



MONTANA UNIVERSITY SYSTEM

2500 BROADWAY – PO BOX 203101

HELENA, MONTANA 59620-3101

(406) 444-6570 – FAX (406) 444-1469

lschramm@oche.montana.edu

COMMISSIONER OF HIGHER EDUCATION

OFFICE OF LEGAL COUNSEL

ITEM 119-113-R0503

TO: Board of Regents

FROM: LeRoy H. Schramm
Chief Legal Counsel

RE: Commissioner as Ex-officio Member of the Board

DATE: May 6, 2003

I have been asked to give my legal opinion of the following question:

Is the Commissioner of Higher Education an ex-officio member of the Board of Regents of Higher Education?

Background

The Montana Constitution (Art. X, Sec. 9(b)) says: “The board [of Regents] consists of seven members appointed by the governor, and confirmed by the senate . . . The governor and superintendent of public instruction are ex officio non-voting members of the board.”

Art. X, Sec. 9(c) says: “The board [or Regents] shall appoint a commissioner of higher education and prescribe his term and duties.”

2-15-1505 MCA says: “The governor, superintendent of public instruction, and commissioner of higher education are ex officio nonvoting members of the board of regents.”

Article III of Regents Policy 201.7 (By-Laws) says: “The board consists of seven members appointed by the governor and confirmed by the Senate.” No mention is made of any ex officio members.

Article VII of Regents Policy 201.7 (By-Laws) says “The commissioner of higher education is an ex-officio, non-voting member of all committees.”

In common practice, reflected, for example, in Board of Regents minutes, stationery and miscellaneous legal documents, the Commissioner of Higher Education has for several years been generally referred to as an ex-officio member of the Board of Regents.

Discussion

There is an apparent conflict between the Constitution, which omits the Commissioner from the list of ex-officio members, and statute, which includes the Commissioner in a list of ex-officio members. Even Board policy and practice is not consistent. The legal analysis of this issue also

must make use of countervailing canons of interpretation. “First and foremost, is the realization that the Constitution is the supreme law of this State. Its mandate must be followed by each of the three branches of government.” *Associated Press v. Board of Public Education*, 246 Mont. 386, 391 (1991). On the other hand, “all legislative enactments are presumed constitutional. The party challenging the constitutionality of a statute bears the burden of proving the statute unconstitutional beyond a reasonable doubt.” *Henry v. State Fund*, 1999 MT 126 at P11, 294 Mont. 449, 451. Therefore, a statutory clause in seeming contradiction to the constitution, “if possible, must be interpreted to harmonize with it.” *Pengra v. State*, 2000 MT 291 at P14, 302 Mont. 276, 281. The question is whether a statute naming the Commissioner of Higher Education as an ex-officio member of the Board of Regents can be reconciled with a Constitution that does not designate the Commissioner as an ex-officio member.

Typically the Legislature may impose additional duties on constitutional officers so long as such duties are not inconsistent with their duties imposed by the Constitution. See, e.g., *Watson v. Caldwell*, 23 So. 2d 855 (Fla. 1945). When the Illinois Legislature designated the Superintendent as an ex-officio member of the Board of Trustees of Eastern Illinois State Normal School the Illinois Supreme Court described this as merely a legislative expansion of his duties consistent with other duties assigned to the superintendent. *Graham v. Inglis*, 43 N.E. 1103 (Ill. 1896). However, one might question the applicability of *Watson* and *Graham* to Montana because the Montana Constitution very clearly indicates that the proper entity for defining the duties of the Commissioner of Higher Education is not the Legislature, but the Board of Regents. “The board [of Regents] shall appoint a commissioner of higher education and prescribe his term and duties.” Art. X, Sec. 9(2)(c). In addition, state statute authorizes the Board to “adopt rules for its own government that are consistent with the constitution and the laws of the state and that are proper and necessary for the execution of the powers and duties conferred upon it by law. This raises the intriguing question, if the Board found it “proper and necessary for the execution of its powers,” could it exercise its Constitutional power to assign duties to the Commissioner by directing him to perform the duties of an ex-officio member of the Board?¹

The statute designating the Commissioner as an ex-officio member of the Board of Regents expands the membership of the Board by one. Because the statute specifically says that the Commissioner is a “nonvoting” member,” it might be argued that the addition has no meaningful impact on the power of the other members and that the authority of the seven voting members is not diluted thereby. A similar argument was rejected by the Nevada Supreme Court when the Nevada Legislature created an “advisory” board of seven regents to advise the five member elected Board of Regents that was endowed with the Constitutional authority to control the University System. The Court noted that the role of the elected, constitutional Regents included listening to evidence, weighing arguments, engaging in debate and defining issues. The mere absence of a vote for the advisory Regents did not mean they were not sharing or partaking of some portion of the elected Regents’ duties. This they found unconstitutional because “when the people have declared by it [the constitution] that certain powers shall be possessed and duties performed by a particular officer or department, their exercise and discharge by any other officer or department are forbidden by a necessary and unavoidable implication.” *King v. Board of Regents of the University of Nevada*, 200 P.2d 221, 232 (Nev. 1948).

¹ I do not construe the Regents’ current by-laws to assign him that duty nor is such a designation included in Policy 204.3 which lists the specific duties assigned to the Commissioner. If the Commissioner is to be deemed an ex-officio member of the Board at this time it is by virtue of statute and practice rather than formal Board policy.

The Montana Constitutional clause establishing the Regents is not without some ambiguity. It says the board “consists of seven members appointed by the governor.” This cannot mean that the Board has only seven members since the same subsection creates two additional members that are not appointed by the Governor. It would have been more clear had it read: “The Board consists of nine members, seven of which are appointed by the governor, plus two nonvoting ex officio members. The ex officio members are the governor and the superintendent of public instruction.” But this is not what it says. That leaves open the question as to whether or not the Legislature can create an additional non-voting member. The principle from *King v. Nevada Board of Regents* would say no, but Nevada had no constitutionally created officer like the Commissioner of Higher Education whose duties are left as an empty vessel to be filled by the Regents. If the Regents were to adopt a specific policy action that parallels 2-15-1505 MCA (which names the Commissioner as an ex officio member) a legal situation would be created for which I can find no persuasive case law as a guide.

Conclusion

The question of whether the Commissioner is, or legally can be, a nonvoting ex officio member of the Board of Regents is an interesting question that is of very little practical importance. The Board long ago defined the Commissioner’s duties in such a way as to make the Commissioner virtually indistinguishable from a nonvoting member. He takes part in debate and he places items on the agenda. He has not been allowed to make motions, but it is not clear that the two constitutional ex officio members possess that power either (I am unaware of any instance in which an ex officio member has made a motion). Further, because the Commissioner, regardless of his status, does not vote there is no danger that any act of the Board can be challenged or invalidated because of the unsettled question of his status.

The legal question posed is one for which there is no clear answer. As long as the statute naming the Commissioner as an ex officio member is on the books the Regents can hardly be faulted if they choose to act in a fashion consistent with the statute. The biggest problem right now is that the Regents haven’t spoken in any definitive way, but yet a practice has grown up that presupposes a certain position (i.e., Commissioner as ex officio member). Neither can the Regents be faulted if they choose to define the Commissioner’s duties to not include ex officio membership on the Board. I think the legal question is a close enough call so that if the Board takes a specific stand (commissioner as ex officio member – yes or no) the chances that the Board would prevail against any legal challenge are reasonably good. I think a court might well side with the Regents because (1) there is no definitive legal precedent, (2) the matter relates to the internal operating practices of the Board, and (3) there are no serious consequences that flow from a decision one way or the other. Thus, while questions about the Commissioner’s status raise legal issues, the matter is every bit as much a policy issue. As such, the Board’s position should be determined, at least in the first instance, by a policy decision from the Board of Regents.