana Constitution of 1972.

Montana Constitution of 1889

Power of Legislature

The first case which involved university personnel issues came before the court in State v. Brannon (1929). The case, discussed in Chapter 2, commenced when the Public Service Commission sought an order to compel R. E. Kirk, as state chemist to comply with the provisions of state law and analyze and test gasoline and kerosene. Kirk was employed as the head or chairman of the Department of Chemistry at the State College of Agriculture and Mechanic Arts in Bozeman and, refused in his request to have the Commission pay the salary of an assistant to conduct the tests, he refused to do any testing of further samples of gasoline and kerosene.

The court, in upholding the provisions of the law, stated that the legislature, vested with the authority to promulgate laws to prescribe or regulate the functions of the university or one of its units, could broaden the functions of the university or any of its units. Accordingly, the legislature could require the head of the Department of Chemistry to perform the additional duty of analyzing samples of gasoline and kerosene as part of his position.

As for the personnel issue the court went on to state that there was no violation of Mr. Kirk's contract with the state. He assumed his position after the law came into effect,

and the law became part of his contract. Since there were no additional duties imposed upon him as the state chemist there was no violation of his contract.

While the authority of the legislature to prescribe the duties of the Board of Education cannot be denied, the question arises as to whether this authority included the power to prescribe the duties of a particular professor. The court appears to have left unanswered the question of whether the legislature was prescribing the powers and duties of the board, which authority it had under the Constitution, or controlling and supervising the university, which authority was granted to the Board of Education.

Faculty and Tenure

The next case which came before the court in which the personnel question was one of several issues was State v. Ayers (1939), discussed in Chapter 2. The personnel issue involved was the status of Professor Keeney after his completion of three years of employment as Librarian and Professor of Library Economy at the university in Missoula.

Professor Keeney's employment began on September 1, 1931, and his initial contract was for one year ending September 1, 1932. Thereafter, he was given annual contracts for the periods ending September 1 of 1933, 1934, 1935, 1936, and 1937. Each of these contracts had regulations concerning tenure printed on the reverse side of the contract, paragraph 2, which stated: "... that reappointment after three years of service shall be deemed a permanent appointment." However, in the contract for the year ending September 1, 1937, this provision had been stricken and on April 6, 1937, Professor

Keeney was notified he would not be offered another contract and his employment would end.

The court discussed the Board of Education's authority to promulgate regulations establishing tenure and their validity. It then turned its attention to the contract for the year ending September 1, 1937, and declared that the board's striking of the regulation covering permanent appointment from the contract had no effect upon Professor Keeney's status. Even though each of the contracts signed by Professor Keeney for the fourth through sixth years was only for one year, after his third year of service, the length of reappointment was immaterial. Reappointment, for one year or for twenty-five, was reappointment. During the first three years of his service, while serving on a temporary appointment, simply without renewing the contract his appointment would have lapsed and become void. However, since he had attained permanent appointment status, his employment automatically continued unless terminated after an investigation and a hearing.

The last case, also discussed in the previous chapter, was State v. Ford (1944). Paul C. Ford began his employment with the University at Missoula in September of 1911. On October 2, 1937, Professor Phillips delivered his written resignation to George F. Simmons, President of Montana State University. On December 12, 1937, Professor Phillips signed a withdrawal of his resignation which was delivered to President Simmons. At its meeting on December 13, 1937, the Board of Education accepted Professor Phillips' resignation.

The court discussed the relationship between the Board of Education, the president of the university, and faculty members and ruled the relationship was that of employer and employee and contractual in nature. It determined Phillips had obtained the status of permanent tenure and that the president acted as the medium of communication between the board and the officers of the university and in so doing the board had authorized professors of the university to deliver communications such as Professor Phillips' resignation to the president for board action. When Phillips had his letter of resignation delivered to Simmons it was as if he had delivered the withdrawal to the board itself and it was the duty of Simmons to call the attention of the board to the withdrawal before it acted on the resignation. A tender of resignation was nothing more than an offer to resign, that is, to terminate the contract of employment. Since it was only an offer, Phillips was entitled to withdraw it at any time before it was accepted by the board. Because of the contractual relationship of the kind involved here, it became effective when accepted. So, an offer by Phillips to terminate his appointment by resignation was effectual only when the resignation was duly accepted by the body whose duty it was to make or terminate the appointment, in this case, the Board of Education.

Summary

Each of the cases involved interrelated issues of control and governance and personnel. The court, in entering its decision on the personnel issues, had to decide whether the governing body which was exercising the power, be it the legislature or the Board of Education, had the authority to promulgate the actions which it attempted to

carry out. In ruling on the authority of the legislature the court emphasized its constitutional authority; when ruling on the authority of the Board of Education it spoke in terms of the powers granted it by the legislature.

It is also interesting to note that the court, in the actions involving the Board of Education, upheld the contentions of the individual professors while in its ruling on the legislature, it upheld the position of the legislature. And, in the actions where the court ruled for the employee, the cases involved tenure and employment rights whereas the case decided against the employee involved the assignment of additional duties as part of his position.

Montana Constitution of 1972

Retirement

The first case brought to the court during this period was State v. State of Montana Teachers' Retirement Board (1977) and involved the Dean of the University of Montana School of Law, Robert E. Sullivan. He had been previously employed as a faculty member at Notre Dame University from September 1947 to September 1954. In 1954 he moved to the University of Montana School of Law faculty and in 1976, while a member of the Montana Teachers' Retirement System, applied for seven years credit in the retirement system on the basis of his Notre Dame teaching service. He tendered his check for back contribution payments as required by the statutes to the board and, at its April 1976 meeting the board refused his application and returned his check. The board

based its denial on the fact that the statute in effect when Dean Sullivan became a member of the Montana Teachers' Retirement System allowed retirement credit only for teaching service in out-of-state public schools, which excluded service in out-of-state private schools, such as Notre Dame.

The court's decision was premised on the basis that retirement benefits in the retirement system were a matter of contract. As such, the terms of each teacher's retirement contract was determined by the terms of the retirement system statute in effect at the time the teacher became a member of the retirement system. The statute in effect at the time Dean Sullivan joined the retirement system provided: "Any teacher who has become employed as a teacher in Montana . . . may receive credit for service for out-of-state teaching employment provided"

While the statute seemed perfectly clear the Board contended that the act had to be read in its entirety and the legislature, in passing the act, intended to benefit only public school teachers. To support their contention the board relied on the act's definition of teacher which stated: "... any teacher in the public elementary and high schools of the state, and the university of Montana." Therefore, the board contended that Dean Sullivan could not meet the statutory definition of "teacher" for his service at Notre Dame University.

The court agreed with the board that the act was enacted to benefit public school teachers and excluded private school teachers. Further, it agreed with the board that no

teacher in a private school could ever meet the definition of "teacher" and qualify for retirement benefits until he became a teacher in a public school of Montana.

However, the court stipulated that once an individual became a Montana public school teacher the section relied upon by Dean Sullivan controlled whether he received credit for out-of-state service. And, to qualify for out-of-state teaching service credit the statute required the applicant to be "Any teacher who has become employed as a teacher in Montana . . ." The court reasoned that the second use of the term "teacher" was used in its statutory sense; that is, one must be employed as a public school teacher in Montana before he was eligible for out-of-state retirement credit in the Montana Teachers' Retirement System.

Continuing, the court stated that the first use of "teacher" in the quoted section could not have been used as it was defined in the statute because to do so would render the section a nullity. If used as defined in the statute before becoming employed as a teacher in Montana, no individual could meet the statutory definition of "teacher" because he was not then a teacher in the state of Montana. If such interpretation were the case, no out-of-state credit could be given to any teacher, public or private, if the statutory definition was applied to the first use of the word "teacher". Accordingly, the court reasoned that the first use of the word "teacher" had to mean the commonly understood definition, that is, one who teaches or instructs others.

The court said that since the legislature did not incorporate a policy section into the act it could only hypothesize as to the legislative intent in enacting the statute granting

out-of-state credit and it reasoned that the statute was enacted to attract qualified teachers from outside the state into the Montana public school system. It went on to state that that purpose would be best served by providing attractive retirement benefits to qualified out-of-state private school and public school teachers alike.

Lastly, the court countered the claim of the board that it had consistently interpreted the statute to disallow credit for out-of-state private school teaching and that the court should respect this interpretation. It stated that even if it was assumed the board had consistently interpreted that statute to disallow credit for private out-of-state teaching service, it was not bound by that interpretation. While it was true that the board's construction of the statute was entitled to consideration by the Court it was likewise the Court's duty to disregard such an administrative determination when it was contrary to the plain meaning of the statute.

Burlington Northern, Inc. v. Flathead County (1978) presented the question of the status of community college teachers and the ability of counties to levy a tax to finance teachers' retirement fund contributions. In setting the levies to finance the budget of Flathead Valley Community College District, the Board of County Commissioners approved an item as the district's teachers' retirement fund contribution. Flathead County assessed Burlington Northern for its share of this levy and it paid one-half of the levy in November 1974 under protest.

After setting forth the proposition that community college districts are subject to the provisions of the teachers' retirement system and that community college teachers are

eligible for the benefits provided under the system the court turned to a discussion of the history of community colleges in the state.

Prior to 1971, community colleges operated under and were governed by the same statutes that governed high school districts. When they were first organized they were under the supervision of the state superintendent of public instruction and in 1965 the legislature placed them under the supervision of the state Board of Education. In 1971, the legislature recodified all laws relating to school districts. Under this recodification the state Board of Education was to retain supervision over community colleges and the community colleges were to be budgeted and financed under high school district budgeting and financial provisions. Later, in the same session, the 1971 legislature made two changes in its earlier recodification of school laws. It placed community colleges under the supervision of the Board of Regents and it replaced the section which provided for financing community college districts under high school budgeting and financing provisions with a new system for financing community college districts separately from the School Foundation Program.

In disposing of the railroad's argument the court stated that the statutes establishing the teachers' retirement system set out the various funds to be maintained by the system. Included in that section was a requirement that community college districts "budget and pay" for the employer's contributions to the pension accumulation fund. Further, the statute required the trustees of a community college district to establish a retirement fund, to calculate contributions to the funds, to adopt a retirement fund budget,

and to pay employer contributions. Accordingly, the county commissioners were authorized to levy a special tax to finance the teachers' retirement fund contributions of community college districts.

Community College Tenure

Sibert v. Community College of Flathead County (1978) was the court's first opportunity to decide the authority to grant tenure within a community college. Victor J. Sibert was hired in July 1969 as the Manager of Services by the Community College District of Flathead County. It was an administrative position and Sibert was not required to perform any teaching duties nor did the position require a teaching certificate.

All of the annual contracts under which Sibert was employed were identical except for salary terms and length of contract, either eleven or twelve months and each contract contained the provision that it was subject to the regulations and policies of the board.

During the term of his employment the Faculty Handbook provided:

All full-time professional faculty (defined in this document as teaching faculty and professional staff) except the president shall become eligible to be placed on continuing contract status. Beginning with the appointment, the probationary period shall not exceed three years, at which time he will be placed on tenure or be notified that he will not be appointed for the fifth.

In March 1976 the community college discontinued the position of Manager of Services and terminated Sibert. Sibert argued that he should have been granted tenure status.

The court looked at the statute defining the powers of school districts to grant tenure: "Whenever a teacher . . . in a position requiring teacher certification . . ." and its

uniqueness in public contracts of employment. Declaring its basis to be academic freedom, that is, freedom within the law to teach the truth and to stimulate the thinking of free men in a society without fear of reprisal, it went on to state that its scope assures, with certain exceptions, both continuing employment and economic security. It continued that society had long ago determined the desirability of teacher tenure and Montana had enacted legislation to implement it as public policy. The court went on to state that there was no public need for such assurances for other school district employees and the statute stated such when it said: "The trustees of any district shall have the power and it shall be its duty: 1) to employ and dismiss administrative personnel"

The district trustee's granting of tenure, in the absence of a statute conferring authority upon them to do so, would be considered ultra vires, that is, beyond or without authority. The school district was a public corporation with limited powers, only able to exercise those powers which it had been granted by law and implied in the exercise of those powers expressly granted. Accordingly, a community college could not grant continuing contract status (tenure) except to those persons specifically authorized to receive such status. Since Sibert was not a teacher and did not hold a position for which teacher certification was required he could not be granted such status.

Wrongful Termination

Ford v. The University of Montana (1979) involved an action brought by Bonnie Ford against her employer, the University of Montana, and bargaining unit, Missoula Typographical union No. 277. She claimed she was wrongfully assigned to a night shift

by the union and wrongly terminated from employment by the university when she refused to work the night shift.

Ford was hired as an apprentice by the university to work in the print shop on November 1, 1972, and on November 13, 1972, Al Devore, who had been a journeyman printer since 1948, was hired. When she was hired the union bylaws granted her no "priority standing", that is, no seniority until completion of her training and attainment of journeyman status. However, on January 1, 1973, the bylaws were amended so that apprentices were granted priority standing at the beginning of their second year of apprenticeship and on November 1, 1973, she commenced her second year of apprenticeship and attained priority status. Devore, a journeyman, had priority status as of November 13, 1972, the date of his hiring.

Under an agreement entered into between the university and the union in October 1975, premium pay for night shift work was eliminated and all jobs were declared open to be reassigned in order of choice by seniority. On November 1, 1975, Ford attained journeyman status and, on the same day, the union posted the priority standings listing Devore as senior to Ford. Both requested day positions and the last day job went to Devore and Ford was placed on the night shift.

After beginning work on the night shift she began suffering from general malaise, insomnia and depression and her doctor advised her that her condition would not improve unless she was placed on the day shift or found another position where she could work daytime hours.

On March 2, 1977, she filed a grievance with the union claiming she had been hired before Devore and under the new agreement she should have been awarded the last day shift job. At a special meeting of the union to consider her grievance, the members concluded that Devore had greater seniority than Ford, and her claim was barred because she had not submitted it within twenty days from the occurrence of the event giving rise to the grievance.

On February 22, 1977, Ford stopped going to work and requested sick leave. On March 23, 1977, the manager of the print shop advised her by letter that her absence was causing a serious personnel shortage and that if she did not return to work by April 4, 1977, she would be terminated and replaced. She did not return and was terminated on April 4, 1977.

Ford did not allege any fraud or bad faith on the part of the union or that the vote of the union membership, which determined that her grievance was without merit, was in any manner improper, dishonest, or the product of bias or collusion. Since none of these elements were proved by evidence, the court ruled that the mere fact that she disagreed with the decision of the union was not a sufficient basis for finding a breach of the duty of fair representation by the union.

The court then considered her claim against the university. Ford claimed that she stayed away from work on the advice of her doctor and that her absence was therefore "sick leave." However, it was shown she had exhausted her sick leave and her absence from work had been unauthorized. There was a provision in the collective bargaining

agreement that if an employee had exhausted their sick leave they could charge the absence to vacation or leave without pay, whichever they preferred. However, this provision had to be approved by the employer, and Ford neither sought nor was given either. Further, the court found she was terminated only after the university had complied with the termination requirements of the agreement and its termination of her was supported by the evidence and correct.

College and University Tenure

Keiser v. State Board of Regents of Higher Education (1981) was the first case discussing tenure rights for professionals in the University System. Marjorie B. Keiser brought an action contending that the "continuous tenure" term of her last contract as Director of the School of Home Economics at Montana State University entitled her to receive the salary and the terms of that last contract, even though she was no longer employed as the Director.

She started her employment with the university on January 15, 1968, as a "Professor and Director" of the School of Home Economics. Her appointment was for the remainder of the academic year and her tenure status was described on her contract as "annual" with a salary of \$18,000. She signed annual contracts for employment for the 1968-69 and 1969-70 academic years under the same tenure status. During the 1969-70 academic year she was recommended for "continuous tenure" with a rank of full professor.

She signed a contract for academic years 1970-71, 1971-72, 1972-73, 1973-74, and 1974-75. In each year she was employed as director, her rank was professor, and her

tenure status was described as "Permanent". In December 1974, she reported that her administrative duties and research could not be carried out during the ten-month academic term and suggested that she be given a twelve-month contract.

For the next year she was given a contract for the fiscal year extending from July 1, 1975, to June 30, 1976, in which she was employed as the school director, held the rank of professor, and her tenure status was "continuous", with a salary of \$27,500, of which \$2,000 was denominated to be "for directorship". Again, in fiscal year 1976-77, she was given the same contract with the same provisions.

In fiscal year 1977-78 she entered into her last contract as Director of the School of Home Economics. The contract stated that she held the rank of professor, her tenure status was "continuous", and her salary was \$30,000 with no allocation of her salary for the directorship.

In 1978, Dr. Tietz, as President of Montana State University, reorganized the administrative hierarchy in such a manner that the directorship of home economics was no longer open to Keiser and she was offered a ten-month contract for academic year 1978-79, as a Professor of Home Economics, tenure status as "continuous", and a salary of \$25,000. She signed the contract under protest stating the contract offered was a violation of her rights as a tenured faculty member with a salary of \$30,000 for fiscal year 1978-79.

The court noted the provisions of the tenure regulations which were part of Keiser's contract wherein it was stated:

5. Continuous Tenure Appointments. The appointment of a member of the professional staff beginning his or her eighth year of service constitute an award of continuous tenure status The appointment of a member of the professional staff beginning his or her fifth year or its equivalent of full-time service at the institution in the rank of associate professor or of professor constitutes an award of continuous service.

Once the professional staff member qualifies for and is granted tenure, his professional faculty contract of employment, and his tenure, shall be with the appropriate institution within the Montana University System and not with the Montana University System.

The court noted that the term "continuous tenure" was not defined in any of Keiser's contracts and that the term was the core of the case. It then discussed the provisions of the 1977-78 contract and stated that nothing contained in the contract reflected anything but that Keiser's tenure, with rank of professor, was for a \$30,000 salary, and for a fiscal year. And, unlike the previous contracts, there was no allocation of salary for her administrative duties in the contract.

The court entered into a discussion of tenure stating that there was no constitutional or statutory right to tenure for professionals in the University System in Montana. Tenure rights, if they existed, had to be found in the contracts of employment between the University System and the professional. At Montana State University each professional contract was negotiated individually, and, therefore, the court could not refer to the contracts of other professionals for guidance as to what Montana State University and Keiser meant when they negotiated and executed her 1977-78 employment contract.

Tenure, the court continued, was the fact, manner, or means of holding possession or control of that which was one's own and that a common characteristic of all employment tenure agreements was that the institution made a general commitment for

employment which was generally expected to continue, with the employee's consent, until his death or retirement. Tenure was the status which protected a professional from dismissal, except for incompetence or serious misconduct, and was a means to certain ends; specifically, freedom of teaching and research and of extramural activities, and a sufficient degree of economic security to make the profession attractive to men and women of ability. Hence, freedom and economic security were indispensable to the success of an institution in fulfilling its obligations to its students and to society.

If academic freedom and economic security were the goals of tenure the court reasoned that it had to look at what the parties had in mind when they entered into the 1977-78 employment contract. The essential elements of that contract which were subject to tenure were: (1) the professional rank, (2) the salary, and (3) the number of months contracted for. The court stated that tenure included both salary and the fiscal year term by the fact that the university drew up the contract and it was completely within its power to describe the tenure in other terms.

Since it was within the university's power to specify any deviation from the previous year, the terms of the 1977-78 contract were construed to be in favor of the professional and the court determined that her contract for 1978-79 was the fiscal year for her full salary of \$30,000.

Justice Harrison dissented and stated he could find no authority indicating that a concept of nonstatutory tenure provided a guarantee of a particular salary or a term of contract. On the contrary, he felt the authorities indicated a general consensus that while

there was not precise definition of the non-statutory tenure concept, the rights accorded by the latter were essentially procedural, it assured against a refusal to reappoint the faculty unless and until certain "due process" procedures were adhered to.

He referred to Sibert v. Community College of Flathead County (1978) above, where the court denied faculty tenure to an administrative position. Although the case dealt with the interpretation and application of statutory language covering teacher tenure he believed the reasoning which the court used in reaching its decision was applicable to this case. He stated that faculty tenure at Montana State University was not an inherent employment right, nor was it one which had been created or defined by statute. It was a right which resulted, if at all, from an express grant of the governing body of the Montana University System, which was the board of regents which received its powers from the Montana Constitution. He reasoned that the court had to look at the actions and enactments of the governing body of the University System to find if it had made such a grant.

The rules of the Board of Regents, which were printed on Keiser's contract provided in paragraph 7, "Transfer of Titles" that:

Transfer of Titles. The offices and titles of deans, assistant deans, directors, heads of department, and chairmen may be transferred by the president of the institution, *in his discretion*, from one member of the professional staff to another as the interests of the institution may require. (Emphasis added.)

Dr. Keiser held the office of Director of the School of Home Economics at the "discretion" of the president of Montana State University and she, like other administrators, did not and could not acquire tenure to the position, salary, contract term

or any other privilege of that office. And, he concluded, by her contract, when she ceased being employed as a director, with the director's salary and term, she once again became a tenured professor entitled to the salary accompanying that position.

The next tenure issue was presented in Akhtar v. Van de Wetering (1982). M. Iqbal Akhtar was an Assistant Professor in the Department of Economics at Eastern Montana College where he had been employed since 1975. He applied for tenure according to the faculty contract in October 1978, and submitted his application to the Unit, Rank, and Tenure Committee. After consideration, the committee made a positive recommendation to the College Rank and Tenure Committee. In January 1979, Robert McRae, Dean of the Liberal Arts School, forwarded an unfavorable recommendation regarding Dr. Akhtar's tenure application to this committee with a copy to Larry W. Jones, Academic Vice-President.

The College Rank and Tenure Committee sent a favorable recommendation to the academic vice-president in March 1979, who forwarded Akhtar's application with his negative recommendation to President John Van de Wetering that same month. On April 17, 1979, the president informed Akhtar of his decision not to award tenure.

In May 1979, the president received a letter from Professor Gaghan, Chairman of the Department of Social Sciences, on behalf of the department, asking the president to reconsider his decision and protesting the use of the student evaluation instrument. The president requested a reevaluation of Akhtar's application excluding the student evaluation test from consideration. Later that month, Dean McRae submitted his reevaluation to the

vice-president, which remained unfavorable. The vice-president submitted his reevaluation to the president reaffirming his negative recommendation. The president then reaffirmed his denial of tenure to Akhtar.

Akhtar filed suit claiming violation of Title IV of the Civil Rights Act of 1964, and equal protection rights of Article II, Section 4, of the Constitution of Montana and the Fourteenth Amendment to the United States Constitution.

Akhtar claimed the denial of his tenure request violated a liberty interest by imposing a stigma on him which impaired his freedom to obtain other employment. The court dismissed this claim stating the failure to receive tenure did not place such a stigma on him as to deprive him of a liberty interest.

He also argued that having taught the requisite number of years and obtained the academic rank of assistant professor, he had satisfied the objective requirements for tenure at Eastern Montana College and thereby had sufficient entitlement to tenure to require due process protections. The court looked at the policies of Eastern Montana College which required faculty members applying for tenure to present evidence showing excellence in teaching, research, and public service and found that a protected right to tenure did not vest with Akhtar's eligibility alone. It stated that his satisfaction of the quantitative requirements simply entitled him to consideration for tenure but did not, on its own, establish an entitlement sufficient to constitute a protected property interest.

Akhtar also cited as sources for his property right interest the 1975-1977 faculty contract, the codification of rank and tenure matters and the traditional and promulgated

policy of the institution. The faculty contract set out the rules and criteria for tenure; the codification clarified the contract tenure provisions; and the policy to which he referred was the "Final Report on Promotion and Tenure for 1977-78" issued to the faculty by President Van de Wetering. Akhtar argued that with these policies and procedures he had acquired a protected property interest in tenure.

In answer to these contentions the court stated that an employee handbook distributed after an employee was hired did not become part of that employee's employment contract. Additionally, the codification on which Akhtar relied was drafted by the Rank and Tenure Committee specifically to clarify both the faculty contract and the handbook and was not a part of the contract.

Akhtar's contention that the president's statement was a "published policy" and, therefore, part of his contract included a statement of the basis upon which the president reviewed promotion and tenure cases that year. He acknowledged the importance of the recommendation of the candidate's department colleagues and stated: "It would be inappropriate for me to interfere with that recommendation for other than procedural reasons except under extraordinary circumstances." The court found the president's action in the denial of Akhtar's tenure not to be in contradiction to his statement. He was faced with inconsistent recommendations and a tie vote that necessitated his final determination. Given this situation, the president asked both the dean and vice-president to reevaluate Dr. Akhtar's application excluding the student evaluation and their recommendations remained the same.

The court differentiated Keiser v. State Board of Regents of Higher Education (1981) from this case. Dr. Keiser had been granted tenure and her property interest in that tenure had clearly vested and the question to be resolved was what tenure consisted of. In the instant case the question was an entirely different one: whether a protected right had vested.

Akhtar claimed he was discriminated against because he was treated differently from other tenure candidates since a different standard of excellence was applied to his tenure evaluation than to others. The court set forth the Board of Regents' general control and supervision of the Montana University System including the duty to appoint both president and faculty for each institution. In turn, the president of each institution was charged with the control and management of that unit. One of the procedures maintained under this authority was the tenure system. Therefore, actions by the president and the Board of Regents regarding tenure were state actions and a discriminatory application of the tenure process would be an unconstitutional denial of equal protection.

Looking at Eastern Montana College's tenure process the court noted that the evaluation of candidates was made in three basic areas: teaching, research, and public service. Publication was one of a number of factors considered in the process. Dean McRae testified that he evaluated all eight tenure candidates using the basic criteria and developed a rank order of candidates in which Dr. Akhtar ranked eighth.

The court continued that the state had a strong interest in maintaining the quality and academic freedom of its postsecondary education system and the tenure process

served that dual purpose. By evaluating a number of areas of performance a broad basis of determination was provided and, therefore, absent an arbitrary or discriminatory treatment of Dr. Akhtar's tenure application, it could find no denial of equal protection.

Justice Morrison, joined by Justice Shea, dissented and said that President Van de Wetering issued a memorandum containing tenure policy on May 23, 1977, stating:

By long tradition, the primary responsibility for tenure decisions must rest with one's colleagues in his department for they are best qualified to judge the probationary faculty member and to assess his role in the plans for the future of the department It would be inappropriate for me to interfere with the recommendation for other than procedural reasons *except under extraordinary circumstances*. (Emphasis added.)

Akhtar was denied tenure although he received a favorable recommendation from the college "rank and tenure committee." The record in the case was devoid of evidence which would constitute extraordinary circumstances and under the policy articulated by the president the only basis for overriding the rank and tenure committee's recommendation was extraordinary circumstances. Therefore, Akhtar reasoned the court should have ruled in his favor and granted tenure.

A month later the court was again presented with another case involving tenure from Eastern Montana College in Leland v. Heywood (1982). James Leland was hired by Eastern Montana College in 1966 as a non-tenured philosophy and humanities professor. From 1968 to 1970 he took a leave of absence, without pay, to work on his doctorate. He returned to Eastern and was promoted to assistant professor in 1970.

In February, 1973, Leland applied to the College Rank and Tenure Committee for promotion to associate professor, which would entitle him to tenure. The committee

informed him he would not be recommended for the promotion because it had been made aware he was to be recommended for a "terminal contract" at the April 1973, meeting of the Board of Regents. A "terminal contract" was one in which the professor was hired to teach for another school year, and then be terminated.

On the day following his application Leland was notified by the Chairman of the Division of Humanities that he had recommended to the Dean of the College of Liberal Arts that Leland not be reappointed as an assistant professor, but instead be offered a "terminal contract" for the 1973-74 school year. The dean of the college informed Leland he supported the recommendation because Leland allegedly had been making unacceptable advances toward female students, had been conducting classes while under the influence of alcohol, and had taken one of his classes to the Student Union.

Leland then wrote Professor Fargo, President of Eastern Montana College's Faculty Senate, requesting a hearing and a written statement of the allegations of misconduct which led to his termination. On March 6, 1973, the requests were presented to the Faculty Senate, and the next day Leland wrote a letter to State Representative Lockrem criticizing the funding of the science building at Eastern and the number of Eastern's administrative personnel. On April 11, 1973, Leland was notified that the Board of Regents had approved the offer of a "terminal contract" to him.

Leland requested, but was denied, a meeting with the Board of Regents. He received the contract under the normal procedure requiring him to sign and return it within twenty-one days. On April 27, 1973, his attorney requested that the Board of Regents

extend the time in which Leland could accept the contract. However, the board demanded that he immediately sign and return the contract, or it would consider the contract as voided and terminate his employment on June 30, 1973. Later he was told that the board, at its May 21, 1973, meeting, had terminated his employment effective June 30, 1973, because he had not signed and returned the terminal contract for 1973-74.

The opinion of the court, delivered by Justice Shea, who had dissented in the court's decision in Akhtar v. Van de Wetering (1982) above, rejected Leland's contention that he believed the Board of Regents had waived the twenty-one day time limit for accepting the contract in its letter of May 7, 1973. The Regents' letter unequivocally stated that the contract be signed and submitted to the President of Eastern Montana College immediately upon receipt or his contract would be considered as voided. Additionally, the letter from his attorney did not show that Leland had accepted the offered contract and requested that the board extend the time in which Leland could accept the contract.

Leland also argued that President Heywood's Address to the Faculty at the beginning of the 1972-73 academic year supplemented the existing rules and regulations on tenure. The address was given several months after Leland had signed his contract for the 1972-73 academic year and in it President Heywood stated that he intended to request that the Board of Regents change the existing tenure system to the system advocated by the American Association of University Professors. The court, quoting Brown v. State Board of Education (1963), discussed in Chapter 2, stated that college administrators have

no authority to contract with faculty members on terms different than those approved by the Board of Regents and therefore Leland could not establish that the written tenure provisions of his contract were supplemented by any oral representations of Eastern's administration.

Leland claimed he was entitled to tenure and that his dismissal for cause was based on President Heywood's oral representations. The court dismissed that claim by noting Leland did not accept the offered contract and he was not entitled to rely on President Heywood's statements. It continued that, by law, a tenured teacher cannot be discharged except for cause upon written charges and pursuant to certain procedures and a non-tenured teacher was protected to some extent during his one-year term. But the rules provided no real protection for a non-tenured teacher who simply was not re-employed for the next year. Since Leland was not tenured he was not removed for cause; rather, he was a non-tenured teacher who was not retained.

Libel and Slander

Small v. McRae (1982) was instituted as a result of the termination of Professor Aaron Small as Acting Chairman of the English Department at Eastern Montana College. In October 1980, Robert McRae, Dean of the School of Liberal Arts, terminated Small's chairmanship and addressed and delivered a memorandum to him as a way of notifying him and the other departments of the change, as provided for in the collective bargaining agreement. The termination resulted in the loss of a stipend of \$900 per academic year and \$150 per summer session, but did not affect Small's academic rank, tenure, base

salary, or membership in the bargaining unit. Instead of following the grievance procedure in the bargaining agreement Small filed a libel action against Dean McRae.

Small contended that he was deprived of constitutional due process because the memorandum which led to his dismissal as chairman placed in issue his good name, reputation, honor and integrity without giving him notice or opportunity to be heard. The court concluded that the governmental interest in orderly administration necessary to prevent disruption of the educational process was sufficient to allow summary dismissal of department chairmen when the requirements of due process are accommodated through the grievance and arbitration procedure contained in the collective bargaining agreement. It reasoned that the procedures gave aggrieved faculty members the opportunity to challenge any alleged breach, misinterpretation or improper application of the terms of the collective bargaining agreement. And, although they were not exhausted by Small, they were available and, as such, afforded him an opportunity to be heard at a meaningful time and in a meaningful manner.

In ruling on Small's claim of denial of first amendment privileges, the court looked at the memorandum of Dean McRae and noted that it gave as reasons for Small's loss of title his inadequate leadership, his failure to bring a polarized department into a smoother functioning unit, the fact that acrimony had increased within the department, his failure to effectively and conscientiously handle the administrative detail associated with the office, and his failure to properly coordinate the newly instituted mass placement process for freshman composition.

The provision in the collective bargaining agreement which allowed the dean to remove department chairmen, and implemented procedures for the selection of a new chairman was authorized under state law. Further, the collective bargaining agreement provided for the procedure to transfer title to a new chairman of a unit. Therefore, the court concluded that the statutory authority conferred upon the Board of Regents as well as the collective bargaining agreement giving the dean power to remove a departmental chairperson, made the memorandum in question an official duty subject to absolute privilege under the statute and therefore, he was immune from prosecution for libel for a publication made in proper discharge of an official duty.

It is interesting to compare this case with that of Keiser v. State Board of Regents of Higher Education (1981). In both cases the petitioner lost the chairmanship of a department: Keiser that of Home Economics and Small that of English. Also, both lost compensation. However, Keiser's action was for the restoration of her salary while Small's was for damages for libel. It would appear that an action by Small for continuance of his stipend of \$900 per academic year and \$150 per summer session would have been accepted by the court with the same outcome as that enjoyed by Dr. Keiser in her suit. However, having chosen to sue for damages Small was unable to prevail in his action. Another aspect of the cases which presented itself was that of the status of the faculty at each institution. Faculty at Keiser's campus, Montana State University, did not have a collective bargaining agreement as did the professional employees at Eastern Montana College. And, as noted by the court, the bargaining agreement contained a grievance and

arbitration procedure which Small could have availed himself of but which was unavailable to professors at Montana State University.

State Employees

Rippey v. Board of Trustees of Flathead Valley Community College (1984)

involved an instructor at the community college whose employment was terminated at the end of the 1982-83 academic year as part of a retrenchment plan. He requested payment for the unused sick leave he had accumulated. The college refused claiming he was a school teacher under Montana law and, as such, was exempted from the state's sick leave plan. The applicable statutes which provided for the entitlement to sick leave set forth the entitlement of employees to compensation for accumulated sick leave and defined state employees to exclude schoolteachers for this purpose.

Under Montana statutes the community college legal status was a hybrid. It was neither a high school nor an admitted part of the University System; however, it was answerable to the Board of Regents. The legislature had put community colleges under the supervision of the Board of Regents; the course of instruction, tuition and fees had to be approved by the Board of Regents; part of the funding came from the state general appropriations; and the operating budget had to be submitted to the Board of Regents for approval. The court considered all of these provisions as indicative that community college staff members were not in a strict legal sense schoolteachers since they were ultimately answerable to the Board of Regents. The court ruled that the meaning of schoolteachers did not encompass postsecondary education faculty, including a

community college faculty member and, therefore, community college educational staff members were state employees for purposes of entitlement to payment for accumulated sick leave.

Classification was the issue which confronted the court in Walch v. University of Montana (1986). Richard Walch was hired in May 1978, as a Maintenance Superintendent V, Grade 16, by the University of Montana. In January 1982, the university reorganized the Physical Plant and his position was split into two separate positions. As a result, Walch's classification was changed to Maintenance Superintendent IV, Grade 15. However, his salary remained exactly the same because the university had been granted a pay plan exception which allowed it to use a formula to maintain a differential between the craft salaries and the salaries of the management staff in the Physical Plant. Walch appealed his reclassification to the Board of Personnel Appeals.

After a hearing the board ordered that Walch's classification be changed to Maintenance Services Manager I, grade 16, but that he continue to be paid in accordance with the formula designed for the management staff in the University of Montana's Physical Plant.

The university continued to pay Walch under the formula which it had been paying him before the order of the board. In March 1984, Walch requested an interpretation of the order from the board in which he contended that the order required the university to pay him in accordance with the pay matrix for state employees under the Grade 16 level, rather than the formula set up for the management staff of the university. The Board

determined that it meant for him to be paid under the pay plan exception formula, not in accordance with the pay matrix for state employees. Walch then brought his action in court.

The court stated that the language of the order, although somewhat ambiguous, indicated that the university should pay Walch in accordance with the pay plan exception formula designed for the management staff. In answer to Walch's contention that the order required adjustments in his pay the court continued that what the order required were adjustments in his classification title and pay grade level. The court referenced the order where it was stated that Walch could be aggrieved by a reclassification of his position even though his pay was not decreased. It went on to state that classification and grade level assignment were major components of the classification system and changes in these components, even if they did not result in a change in salary, constituted potential bases for appeal. And, there were no guarantees of permanence for either the pay plan exception or the formula by which Walch's pay was calculated. Should either of these variables change, Walch's classification title and grade level would resume being of primary importance in the determination of his salary.

The terms of a professor's contract were at issue in Julian v. Montana State University (1987). Gordon Julian was a Professor of Chemistry at Montana State University when he entered into an agreement dated August 9, 1984, with the university concerning his early retirement. The agreement provided him summer appointment for the three years preceding his retirement on June 30, 1987; appointed him chairman of the

search committee to fill his vacancy; and assured him, subject to funding and need, that he would be hired on a "one-third, temporary" basis after his retirement.

Julian was given summer appointments for 1984 and 1985 and was paid. He received his appointment for the summer of 1986 and in July 1986, he was requested to write a draft resignation letter as required by university policy. The draft was substantially different than the agreement of August 1984, and he was asked to resubmit a letter that would better reflect the terms of the August 1984 agreement. In reply, Julian requested clarification of the university policy and was advised that he was not guaranteed post-retirement employment, the Chemistry Department had been hiring temporary instructors every year and the department would make every effort to see that he had at least three years of part-time, post-retirement employment.

During this period, the university was concerned that if it paid Julian for July 1986, it would be considered as accepting the terms of the draft letter sent by him so it stopped payment of his July pay. Julian made no effort to meet or otherwise contact the university and instead filed his lawsuit alleging violation of the Montana Wage Protection Act.

The court dismissed his claim ruling that the summer appointments were intended by both parties to be consideration in support of Julian's promise to retire early. The head of the Chemistry Department testified that the university did not expect any services from him outside those normally required of a tenured professor, nor was he given any. All that was expected of him was his retirement.

The provisions of the Wage Protection Act were not applicable because no labor was performed by Julian. His summer appointments were not ordinary contracts for services within the meaning of the act but were the consideration supporting the retirement contract and could not be focused upon to the exclusion of the rest of the contract.

Julian contended that the university breached the contract when they did not pay him for his 1986 summer appointment and, because their actions touched the fundamental purpose of the contract, they had committed a material breach. The court ruled that the facts showed that Julian returned a resignation letter containing terms substantially different from those in the 1984 agreement and the university then requested a letter that better reflected the August 1984 language and put a hold on Julian's third contract installment, and that the university was justified in withholding Julian's pay until they could be assured he would comply with the 1984 agreement.

Another contract dispute came before the court in Sperry v. Montana State University (1989). Ray Sperry was employed at Montana State University from 1965 through March 31, 1986, retiring as Director of Continuing Education. When he began working the terms of his employment were governed by a written contract known as the "Montana 12 Contract" which allowed employees to take an eighth quarter leave with pay for research, travel or any other reason approved by the Board of Regents. Employees were required to work seven quarters before eligibility for eighth quarter leave accrued and they were also allowed to accumulate two quarters, a total of six months.

In 1967, the Board of Regents ordered the university to terminate the Montana 12 Contract and convert to a one-year contract and Sperry's contract was so converted. His annual salary was increased by \$1000, which constituted a thirteen percent increase in pay and he signed an agreement accepting the change of contracts stating that all accumulated eighth quarter leave had been taken, waiving his claim to any future eighth quarter leave.

From 1967 until his retirement in 1986, Sperry signed nineteen annual contracts with the university, none of which mentioned any conversion compensation due which would have arisen from the replacement of the Montana 12 Contracts with the annual contracts as compensation for additional time worked without leave. In 1983, he wrote a letter to Dr. Malone, Dean of the College of Graduate Studies, to discuss early retirement and submitting a schedule requesting a salary adjustment for his last three years. The university rejected his offer: he submitted another request and schedule stating that, if a satisfactory agreement was reached, he would offer a statement agreeing not to pursue a past wage grievance.

After an agreement was reached, Sperry wrote a formal resignation letter on February 9, 1984, to be effective as of March 31, 1986. One year after the agreement on the terms of retirement, Sperry sought conversion compensation from the university in a letter to Vice President Knapp contending that at the time of the 1967 conversion, he was offered a twenty-three percent salary increase, received a thirteen percent increase, and ten percent was still due and owing as conversion compensation.

Making short shift of his contention the court ruled that Sperry's signing of nineteen, one-year contracts and cashing paychecks over the past nineteen years without complaint of no conversion compensation, in combination with his acceptance of the retirement agreement and his promise not to pursue a past wage grievance constituted a complete waiver and release.

Sperry contended that his direct supervisor indicated his increase in pay did not include the conversion compensation, but promised he would receive the additional salary increase at a later date. Montana State University contended that Sperry received a thirteen percent increase, which included his conversion compensation, and that there was no promise by anyone to pay him further increases. The only person, other than Sperry, who would have known of the alleged oral contract was his direct supervisor, Robert McCall, who died in 1971. Sperry did not bring the compensation issue to the attention of anyone at the University until his 1985 letter to Dr. Malone, long after McCall's death and after he had completed the retirement agreement. Applying the equitable doctrine of laches, which exists when there has been an unexplainable delay of such duration or character as to render the enforcement of an asserted right inequitable, the court agreed with the university that Sperry's claim was barred.

Immunity to Suit

Stansbury v. Lin (1992) involved a slander action against a professor by a student. In March 1990, Fred Stansbury appeared as a student for the first day of a sociology class taught by Professor Ruey Lin-Lin at Eastern Montana College. Stansbury alleged that Lin

demanded he leave the classroom and that, upon his departure from the classroom, Lin slandered him in a thirty-minute tirade to the remaining students in the class.

In January 1991, Stansbury's attorney, on behalf of Stansbury, signed a settlement agreement in which Stansbury released Eastern Montana College and its officers, employees and agents from any liability for any alleged slander of Stansbury by Professor Lin which contained the following sentence:

b. Nothing herein precludes Fred Stansbury from pursuing [sic] legal recourse against Professor Ruey Lin-Lin for actions of his outside the course and scope of employment authority of Eastern Montana College or the Montana University System.

Following the execution of the settlement agreement, and the receipt of the settlement provided in the agreement, Stansbury filed a slander complaint against Professor Lin. In defense Lin argued that since Stansbury had settled the slander action with the college, he was statutorily barred by Montana law from suing Lin as an individual. Lin argued further that he was individually immune from suit and he also submitted an affidavit of the chief legal counsel to the Commissioner of Higher Education, which acknowledged that under the authority of law barring suit against Lin as an individual, Lin was acting within the scope and duty of his employment at the time of the alleged slander. Stansbury contended that Lin was acting outside the course and scope of his employment at the time of the alleged slander and that the state had previously acknowledged that fact.

The court discussed the status of Eastern Montana College and determined it was a college run by the state of Montana and, therefore, was a governmental entity as defined

in the Montana statutes. It then considered Section 5 of the statute covering governmental immunization, defense, and indemnification of employees which stated:

Recovery against a governmental entity under the provisions of parts 1 through 3 of this chapter constitutes a complete bar to any action or recovery of damages by the claimant, by reason of the same subject matter, against the employee whose negligence or wrongful act, error, or omission or other actionable conduct gave rise to the claim. In any such action against a governmental entity, the employee whose conduct gave rise to the suit is immune from liability by reasons of the same subject matter if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of the employee's employment, unless the claim constitutes an exclusion provided in (b) through (d) of subsection (6).

The court concluded that Stansbury had already obtained recovery, in the form of a settlement from Eastern Montana College, for the same subject matter as his suit against Lin and, therefore, the statute was a complete bar to his present lawsuit.

Stansbury's argument that the provision in the settlement agreement affirming his right to sue Lin personally was interpreted by the court as only precluding the settlement agreement from cutting off Stansbury's right to sue Lin and did not cancel the statutory bar to this action.

As to the question of Lin's actions being within the course and scope of his employment, the court stated that it was immaterial because the second sentence of Section 5, quoted above, applied. This action, which was filed after Stansbury settled with Eastern Montana College, was not then and never has been an action against a governmental entity and therefore the second sentence did not apply.

Justice Trieweiler dissented. He stated the evidence showed that Lin, after ordering Stansbury to leave the classroom, had referred to him as stupid and lazy.

Stansbury also filed an affidavit stating that Lin had told the rest of the students in the class that he was ignorant, obnoxious, incapable of learning, and no good as a person or a student.

The opinion continued that the court had previously held that where intentional torts were not committed for the benefit of the employer, they were outside the course of employment as a matter of law and the employer could not be held vicariously liable for the consequences of such an act. In this case, the defamatory conduct of Lin was outside the course of his employment as a matter of law. Therefore, the court, ignoring all rules of statutory construction, had simply concluded that, based on the statute, recovery could not be had against an employee of the State based on the same subject matter for which recovery was had against the State.

Good Faith and Fair Dealing

Farris v. Hutchinson (1992) was the only case which involved the Commissioner of Higher Education. In April 1989, Carol Farris was hired as a gender equity coordinator by the Commissioner of Higher Education for a federally mandated affirmative action program for the vocational technical education system in Montana. Throughout the course of her employment she signed "three professional employment contracts" prepared by the Montana University System, each lasting one year and providing for non-renewal with adequate notice. The last contract was effective between July 1, 1990, and June 30, 1991, and on February 5, 1991, the commissioner notified Farris that her contract would not be renewed. This suit followed.

Farris contended that, if she could show objective manifestations of job security beyond the term contract, she could maintain a breach of the implied covenant of good faith and fair dealing. She argued that prior to being hired she was informed that the commissioner viewed her position as a permanent position and that the signing of the yearly "term" contracts was merely a formality. However, the statutes on contracts containing the Parol Evidence Rule stated: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

In this case the consideration of oral negotiations between the commissioner and Farris prior to the signing of the contract was barred by the Parol Evidence Rule. The term contracts embodied the legal agreement between Farris and the commissioner. She signed three term contracts each for one year and was aware that upon adequate notice the contracts could be non-renewed.

Farris also contended that the personnel policies and regulations allowed the commissioner to deprive her of the remedies available under the Wrongful Discharge From Employment Act because the regulations and notice requirements allowed the commissioner to circumvent the just cause requirement under the act. The act provided that a discharge was wrongful only if it was not for good cause and the employer violated the express provisions of its own written personnel policy.

The court disposed of this argument by stating that the act itself excluded from its provision the discharge of an employee covered under certain written agreements, including an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term. Since Farris's contract was a written contract for a specific term as contemplated under the act, the act was not applicable.

Farris also argued that the commissioner, by adopting regulations which allowed him to hire employees under specific term contracts, could escape the just cause requirements imposed by the act and terminate an employee by simply not entering into a new contract. The court went on to state that nothing in the law forbid the parties in this case from entering into a contract where the contract was exempted from the act and that it had done so in Leland v. Heywood (1982) above.

As in the Stansbury v. Lin (1993) case, there was a strong dissent, this one by Justice Hunt with Justice Trieweler concurring. He felt the court's ruling would allow an employer to make significant oral representations to an employee concerning the terms of the employment, induce the employee to sign a written contract with provisions contrary to the oral representations on the basis that the written contract was only a formality, and then completely avoid all liability for the oral misrepresentations which induced the employee to sign the written contract in the first place.

He set forth an exception to the Parol Evidence Rule which stated that other evidence of the circumstances under which the agreement was made or to which it related, or other evidence to explain fraud, was not excluded. Whatever the situation in the

present case, there were allegations that false representations had been made which could only be proved by evidence extrinsic to the contract and, therefore, such evidence should have been allowed.

Lastly, the Commissioner had contented that allowing Farris the opportunity to present evidence that oral representations were made which were contrary to the written contract would be nothing short of a revolution in Montana contract law. Justice Hunt stated that to exclude all extrinsic oral representations in these situations on the ground that allowing such evidence would undermine the sanctity and security of written contracts was both draconian in nature and altogether unnecessary. He felt that a decision which protected both employers and the sanctity of written contracts, while still allowing employees some opportunity to seek redress, could have been fashioned in this case and should have been sought by the majority.

Teaching and Tenure

Talley v. Flathead Valley Community College (1993) was the first of two cases involving a series of term contracts signed between Talley, a part-time instructor, and Flathead Valley Community College, beginning in September of 1982 and continuing throughout the winter term of 1989. During the winter of 1989, the community college canceled Talley's Religious Studies class and reinstated it after objections were raised by Talley. Subsequently, his classes for the spring term were listed but again canceled. His classes were cut again during the summer and fall terms and he was not rehired by the community college.

Talley filed a complaint alleging that he was not rehired because he had spoken out concerning polices at the community college and in retaliation for union activity. The community college claimed that he was not rehired because of inadequate enrollment. Talley argued that according to Montana statute he had acquired tenure. According to him, changes in the law governing community colleges did not preclude the tenure statute from applying to instructors at Flathead Valley Community College and the community college's definition of teacher was incorrect. The community college argued that the tenure statutes were applicable to teachers in elementary and high school districts, but not to part-time instructors at a community college and further that Montana had already defined "school teacher" as excluding community college instructors. Lastly, the college argued that the use of teacher in the tenure statute also required that a person be certified to teach by the Department of Public Instruction and that such was not the case for instructor at the college.

The court declared that this was a case of first impression in Montana as it had not previously interpreted the teacher tenure statute which provided:

Whenever a teacher has been elected by the offer and acceptance of a contract for the fourth consecutive year of employment by a district in a position requiring teacher certification . . . the teacher is considered to be reelected from year to year thereafter as a tenure teacher at the same salary and in the same or a comparable position of employment as that provided by the last executed contract with the teacher unless the trustees resolve by majority vote of their membership to terminate the services of the teacher

The statute also provided:

'Teacher' means any person, except a district superintendent, who holds a valid Montana teacher certificate that has been issued by the superintendent of

public instruction . . . and who is employed by the district as a member of its instructional, supervisory, or administrative staff.

The court noted that while it was true that the community colleges of the State were once under the authority of the Office of Public Instruction and were referred to as a School District, they have been referred to as Community College District since 1979. And, in the Community College District, teaching faculty were not required to have teaching certificates issued by the Office of Public Instruction, although other requirements existed for employment as an instructor. It went on that the 1979 Legislature attempted to clarify the statutes governing community colleges by combining the statutory guidelines concerning the community colleges into Chapter 15 of Title 20 "Education" and provided:

Unless specifically identified in any other sections of the school laws prescribed in this title, community college districts are governed by the provision of this chapter. Should there be a conflict between other requirements of this title and the provisions of this chapter regulating community college districts, the provisions of this chapter shall govern.

The court concluded that the language of this chapter clearly indicated that unless a statute in Title 20 "Education", not in Chapter 15, specifically noted that it applied to community colleges, it did not apply to community colleges. The tenure statute was in Chapter 4 of Title 20 and did not specifically mention community colleges, and therefore it did not, as argued by Flathead Valley Community College, apply to them.

The clear meaning of the teacher tenure statute was that it applied to all teachers who have been certified to teach by the Superintendent of Public Education and who taught in school districts under the authority of the Office of Public Instruction. Instructors at a community college were not required to have certificates from the

Superintendent and did not teach in school districts under the authority of the Office of Public Instruction, and were not teachers as that term was defined by the legislature.

The court referred to its decision in Rippey v. Flathead Valley Community College (1984) above, where it held that the ordinary meaning of the word teacher did not encompass higher education faculty, including a community college faculty member.

While the Rippey case dealt with sick leave compensation for faculty members at Flathead Valley Community College the decision interpreted the word teacher as it was used in the current Title 20 definition. Both Rippey and the plain wording of the current statute precluded any instructor at a community college in Montana from relying on the tenure provisions. Further, trustees of community colleges have been given power by the legislature to establish the conditions of employment of their staff and instructors pursuant to law and if the community college chose to have tenured faculty, it could establish the conditions under which that tenure was applied.

The court continued that community colleges were unique centers for learning; they were neither high schools, nor were they part of the University System. Similarly, instructors teaching at these centers were also unique. Montana law specifically designated that community college districts were under the control of the board of regents and that community college trustees had the power to set conditions of employment for their faculties.

Talley argued that he was entitled to a reasonable expectation of the opportunity for continuing employment and in reply the community college contended that every term

contract signed by Talley contained the phrase: "... acceptance of this contract confers no right on the part-time faculty member to tenure, credit toward tenure, or any other permanent faculty status." In reply, Talley argued that his 1982 contract contained this wording but also another sentence: "but may be renewed upon the same terms by mutual agreement, made in writing between the parties." The court stated that it considered a similar argument in Farris v. Hutchinson (1992) above, when it ruled that an agreement made in writing could not be altered except by another writing or by an executed oral agreement and that no obligation could be implied which would result in the obliteration of a right expressly given under a written contract. Talley's contract was clear and no obligation could be inferred which would indicate an alteration of that agreement.

Talley argued that he had a property right in his position as a part-time instructor at the college. The court recognized that a property interest in one's position must be created by existing rules and regulation, state laws, or understandings between employee and employer. Therefore, Talley's contract specifically precluded any property right because it was clear and unambiguous on its face and created no expectations of continuing employment with the community college.

Talley argued that the community college had acted in violation of the covenant of good faith and fair dealing by not hiring him back. The court answered that the obligation of good faith and fair dealing was measured by the justifiable expectations of the parties. Despite Talley's argument that he had a reasonable expectation of continuing employment the existence of the no-tenure phrase in his contracts was an undisputed

material fact. Therefore, given the plain wording of his contracts, such an expectation was not reasonable, nor was it justifiable.

Under the facts of the case Talley had no property interest in his position because his contract clearly prohibited it and due process under the Montana or United States Constitution was not an issue. Further, all contracts with the community college were successfully completed; thus, tortious interference with a contract was not an appropriate claim. Nor did the record contain evidence that other similarly situated individuals were treated any differently than Talley in his position as a part-time instructor, precluding an equal protection argument. The Privileges and Immunity clause of Article 4 of the United States Constitution prevented discrimination by states against non-residents; the Privilege and Immunities Clause of the Fourteenth Amendment protects attributes of United States citizenship; there was no privileges and immunities clause in the Fifth Amendment; and therefore, any privileges and immunities argument was inappropriate. The court concluded the only constitutional claim which had merit under Talley's pleadings was the claim of denial of free speech according to the First Amendment to the United States Constitution and the case was returned to the District Court for jury trial on this sole issue.

Grievances

The court was presented with an arbitration issue in community colleges in Schaal v. Flathead Valley Community College (1995). Robert C. Schaal was hired by the college under a one-year employment contract in June of 1989. He was similarly employed the

following year but without a formal contract. He was given a one-year formal employment contract for the 1991-92 school year which contained a provision incorporating procedures and adopted policies of Flathead Valley Community College into the contract and did not contain any provisions for renewal upon expiration.

In June of 1992, Schaal was notified by President Fryett of the community college that he would recommend to the community college's board of trustees that they not renew Schaal's contracts for the 1992-93 academic year. The board of trustees, at its June, 1992, meeting, voted as President Fryett recommended.

Schaal alleged that he submitted a grievance to the community college in the form of a letter to President Fryett in compliance with the community college's policy for arbitration of grievances. He further alleged that his letter was an appropriate submission of his grievance because the policy provided that a grievant could write his own grievance. He also argued that because President Fryett did not respond in compliance with the policy, he was denied his right under contract to have his grievance arbitrated.

The community college contended that Schaal had no right under the contract to have his grievance arbitrated because he did not use the grievance form mandated by the Policy. In addition he did not pursue his grievance to the next step of the grievance procedure and it pointed out that Schaal did not file a request seeking review of the President's decision by the Board Personnel Committee. Therefore, the community college concluded the grievance was assumed resolved in accordance with its policies and there was no obligation to arbitrate.

The record reflected that Schaal did not utilize the grievance form required by community college policy when he submitted his letter of grievance to President Fryett and President Fryett's response to Schaal's letter of grievance making it clear that he would not suggest that Schaal be reinstated. If Schaal did not view his grievance as resolved at this point, he should have sought review by the members of the Board Personnel Committee in accordance with the policy. Therefore, the community college had no obligation to arbitrate the nonrenewal of Schaal's contract.

Schaal claimed that the community college breached its duty of good faith and fair dealing. He contended that the community college was under the supervision of the board of regents and that the board of regents policy manual provided that employees employed for three years must be given six months written notice of intent not to renew their contracts. He argued that the community college failed to follow this policy when it gave him only sixteen days notice that his contract would not be renewed. Additionally, Schaal claimed that he was a permanent employee according to the community college's policy which provided probationary employees, those employed less than six months, could be discharged without cause. He argued that because he had been employed for three years he was a permanent employee with a reasonable expectation of continued employment.

The community college contended that Schaal had never been a probationary employee nor a permanent employee because he was a contract employee and his contract had no renewal provisions. It also argued that Schaal had no reasonable expectation of employment beyond the term of his contract and the notice requirement of the board of

regents policy did not apply in Schaal's case because the board's policies applied only to the Montana University System and Flathead Valley Community College was not a part of that system.

The court discussed Tally v. Flathead Valley Community College (1993) above, wherein it stated that the nature and extent of the obligation of good faith and fair dealing was measured by the justifiable expectations of the parties. Using this rationale, the community college did not violate policy or breach Schaal's employment contract when it determined that his contract would not be renewed. The nature and extend of the obligation of good faith and fair dealing was measured by the justifiable expectation of the parties. Since there was no basis for a reasonable expectation of continued employment beyond the term of Schaal's contract, the community college did not violate the covenant of good faith and fair dealing.

Schaal claimed he had a property interest in his employment based on the community college's personnel policies, the board of regents policy providing six months notice of nonrenewal, and the community college's policy regarding probationary versus permanent employees and that the community college violated his right to due process when it denied him the opportunity to properly respond prior to his termination.

The community college replied that Schaal's right to due process was not violated because he did not have a property interest in his employment and the court concluded that there was no evidence of a policy which gave Schaal a right of employment after the expiration of his employment contract. As a result, he did not have a property right in his

employment and the college did not deprive him of property when it determined his employment contract would not be renewed.

Constitutional Rights

The last case involving faculty and staff issues was Talley v. Flathead Valley Community College (1995). The case involved the same parties and the same facts that were presented in Talley v. Flathead Valley Community College (1993) above. The sole issue was Talley's claim that the community college conditioned his continued employment at the community college upon the abandonment of his position that he had a right to continued employment, and, in so doing, violated his right to free speech.

The First Amendment protected speech of public employees upon matters of public concern and, as expressed by the United States Supreme Court in Connick v. Myers (1983), except in the "most unusual circumstances", it did not provide immunity for speech concerning matters only of personal interest to the public employee. Although "most unusual circumstances" were not defined Talley argued that such circumstances were present here. He asserted that the elimination of his classes at the community college was a matter of public concern; that he spoke out publicly as well as privately about it; and that after his last contract with the college expired, he was an ordinary public citizen and his comments about the college were no longer subject to the threshold inquiry from Connick.

In the present case the record did not establish that the community college's failure to rehire Talley was a matter of public debate or interest in the community at large. The

record, however, did establish that Talley's primary motivation for his statements was his desire for more teaching contracts for himself. The court concluded that Talley had not demonstrated most unusual circumstances justifying an exception from the general rule set forth in Connick and that Talley had not presented a claim of violation of his free speech because his statements did not address a public interest or concern.

Summary

During the twenty-five year period following the adoption of the Montana Constitution of 1972 the court has been presented a myriad of issues for its consideration and determination. While the majority of the cases dealt with faculty and their specific issues, there were issues brought forth by members of the staffs of the various institutions, including the community colleges.

Among the issues which it faced in the staff area were tenure for non-teachers, wrongful discharge, classification, good faith and fair dealing, and contracts. Faculty issues included the definition of teacher, retirement, taxation, tenure provisions, right to tenure, constitutional rights, constitutional protections, sick leave, contracts, immunity from suit, due process, grievances, and property interest.

And, while the cases arose from institutions located throughout the state it is interesting to note two items: (1) within the University System there were no cases arising at the Western Montana College and the Northern College campuses, and (2) the only community college which was involved in cases presented to the court was Flathead Valley Community College.

Of the ten cases involving faculty, both within the University System and the community colleges, seventy percent included issues of tenure. The cases involving faculty all arose on the campuses of Eastern Montana College, Flathead Valley Community College, or Montana State University.

It must also be noted that the court, in deciding the cases, placed a great emphasis on its past decisions and did not overrule any of them. This is particularly interesting in light of the fact that the University System was undergoing reorganization, the board of regents had just been created, and the community college system was being removed from high school district control. Additionally, these institutions were undergoing change, both within and without, as the result of new laws enacted by the legislature, and the new rules, regulations, and policies adopted as a result of the reorganization and new laws.

CHAPTER 4

STUDENTS

Introduction

Since Montana's admission to the Union in November 1889, the courts have been called upon to render decisions involving students on only eight occasions. The first case did not even come before the court until 1928, and it would be forty-three years before the court would have the opportunity to rule again on a controversy involving students. And, it was in the area of postsecondary education that the only disputes which resulted in legal actions were presented to federal courts for adjudication.

Prevalent throughout the decisions entered by the courts in the controversies which were presented for their consideration was the theory of "academic absentionism." This theory, discussed in Chapter 1, was used by the court to allow it to defer its judgment to that of the academician who was thought to be more qualified to judge the qualifications of students, their substantive rights, and their right to information.

The adoption of the Montana Constitution of 1972 was responsible for the adoption of numerous changes within postsecondary education, affecting students, faculty and staff, and control and governance of the system. This chapter will therefore look at

student issues during two periods: those that occurred during the Constitution of 1889, and those that have occurred since the adoption of the Constitution of 1972.

Montana Constitution of 1889

Arbitrary and Capricious

The court was first presented a case involving student issues in State v. Clapp (1928). In the fall of 1924 the plaintiff, Janet T. Ingersoll, a married woman who was twenty years old, was enrolled as a student at the university in Missoula. On January 19, 1927, President Charles H. Clapp, acting with Dean of Women Harriet R. Sedman and Dean of Men Richard H. Jesse, as the deans' council, suspended her and struck her name from the roll of students. She then requested the president to reinstate her, or grant her a hearing, which he denied. Her petition to the Board of Education was also denied and on April 18, 1927, she filed her action.

While attending the university Ingersoll and her husband, who was also a student at the university, lived in a house at which it was charged they held unchaperoned parties attended by students during which intoxicating liquor was served. It was further alleged that such activity was regarded as not in conformity with the usual standards of society at the university, or with the duties of law-abiding citizens. Ingersoll was interrogated by the Dean of Women about the allegations and she and her husband were called before the deans' council of the university and interrogated regarding the serving of liquor at their home and the conduct of student parties at their home. Following these meetings it was

the unanimous judgment of the deans' council that the general good and welfare of the university would be promoted by their suspension.

Both the plaintiff and her husband admitted he used intoxicating liquor, and served liquor to guests, including students who visited their home. The testimony also brought out that the plaintiff did not drink and that she refused to provide the names of students who frequented and drank at their house.

At a meeting of the deans' council held on December 19, 1926, at which the plaintiff and her husband were present, they had the opportunity to make any statement they desired, but they did not attempt to refute or deny any of the charges. During this meeting a suggestion was also made that the plaintiff's husband had acquired the reputation of being the campus bootlegger. However, following their suspension, President Clapp testified he had subsequently ascertained this belief was not true.

Ingersoll maintained she was entitled to a formal hearing upon the charges against her, to be confronted with the witnesses who gave information against her, with the privilege of cross-examining them, and that she did not have the opportunity to call witnesses in her own behalf.

The court set out what was meant by a hearing in a matter such as the present one. It stated it did not mean a hearing like that which constituted the trial of a suit, or like the examination of one who was charged with the commission of an offense against the law, reasoning there was no power vested in the president of the university to compel attendance of witnesses or to force them to testify if they were in attendance. When

Ingersoll was called before the deans' council, informed of the charges made against her, given an opportunity to deny the same, and make a statement in connection therewith, she was accorded a sufficient hearing.

Expressing the holding of other jurisdictions concerning "academic abstention" the court stated that courts would not interfere with the discretion of school officials in matters which the law had conferred to their judgment, unless there was a clear abuse of that discretion, or arbitrary or unlawful action. The court concluded the enforcement of the disciplinary rules of the state university was committed to the officials thereof, and not to the courts and upheld her suspension.

The other case presented to the court during this period was State v. Pantzer (1971). James C. Bartlett applied to the University of Montana for admission to the School of Law class beginning in 1971. His application was acknowledged by letter in which he was advised that his transcript indicated he had not taken courses in financial accounting and advanced English composition. He satisfied the English composition requirement and offered to enroll at the University of Chicago in the spring quarter in a graduate accounting course. By letter dated January 28, 1972, the School of Law stated its willingness to accept the course if he completed it with a satisfactory grade.

Bartlett enrolled in the course and completed it earning a grade of D. At the University of Chicago a D grade was sufficient to earn college credit; at the University of Montana, in the School of Law a D was a passing grade for courses taken at the University. In fact, in the School of Law, a degree would be granted if the student had

completed ninety semester hours in law courses with a grade point average of 2.0 or a C average.

At the time of his application, he received from the School of Law a publication setting forth the provisions of the English requirement and the financial accounting requirement which stated: "College credit in the principles of financial accounting also is required for admission. Normally, two quarters or two semesters of accounting are necessary to fulfill this requirement."

On April 16, 1971, the School of Law advised Bartlett of his acceptance and again referred him to the School of Law Bulletin for the accounting requirement. At no time, by bulletin, letter, or otherwise, had the School of Law explicitly stated to Bartlett that his accounting requirement was anything more than "college credit" earned by him, except the reference in the letter of January 28, 1971, to a "satisfactory grade."

On July 20, 1971, the School of Law advised Bartlett he would not be admitted on the ground he had not completed the accounting requirement, specifically that the grade of D was not a "satisfactory" grade. He appealed and his appeal was denied.

The accounting requirement was a new requirement for admission to the School of Law; consequently, there were students in the school who were admitted without completing the requirement. During the fall semester of 1971, the University of Montana was offering an academic course "Accounting for Lawyers", but it was restricted to second year law students. Completion of this course would fulfill the accounting requirement and there was not a written requirement that students achieve a grade of C or

better. The School of Law advised Bartlett it would consider enrolling him in the "Accounting for Lawyers" course for the accounting requirement; however, it refused to allow him to enroll in both the School of Law and the accounting course although second year law students were allowed to enroll in both. Additionally, the School of Law then allowed students who were deficient in the English composition requirement to enroll in an English course in the fall quarter and they were given probationary enrollment in the School of Law at the same time.

The court referred to State v. Clapp (1928) above, and reaffirmed its rule of judicial nonintervention in school matters unless there was a clear abuse of discretion, or arbitrary or unlawful action. And, while this case concerned admission, and Clapp dealt with suspension, the court stated its intention to use the same standard of abuse of discretion or arbitrary action.

The discretion to admit Bartlett hinged in this case strictly on the interpretation of the words "satisfactory grade." Nowhere in its catalog, by letter, or otherwise, did the School of Law indicate what was meant by "satisfactory" grade, whether it was a credit earning grade or a grade of C or better. While there was testimony that the common terminology at the university that the grade of D was not deemed "satisfactory", but rather was "acceptable", the court continued that if the significance was so important as to hinge a decision on, the significance was important enough to warrant an explanation in some form, either by letter, publication or some other medium of communication.

Therefore, it reasoned that to cause a qualified student, whose entry into the School of Law would not interfere with the educational process in any discernible fashion, to lose one year and the opportunity for education on the technical, unpublished distinction between the words "satisfactory" and "acceptable" as applied to a credit earning grade from a recognized institution was an abuse of discretion. Accordingly, the court looked beyond the rule of judicial nonintervention and ordered Bartlett admitted to the School of Law.

Summary

During the eighty-three years that the Constitution of 1889 was in effect the court was presented with only two cases involving student issues. Interestingly, both cases, one dealing with suspension and the other with admission, were decided using the principle of "academic absentsion." This principle, which established the yielding of the court's discretion to that of academicians would become the basis for court decisions during the following years.

Montana Constitution of 1972

Domicile

County of Blaine v. Moore (1977) presented the issue of the determination of the domicile of college students. Edwin S. Moore and his wife, Marlene, in early 1969, moved to the ranch of Marlene's parents located at Lodgepole, Blaine County, Montana. In 1972, they moved to Denver, Colorado, and in December 1972, they returned to her

parent's ranch where they resided until September 1973, when they moved to Havre in Hill County where they both attended Northern Montana College and resided in married student housing. They returned to the ranch on weekends and over Christmas vacations. In April 1974, they moved out of married housing and transported all their personal property back to the ranch. During the summer of 1974, Moore commuted from the ranch to Northern Montana College.

In September 1974, Marlene was admitted to Community Hospital in Anaconda where she gave birth to a baby girl. Complications required that she be readmitted and then transferred to St. James Community Hospital in Butte. Their medical expenses were approximately \$30,000 and they were without funds to pay the medical bills. Therefore, they filed an application for general assistance in Deer Lodge County, which determined that Blaine County was their residence and to which the application was forwarded.

After addressing several of the issues raised by the parties, the court turned its attention to the question of determining the Moore's residence. The applicable statute provided that financial responsibility rested in the county in which the claimant resided at the end of a one year continuous residence in Montana. After a year's residence in Montana, subsequent to returning from Colorado, the Moores were residing at Havre, in Hill County, attending Northern Montana College and living in the married couples housing unit. However, a presumption arose that the county wherein a college or university lies was not the resident county of the attendant students. Generally, students travel from the residences of their parents, attending college only during the academic

year, and returning to their parents' residences on weekends, holidays and summer breaks. For this reason, it was customary to look to the parent's residence in order to determine the residence of the student. Otherwise, the county in which the college lies would be unduly burdened with providing for the social welfare of students.

The facts of the case did not fall within the guidelines of the presumption. The Moores were not of the age often associated with college students. Furthermore, there was an absence of the parental ties often associated with the student leaving his parents' home to attend college. Therefore, the court had to make a determination as to the county having the most significant contacts with the Moores.

It continued that the Moores resided in Blaine County for nine months prior to their attending Northern Montana College. During their stay in Hill County, they returned to Blaine County on weekends and holidays to help Mrs. Moore's parents with the ranch work. Upon leaving Hill County, they returned to Blaine County, and resided on the ranch while continuing to help with the work. Moore commuted to Northern Montana College where he continued his course work during the summer of 1974. Further, Moore testified that at all times he considered Lodgepole to be the site of his permanent residence.

The court determined that Blaine County was the county having the most significant contacts with the Moores and therefore it was financially responsible for their medical bills and was considered to be the Moore's residence.

Readmission

The question of arbitrary treatment arose again in Johnson v. Sullivan (1977), another case involving the University of Montana School of Law. Sandra S. Johnson entered the School of Law in 1973. During her third semester she received an F in the Constitutional Law course and D's in two other courses and, consequently, she was deficient by eleven grade points at the end of the semester. She was excluded from the School of Law under the applicable exclusionary rule which provided that students with a deficiency of six or more grade points at the end of their third semester were not allowed to continue their law studies. Her second petition for readmission subsequent to that exclusion was granted by the School of Law faculty, and she returned the next academic year. At the end of that year her academic performance was deficient by eight grade points and was excluded again, this time for failure to have a cumulative grade point average of 2.0 and a zero grade point deficiency, at the completion of the fourth semester. She again petitioned for readmission and it was denied. She then brought this action.

The university computed a student's cumulative grade point average by dividing the number of grade points earned by the number of credits undertaken, with four grade points assigned for each credit of A, three grade points for each credit of B, two grade points for each credit of C, one grade point for each credit of D, and zero grade points for each credit of F. Also, under the general university rule, the last grade received in a repeated course replaced the prior grade.

In the School of Law, however, a student's cumulative grade point average was computed on the basis of all courses for which a student had registered and received a grade. If a grade of F was received in a School of Law course and the course was repeated, both the initial F and the last grade received were included in the computation of the student's cumulative grade point average.

Johnson received her failing grade in Constitutional Law, a course required for graduation from the School of Law. Therefore, she was required to repeat the course, and she received a passing grade. However, her cumulative grade point average remained below the 2.0 required of law students at the end of their fourth semester.

She contended that the method of computing a student's cumulative grade point average violated due process and denied a fair and equal application of the academic requirements for graduation. In effect, the question was whether it was unreasonable, arbitrary, or capricious for the university to include both grades received for a repeated course in its computation of a law student's cumulative grade point average.

The court discussed the objective of the grading system which it stated was to provide an accurate, easily understood measure of academic performance. And, as it related to the School of Law's exclusionary rule, a student's grade point average was used as an indication of his or her presumed fitness to continue the study of law. It also discussed the state's "diploma privilege" whereby graduates of the School of Law could be admitted to practice on motion; they were not necessarily required to take and pass the state's bar examination. Graduation from the School of Law virtually guaranteed

admission to practice. The object of measuring performance and allowing or precluding a law student's continued study on the basis of that performance was to assure that graduates of the School of Law were qualified to enter practice.

The university argued that its method of computing law students' cumulative grade point averages was reasonably related to the objectives of determining academic competence and the probability of professional competence. Johnson asserted that she had established competence in Constitutional Law by receiving a grade of C for the course in her second attempt based on her interpretation of the effect of the School of Law's acceptance of her second petition for readmission following her first exclusion. She argued that by granting that petition, the School of Law faculty implied that they found the failing grade to be invalid.

The court found there was no dispute that Johnson was apprised of the rule requiring the inclusion of the first grade received for a repeated course in the computation of her cumulative grade point average and that there was no dispute that the university applied this method in its computations of the cumulative grade point average of all students in the School of Law. As such, she had neither arbitrary action on the part of the university nor arbitrariness on the application of the rule in its measurement of her academic performance and the state's "diploma privilege" did not divest the university of its discretion to set standards for the measurement of academic competence.

Johnson's contention regarding the differing methods used to compute grade point averages of law students and students in other disciplines was treated by the court through

a discussion of the differences between law students and other university students.

Declaring that the classification was neither based on a suspect criterion such as race, wealth, nationality, or alienage, nor affected by a fundamental right such as the right to vote, the right of interstate travel, or the right to freedom of speech, the court applied the rational basis test.

It continued that there were many practical differences between the School of Law and other schools and departments of the university. Instruction methods and examination procedures differed, as well as attendance policies and requirements for class preparation. It was not unreasonable to classify students in this manner and the study of law was substantively different from the study of English, or forestry, or pharmacy. There was no classification of students within the School of Law with respect to the computation of their cumulative grade point average; all law students who repeated a course had the first grade received in that course included in the computation. Therefore, there was no denial of equal protection.

Johnson did not challenge the exclusionary standard, which provided that law students must have a 2.0 cumulative grade point average at the completion of their fourth semester; rather, she asserted that she should have been readmitted despite her failure to meet this standard. She did not argue that the School of Law faculty should be required to either grant or deny all such petitions. She did not show or offer any proof that would tend to show her petition was not given the same consideration that was given to the petition of other students similarly excluded. The court concluded that, absent any

showing of discriminatory or arbitrary treatment by the faculty in their review of her petition for readmission, it had to conclude her contention was groundless and her petition was denied.

Implied Contract

The first case involving postsecondary education issues presented to a federal court was Peretti v. State of Montana (1979), filed in the United States District Court for the District of Montana. The State of Montana maintained five vocational education centers, one of which was in Missoula. The centers were financed by state appropriations, which could be supplemented by county levies. In Missoula, the Board of Trustees of Missoula County High School provided the day-to-day administration of the center, but the overall control of the budget and the curriculum was vested in the Board of Public Education.

In the fall of 1976 the plaintiffs enrolled in the two-year aviation technology program offered by the Missoula center which led to a private pilot's license and employment in the general aviation industry. In 1977, the legislature appropriated \$819,388 less than in 1975 for the vocational education centers which required adjustments to be made in the programs offered, and the board eliminated the aviation technology program.

The court discussed the relationship between a public postsecondary educational institution and a student and presented the proposition that the relationship was contractual in nature. The contract could be conceived of as one in which the student

agreed to pay the fees, maintain a satisfactory level of achievement, and observe the school's rules and regulations. In return, the school agreed to allow the student to pursue his course of studies and be granted a diploma upon the successful completion of the course of study.

In this case a student enrolling would know he was required to dedicate six consecutive quarters to the aviation technology course, that any time spent short of two years would essentially be wasted, and the center would reasonably know that a student enrolling and spending three quarters would expect an opportunity to complete the remaining three quarters. Accordingly, there was an implied contract between the Board of Education and the plaintiffs that, if the plaintiffs enrolled in the aviation technology course, they would be given an opportunity to complete the training period of six quarters and receive a diploma evidencing such completion.

Such a right, arising out of an implied contract, stated the court, was within the Fourteenth Amendment's protection of life and property and the state could not destroy the right by an act of the legislature repealing the law which formed the basis of the right.

The state argued that the court could not entertain this action under the Eleventh Amendment that barred actions by a citizen of a state against a state in the absence of a waiver. The court discussed Article 2, Section 18, of the Montana Constitution of 1972, amended in 1974, to read: "The state, counties, cities, town, and all other governmental entities shall have no immunity from suit for injury to a person or property." It concluded

that the language of this section constituted a waiver of immunity by the state in the case and held that the State of Montana was liable to each of the plaintiffs for damages.

Residence Revisited

The question of a student's residence again arose in Michels v. Department of Social and Rehabilitation Services of the State of Montana (1980). Melanie Michels was born in Great Falls and had lived her entire life there. In the spring of 1978 she left Great Falls to attend Western Montana College in Dillon. While in school she returned to her home nearly every weekend and considered Great Falls her permanent address. In the summer of 1978 she found employment with the Gallatin National Forest and in August 1978, she was involved in a head-on automobile collision and seriously injured. She was hospitalized for several weeks and incapacitated three months. She applied for county medical assistance and was denied benefits and filed this suit. Among the issues the court was called upon to decide was if she was a resident of Cascade County for the purposes of county medical insurance.

Referring to its decision in County of Blaine v. Moore (1977) above, the court noted that Michels was born and raised in Cascade County, her parents and family lived in Cascade County, she gave Cascade County as her permanent address, and intended to reside there after she finished school. The fact that she accepted temporary summer employment in Gallatin county did not change her place of residence. And, under the rule established in County of Blaine v. Moore (1977) it was customary to look to the parents'

residence in order to determine the residence of the student. Therefore, she was found to be a resident of Cascade County for the purpose of county medical assistance.

Constitutional Law

The second, and only other postsecondary education case filed in federal court was State of Montana v. Peretti (1981) which was argued before the United States Court of Appeals for the Ninth Circuit. The State of Montana appealed from the judgment entered by the United States District Court for the District of Montana in Peretti v. State of Montana (1979) above, wherein it was found to have violated the due process rights of students at the Missoula Educational Center when it terminated the aviation technology program in which they were enrolled without giving them a chance to finish their course of study.

The basis of the appeal was that the Eleventh Amendment to the United States Constitution explicitly withheld from United States courts jurisdiction over suits against a state brought by citizens of another state or by citizens or subjects of another country. Although the amendment did not expressly prohibit suits brought against a state by its own citizens the United States Supreme Court had consistently held that an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state. Therefore, in the absence of a waiver of Eleventh Amendment immunity by Montana, district court jurisdiction over the case was foreclosed.

The district court found such a waiver in a provision of the Montana Constitution of 1972 which stated that: "The state, counties, cities, towns, and all other local

governmental entities shall have no immunity from suit for injury to a person or property” The appeals court continued that a state could waive suit in its own courts without thereby waiving its Eleventh Amendment immunity from suit in federal courts and, in this case, the waiver did not extend to suits in federal court because it found waiver only where stated by the most express language or by such overwhelming implications from the text that would leave no room for any other reasonable construction and the language of the Montana Constitution did not meet that standard.

The appeals court also dismissed the district court’s alternate basis for its decision that a Montana statute provided that the state shall be liable on its contracts to the same extent as a private individual under like circumstances. It stated that the conclusion could not be supported in the face of the jurisdictional provision in the same statutory section which granted Montana state district courts exclusive jurisdiction over any claim or dispute arising out of any express contract entered into by the State of Montana. Therefore, because Montana did not consent to suit in federal court, the Eleventh Amendment precluded district court jurisdiction over the suit.

Award of Degree

Bindrim v. University of Montana (1989) was the last case involving student issues presented to the court. Donald Bindrim enrolled at the University of Montana in September of 1984 to pursue a Bachelor of Arts degree in Education with an emphasis in Music. He had previously attended East Texas State University and the University of

Texas at Arlington. He attended three quarters plus two summer session courses and performed secondary school practice teaching in the fall of 1985.

Bindrim raised two issues for the court's consideration. First, he asserted that the university contradicted its own catalog by requiring him to take the piano function examination in order to pass Music 217, a course required for graduation. He argued that the university catalog in effect at that time made no mention of the examination as a requirement for passing the course. He did not take the examination and received an I (incomplete) for the course. He did not take the examination within one year of receiving the I, and under university academic rules the I automatically became an F.

Secondly, he asserted that university officials reneged on assurances that his coursework from the Texas institutions would satisfy all of his education coursework requirements. He contended that the School of Education told him he needed only to fulfill student teaching requirements listed in the catalog but a letter sent by the school to him in 1986 stated that university records indicated he needed to take additional educational courses in order to graduate.

Bindrim's first claim was one of alleged breach of an implied contract with the university. According to him, the contract provided that he would receive a degree if he paid his tuition and satisfied the academic requirements found in the school's catalog, as modified by the assurances of the School of Education. The court ruled that he did not fulfill his duties under the contract and, therefore, he was not entitled to a degree. Under the contract terms alleged by him, successful completion of specified courses and a

specified number of student teaching hours were conditions precedent to receiving his degree. Music 217 and Music 236 were among the courses so specified, and Bindrim failed them both. He also failed to complete the student teaching requirement.

Additionally, the alleged contract also contained the following language found in the catalog:

The right is reserved to change any of the rules and regulations of the University at any time, including those relating to admission, instruction, and graduation. The right to withdraw curricula and specific courses, alter course content, change the calendar, and to impose or increase fees similarly is reserved. All such changes are effective at such times as the proper authorities determine and may apply not only to prospective students but to those who already are enrolled in the University.

There was no showing that the university abused its discretion in setting the criteria contained in the catalog or reserving the right to change those criteria.

The court dealt with Bindrim's second claim of breach of good faith and fair dealing by stating its previous ruling that the minimal requirement for a breach of the covenant was arbitrary, capricious or unreasonable conduct that exceed the plaintiff's justifiable expectation of reasonableness. Bindrim's justifiable expectation of reasonableness was that upon fulfillment of the academic requirements set by the university and payment of all requisite fees, he would be awarded a Bachelor of Arts degree in Education. But the facts that emerged from all of his claims were that he was required to complete the requirements found in the university's catalog as modified by the assurances given by the School of Education and that he did not do so. Therefore, the university did not breach its contract and there was no showing of an abuse of discretion

by the University that exceeded his justifiable expectation. Accordingly, he was not entitled to a degree.

Summary

During this period the court continued its policy of refusing to substitute its judgment for that of education officials, absent a showing that their judgment was arbitrary, capricious, or unlawful. And, for the first time, the federal courts were called upon to enter a decision involving a postsecondary education dispute in Montana. Ironically, the decision entered in favor of the students in the federal district court was reversed by the federal appeals court. In four of the six actions heard by the Montana Supreme Court, two involved the residency of students, an issue which had not been previously presented for adjudication. And, in the other two cases, involving the actions of university administrators, the court ruled against the students in both cases thus continuing its adherence to the principle of "academic abstention" that it had enunciated sixty-one years earlier.

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS FOR FURTHER STUDY

Summary

It has been 108 years since Montana was admitted to the Union. During this period the Montana Supreme Court has been presented with cases involving postsecondary education issues on 50 occasions and the federal courts for the District of Montana have been presented with two cases. The opinions issued in these cases have generally dealt with issues in three areas: control and governance, faculty and staff, and students. Of the 50 cases presented for a decision to the Montana Supreme Court, 24 involved issues of control and governance, 17 involved issues of faculty and staff, and six involved student issues. Additionally, three of the cases involved joint issues of control and governance and faculty and staff. The two cases in which the federal courts were called upon to render a decision involved the same parties and issues, the only difference being that the decision of the Federal District Court for the District of Montana was appealed by the losing party to the Federal Circuit of Appeals for the Ninth Circuit for its consideration and decision.

To summarize the findings, each research question is individually discussed in the following section.

What Guided the Courts

In the cases dealing with control and governance the Montana Supreme Court, in addition to the Constitution of the United States, was guided in its deliberations by two Montana Constitutions, the first effective upon admission to statehood in 1889 and the second upon passage by voters of the state in 1972. Additionally, the Court was guided by common law principles passed from English law and prior decisions of the Montana territorial court and federal courts.

One of the dominant principles which guided the Montana Supreme Court in its deliberations was that of upholding the constitutionality of the state Constitution. Speaking in State v. Rice (1906), the court declared that it was only with the greatest hesitation that courts would hold inoperative and invalid a provision of the state Constitution. And, in State ex rel Jones v. Erickson (1926), the court applied this principle to legislative enactments and initiative measures when it declared that the constitutionality of an act is *prima facie* presumed, and every meaning is in favor of upholding it. The Court went on to state that one of its guiding principles was that where two constructions are possible one of which will result in declaring an act constitutional and the other unconstitutional the court will prefer the former.

In Mills v. Stewart (1926), the court stated that another principle under which it operated was that the legislature's determination that an appropriation was for a public purpose belonged to the legislature, and the court would look favorably upon every reasonable presumption in favor of a legislative decision. The court also stated that when

a statute was attacked as being unconstitutional, the question was not whether it was possible to do so but whether it was possible to uphold it.

In the cases presented to it dealing with faculty and staff the court, in addition to the guiding principles enumerated above, set forth several other principles upon which it based its opinions. In State ex rel Sullivan, v. State (1977), the court stated that the intent of the legislature cannot be determined from the wording of any particular section or sentence, but rather must come from a consideration of the act as a whole. The court further stated that it would not be bound by interpretations by administrative agencies.

On several occasions the court set out the provisions of due process that would be required in order to be constitutionally sufficient under the federal and Montana Bill of Rights. The court, in several of its decisions, announced what it considered to be good faith and fair dealing between employees and employers.

In the earliest case dealing with students the Montana Supreme Court in State ex rel Ingersoll v. Clapp et. al. (1928) stated that the doctrine of "academic abstention" was the court's policy in such actions and that the enforcement of the disciplinary rules of the university is committed to the officials thereof, and not to the courts. Further, it stated that the courts would not interfere with the discretion of school officials in matters which the law had conferred to their judgment, unless there was a clear abuse of this discretion, through arbitrary or unlawful action.

Forty-three years later, in State ex rel. Bartlett v Pantzer et al. (1971) the court, acting in an admissions case, as opposed to a disciplinary action, stated that while it

approved generally of judicial nonintervention in admissions cases, it would still look to whether or not there had been a clear abuse of discretion or arbitrary action. Only six years later the court was faced with a case from a student who was denied readmission and it again stated that unless the action was arbitrary or capricious, it would not find it unreasonable.

In the only Federal District Court case presented for a decision the judges' opinion was based on the relationship between the student and the postsecondary educational institution being contractual in nature.

Aspects of Postsecondary Education Affected

The earliest cases which were presented to the Montana Supreme Court for its decision involved actions against state officers and boards directing them to release funds or deciding that they had no control over funds for postsecondary education purposes. The cases set state agencies, boards, elected officials, postsecondary education officials, the legislature, and the executive branch against each other in a contest for control of postsecondary education in Montana. During the period preceding the First World War the court's opinions generally enforced the authority of the postsecondary education officials as opposed to the interests of the other parties.

The support for the independence of the education officials underwent a change of direction following the First World War when the court ruled in State v. Brannon et al. (1929) that the Board of Education, being an executive agency whose powers and duties were prescribed and regulated by law, was subject to legislative control. This decision,

affecting the control and governance, faculty, and student structures of the postsecondary education system, which was to remain in effect until the passage of the Montana Constitution of 1972, had profound effects. As a result of the decision the legislature's authority in postsecondary education to create positions and impose additional duties upon university personnel was upheld.

During this same period the court ruled that the Board of Education, granted the power to manage and control the business and finances of the state educational institutions, had the power to do all things necessary in the exercise of its powers. Using this authority the board was able to establish and collect from students building fees and such other fees necessary for the operation of postsecondary education. The court went on to state that those upon whom the fees were to be levied and collected, the students, were not required to be consulted, or allowed to vote, on the matter.

Several cases presented to the court were concerned with the relationship of the Board of Education and postsecondary education faculty. In these cases the court ruled that the regulations of the board were not only for its own governance but part of each faculty members' contract, thus affecting their rights to tenure and reinstatement.

Using the rationale of the cases the court went on to rule that the relationship of the Board of Education and professors being that of employer and employee was it was contractual in nature. This led the court to conclude that the Board of Education, having the right to contract, was not exempt from suit and that the courts could enforce contracts against the board.

In its only advisory opinion involving postsecondary education the court was asked to render its opinion with respect to the trust and legacy funds established by the Montana Constitution of 1889 for the University of Montana. This opinion determined the conditions under which the fund could sell and trade securities and allowed for the transfer of responsibility for investing the trust and legacy funds.

The Montana Constitution of 1972 created a Board of Regents to supervise postsecondary education, a Board of Public Education to supervise the public school system, and a state Board of Education, comprised of the first two boards, responsible for long-range planning and coordination and evaluating policies and programs. The court, presented with the opportunity to define the powers of the new boards, declared that the Board of Regents language in the new constitution was much stronger and more comprehensive than that of the old provision. Under the 1889 Constitution the Board of Education's powers were limited to those prescribed and regulated by law, a provision not contained in the 1972 Constitution. Additionally, in the 1972 Constitution the Board of Regents was given full power, responsibility, and authority to supervise, coordinate, manage and control the Montana University System while under the 1889 Constitution the Board of Education was given general control and supervision of the University System. The effect of this language was to remove the general control of the University System from the legislature while retaining its right to appropriate funds and their accountability. Likewise, the court continued, the legislature could not affect indirectly through the means of line item appropriations and conditions what it could not do directly. Also affected by

this decision was the relationship of university personnel. Declaring that the Board of Regents was the competent body for determining priorities in postsecondary education the court went on to state that an important priority was the hiring and keeping of competent personnel. And, within this area, control over college presidential salaries was not a minor matter as it dictated university personnel policy, and therefore, the legislature's attempt to set salary increases for presidents of units of the university system and for the Commissioner of Higher Education was unconstitutional.

The public's constitutional and statutory right to know was determined to be secondary to the right of privacy in the job evaluations of university presidents and closure of the meeting at which their evaluations were discussed was necessary to protect their privacy and uphold their expectations of privacy.

The court's ruling in the Sullivan case had the effect of allowing credit for out-of-state teaching service in a private university for retirement purposes. Prior to this decision the Montana Teachers' Retirement Board had ruled that only out-of-state teaching service in a public school could be credited for retirement purposes. The court's opinion had the effect of saying that even though an administrative agency had interpreted the law in a consistent manner, the court was not bound by that interpretation.

In cases involving the authority of a governmental agency, such as the community college district board of trustees, the court has ruled that in the absence of a statute conferring authority to grant tenure, such grant becomes ultra vires (beyond or without authority) and of no force or effect. In other cases the court declared that there was no

right to tenure in Montana. Decisions of the court have also involved tenure and the effect of the due process and equal protection clauses of the Constitution. The court has stated that each contract of employment was an individual contract and, therefore, had to be looked at independently of contracts entered into by other employees of the university.

Within the area of student actions the court has consistently upheld the right of the university to establish the rules and regulations governing admission, suspension, discipline, curriculum, and conduct through the application of the doctrine of "academic abstention." However, the court has on several occasions stated that this doctrine is tempered with the admonition that there must not be an abuse of discretion or arbitrary action on the part of the university officials in the performance of their duties. On several occasions the court has had to rule on the domicile of students.

What Groups Were Affected

In the initial years following its admission into the Union postsecondary education in Montana was submitted to a series of challenges from elected state officials in the Executive Branch to its control and governance by the Board of Education. These cases involved the state treasurer, the Board of Examiners, the executive boards of the various units of the state university, and the State Board of Land Commissioners. The governor, attorney general, and Superintendent of Public Instruction were also involved due to their membership on the Board of Education, which under the provisions of the Constitution of 1889 had control of the state university.

On several occasions, Montana taxpayers, acting as individuals, have instituted actions before the courts which involved the levying of taxes for educational purposes, the issuance of bonds for university purposes, whether appropriations of the legislature were for public or private purposes when they involved elements of the state university, and construction of college buildings.

Administrators at the various campuses of the university system were involved in several of the cases when their authority to hire, grant tenure, and regulate parking was challenged by employees and students. Both the public's right to know and the right of the media to report on university matters were submitted to the court for its determination with the result that the right to individual privacy was given priority over the public's constitutional and statutory right to know.

Within this area of who was affected perhaps the most significant issues arose in cases involving the legislature and its control over the governance and operations of the state university system. In the case of State v. Brannon et al. (1929), the court established that under the Constitution of 1889, with general control and supervision of the state university vested in the Board of Education whose powers and duties were prescribed and regulated by law, that the board was a part of the executive department of state government and subject to legislative control. As a result of this decision the legislature was given the power to determine the duties of university personnel, narrow or broaden the functions of the university, or any of its units, require research and experimental work, and designate the terms of employment of university employees.

The power of the legislature to control and regulate the operations of the University System was of great concern to the members of the Constitutional Convention of 1972. In their deliberations concerning the construction of the education articles which were to become part of the new constitution, the members, citing the court's opinion in the Brannon case, considered several proposals, including leaving the education provision unchanged. However, deciding that the governance of the state university system had grown unworkable and needed to be free from state administrative bureaucracy, the members proposed to create separate boards, the Board of Public Education for the control of elementary and secondary education and the Board of Regents for the control of postsecondary education. Under the Constitution of 1972 the role of the legislature in postsecondary education has been narrowed from one of defining all powers and duties of the board to only the functions of appropriations, audit, setting the length of the terms of the members of the boards, and assigning additional educational institutions to the Board of Regents.

The professoriate has been affected by court decisions on several occasions in the areas of tenure, regulations of the Board of Education, resignation and reinstatement, and the relationship of employee and employer, along with the nature of and rights involved in the individual contracts of employment. Additionally, the right of teachers to have their out-of-state service qualified for Montana retirement credit was established.

The effects upon students of decisions of the courts were not as encompassing as those involving other groups. The court, in its opinions on issues concerning students,

continued to reflect the doctrine of "academic abstention" and declined to interfere in the administration's disciplinary rules. Only when the court found that the institution had acted arbitrarily or unreasonably would it substitute its decision for that of the institution and only in the particular case which it was considering. On several occasions the court was called upon to determine the domicile of students to enable them to secure benefits from local governmental agencies granted only to individuals residing in the county.

Conclusions

The study of the decisions of the Montana Supreme Court and the federal courts for the District of Montana made clear that postsecondary education law is a complex and ever-changing process. The conclusions presented below are based upon the policies, procedures, catalogues, and collective bargaining agreements which the Board of Regents and the affected campuses have enacted to carry out the conduct of postsecondary education in Montana.

Control and Governance under the Constitution of 1889

Beginning with the case of State v. Brannon et al. in 1929, and expressed in succeeding cases through 1975, the Montana Supreme Court had ruled that the Board of Education, charged with managing the University System, was part of the executive department and that the legislature could describe the extent of the powers and duties to be exercised by the board. While it is true that the court was correct to reject the argument that the board was "equal with the legislature" in its decision, it failed to

consider whether the legislature, in designating the chairman of the Chemistry Department of a unit of the university as state chemist, had infringed upon the authority of the Board of Education to control and supervise the state university.

The court's analysis also presents the problem of whether the legislature was prescribing the powers and duties of the board, or controlling and supervising the university. Arguably, the legislature's power to prescribe the authority of the board did not include the power to carry out these responsibilities by assigning specific duties to a professor.

Another factor which the court failed to consider was that by placing so much emphasis on the authority of the legislature to dictate the duties and responsibilities of the board it could have had the effect of eliminating the clause granting the board "general control and supervision" from the constitution. If this clause was not present in the constitution, the legislature would have had the authority to create a state university and the board to administer it. However, the constitutional provision creating a state university and providing for its control acted as a restraint upon the authority of the legislature to create a state university and a board to administer it without restraint. And, under such a situation, there would be no restraint upon the legislature in prescribing or even eliminating the authority of the board which it had created.

In the case of Brown v. State Board of Education (1963), the board's position, and its affirmation by the court, are open to question. The phrase "other than financial" could be read as a modification of the terms "management" and "control" leading to the

conclusion that the president and faculty of the college in Billings could have been granted authority to select teachers and employees. The real question, which was not raised nor discussed by the court, went to the issue of whether the board's authority to control academic personnel policies was included in "the general control and supervision of the state university . . ." under Article XI, Section 11 of the Montana Constitution. The board, by taking the position it did, was harmful to its own interest. By arguing before the court that this question was controlled by statute would seem to indicate that the board failed to understand the nature of the grant of its authority set forth in the constitution.

Reaction of the Constitutional Convention

Recognizing the limitations of Montana's public postsecondary education history before 1972, the delegates to the Constitutional Convention considered five proposals (see Chapter 2) for the control and governance of postsecondary education to be enacted as part of the new constitution. Given the history of postsecondary education in Montana the framers of the new constitution were correct in determining that it was different than public school education in goals, curriculum, financing, control, and operation, and must be administered accordingly. Recognizing the growing power and fearful of, a centralized, bureaucratic state, the delegates concluded that the maintenance of the system of postsecondary education free from unnecessary bureaucratic and political interference was important not only to a healthy academic atmosphere but also to the administrative efficiency of the post-secondary education system.

Analysis of the convention proceedings shows that reaction to the growing power of a centralized bureaucracy, the unworkability of the old system under direct legislative control, autonomy of higher education from state government oversight, and academic freedom, directed the delegates to declare the need for change in the leadership of postsecondary education.

The analysis also shows that the delegates determined that legislative control had not worked and, accordingly, they drafted provisions for incorporation into the new constitution creating two boards to manage education in Montana, the Board of Public Education to manage the public school system and the Board of Regents to direct and control postsecondary education. The result of the new constitutional provisions was to transform the Board of Regents from a purely legislative creation to a constitutional department and severely limited the role of the legislature in higher education.

Control and Governance under the Constitution of 1972

The Board of Regents, as a constitutionally established, autonomous postsecondary education board, seems to have greater legal stability and certainty than the Board of Education operating under the Constitution of 1889. Since 1972 there has been only one case related to the board's power and authority. The court declared that the principle of regent independence was definitely intended by the drafters of the 1972 Montana Constitution and that the legislature's role in higher education had been narrowed from one of defining all powers and duties of the board to only the functions of

appropriation, audit, setting by statute the terms of office of members of the board and assigning additional educational institutions to the control of the board.

Policies of the Board of Regents

The Board of Regents is discharging its constitutional responsibilities through the policies which it had adopted and administration rules and regulations established at various levels. The Regents' policies, cover the major functional areas of governance and organization, academic affairs, personnel, compensation, research and public service, financial affairs, physical plant, student affairs, planning and private institutions, and athletics. Each major area incorporates applicable statutory authority, applicable judicial interpretation and attorneys' general opinions, board policy, definitions, procedures, forms, and the history of the policy.

Administration, Teaching and Tenure

The review of the Policies and Procedures of the Board of Regents for the Montana University System reveals the impact of decisions of the Montana Supreme Court upon these policies. The decision in Keiser v. State Board of Regents was announced by the court on May 1, 1981. On June 26, 1981, the Regents amended the policy to counter the effects of that decision. Specifically, the new policy stated that persons performing administrative functions serve in those capacities at the discretion of the president and may be removed at any time. Further, the policy went on to state that faculty who were appointed to administrative positions did not have tenured status with

respect to these positions, the salary of the position, the term (Academic Year or Fiscal Year) of the contract, or any other provisions of the perquisites of that administrative position. As a further reaction to the Keiser ruling the policy was changed to state specifically that, if a person removed from an administrative position has tenure in an academic position, they will be employed under the same conditions and contractual terms as other tenured faculty and their salary will be determined by negotiations between the faculty member and the president. The effect of this policy is to negate the decision of the court in the Keiser case concerning the contract terms of tenured faculty leaving an administrative position. The policy dictates the negotiation of a new contract if the faculty member is to remain in an academic position without regard to the previous contract negotiated in the administrative position.

The Montana Supreme Court has, in all of the tenure cases presented to it for determination, emphatically stated that there is no constitutional or statutory right to tenure for professionals in the state University System. These rulings mean that the faculty member must look to the institution and the contract under which he or she is employed to determine his or her rights.

Reflecting the court's decision in the line of cases involving tenure, tenure rights, and tenure eligibility at Flathead Valley Community College, the provisions of the Collective Bargaining Agreement between the Board of Trustees of the college and the College Education Association specifically provide that the tenure provisions of the contract were negotiated with the understanding that the statutory tenure provisions were

not applicable to community colleges. Used in conjunction with the Board of Regents Policy and Procedure Manual which sets forth the qualifications for teachers at the College, the parties have jointly arrived at a definition of a teacher, what qualifications are needed to teach in the various areas of the college, and established the tenure provisions to avoid costly, repetitive, and time-consuming litigation involving the same issues.

Grievances and Due Process

The Montana Supreme Court in the cases involving faculty and personnel which it has been presented has upheld the procedural due process involved in the grievance and arbitration procedures of the educational institutions and the Board of Regents. These procedures are contained in the Collective Bargaining Agreements of Flathead Valley Community College, Montana State University-Billings, and the University of Montana-Missoula, the Faculty Handbook of Montana State University-Bozeman, the Policy Manual of the Board of Trustees of Flathead Valley Community College and the Policy and Procedures Manual of the Board of Regents. Taken together, they form a comprehensive, cohesive, and inclusive process for the submission, clarification, presentation, and decision of issues involving faculty and staff employed in postsecondary education in Montana.

The Court and Students

In cases concerning college students the Montana Supreme Court has determined that courts would not interfere with the discretion of school officials in matters which the

law had conferred to their judgment, unless there was a clear abuse of that discretion. This policy of judicial nonintervention includes the areas of discipline, admission, and graduation. This rule is in accord with the rule enunciated by the United States Supreme Court in Regents of the University of Michigan v. Ewing (1985), 474 U.S. 214.

Students and Due Process

In the 1960's the doctrine of "in loco parentis" began to give way to constitutional provisions. Reflecting this change in relationships the conduct codes of the Montana postsecondary education institutions were redrafted to include specific rights of due process and the administration of student discipline. The codes specified the rights of the accused to include those which are included in the U. S. Constitution Bill of Rights, the standards of conduct, disciplinary sanctions that could be applied, disciplinary procedures, and the rights of appeal.

The appeal rights of students have been recognized and, upon the conclusion of the disciplinary procedure contained in the student conduct codes, the student may appeal to the Commissioner of Higher Education and the Commissioner's decision may be appealed to the Board of Regents.

Recommendations for Further Study

Montana District Court Decisions

This study has reviewed the decisions of the Montana Supreme Court and the Federal Courts for the District of Montana. However, within the Montana judicial system

there are decisions which have affected postsecondary education in Montana that have been entered by the district courts located throughout the state. The impact of these decisions, while only effective within the judicial districts in which they were entered, nevertheless have an immense effect on the institutions located within the judicial districts. What decisions involving higher education were entered by these courts? Who were the parties involved? What were the issues? What was the decision? What was the effect of the decision? The investigation should look into the judicial districts which have campuses of postsecondary education located within their jurisdiction. These should include Yellowstone County for Montana State University-Billings and the Billings College of Vocational Technology; Gallatin County for Montana State University-Bozeman; Butte-Silver Bow County for Montana College of Mineral Science and Technology of the University of Montana and the Butte College of Vocational Technology; Missoula County for the University of Montana-Missoula and the Missoula College of Vocational Technology; Lewis and Clark County for the Helena College of Vocational Technology; Cascade County for the Great Falls College of Vocational Technology; Hill County for Montana State University-Northern; Beaverhead County for Western Montana College of the University of Montana; Dawson County for Dawson Community College; Custer County for Miles Community College; and Flathead County for Flathead Valley Community College.

Effect of Federal and State Regulations

The role of the federal government in postsecondary education is becoming more and more pervasive. The lack of a provision governing postsecondary education in the Constitution of the United States has not prevented the federal government from increasingly, and decisively, affecting the conduct of postsecondary education. What are the federal regulations in effect? What is their effect upon the judicial systems and postsecondary education? What areas of postsecondary education are affected? More and more, state governments are undertaking the tasks of managing the implementation of federal regulations through state agencies. Affirmative action, equal employment opportunity, fair housing, and disability legislation are but a few of the federal programs for which monitoring, compliance, and enforcement have been delegated to the states. These regulations are enforced by agencies whose decisions, unless overturned by a court, have the force of law. How have state regulations affected postsecondary education? What areas of postsecondary education have been affected? Who has been affected? In what light have the courts looked at these regulatory agencies?

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