DA 19-0169

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 37

MARTHA SHEEHY, a member of
the Montana Board of Regents,

Petitioner and Appellee,

v.

The COMMISSIONER OF POLITICAL PRACTICES
FOR THE STATE OF MONTANA, through
JEFFREY A. MANGAN, acting in his official capacity
as the Commissioner of Political Practices,

Respondent and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DV 18-0844
Honorable Gregory R. Todd, Presiding Judge

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Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 In April 2018, Montana's Commissioner of Political Practices, Jeffrey Mangan, issued a Summary Decision of Complaint Without Informal Contested Case Hearing ("Summary Decision") against Montana Board of Regents of Higher Education ("the Board") member Martha Sheehy ("Regent Sheehy") alleging that Regent Sheehy violated Montana's Code of Ethics ("Ethics Code"), governed by Title 2, chapter 2, part 1, MCA. After receiving a complaint, the Commissioner concluded that Regent Sheehy, and other Regents, improperly used state resources to support the passage of the 2018 6-Mill Levy ballot initiative. However, while the Commissioner found that other Regents also violated the Ethics Code, the Summary Decision and enforcement action was centered solely on Regent Sheehy.

¶2 The District Court reversed the Commissioner's Summary Decision on the basis that its decision was in violation of the constitutional and statutory provisions relating to the Board, in excess of the statutory authority of the Commissioner, procedurally unlawful, clearly erroneous, and arbitrary, capricious or characterized by abuse of discretion. The Commissioner appeals.

¶3 We restate the following issues on appeal:

> *Issue One: Whether a member of the Board of Regents is considered a public employee subject to the Montana Code of Ethics.*
>
> *Issue Two: Whether the Commissioner of Political Practices has jurisdiction over members of the Board of Regents to enforce the Montana Code of Ethics.*
>
> *Issue Three: Whether Regent Sheehy's questions concerning the 6-Mill Levy violated the Montana Code of Ethics.*

¶4 We reverse in part and affirm in part.

FACTUAL AND PROCEDURAL BACKGROUND

¶5 On May 26, 2017, and November 16, 2017, the Board held regularly scheduled public meetings. The Board is "responsible for long-range planning, and for coordinating and evaluating policies and programs" for the Montana University System ("MUS"). Mont. Const. art. X, § 9. There are seven regents that serve on the Board and each is appointed by the Governor, and confirmed by the Senate, to seven-year overlapping terms. The agenda at each of the meetings at issue included a discussion and update on the 6-Mill Levy by Molly Bell ("Bell") of Hilltop Public Solutions. The 6-Mill Levy is voted on every ten years by Montanans and was on the 2018 statewide ballot. It provides around 10% of the total state funding for the MUS or approximately $19 million a year.

¶6 In March 2018, Timothy Adams ("Adams") filed a complaint with the Commissioner alleging that members of the Board, including Regent Sheehy, violated the Ethics Code by soliciting support of the 6-Mill Levy ballot issue while using public resources during the Board's meeting on May 26, 2017. During the May 2017 Board meeting, Regent Sheehy asked two questions of Bell, which the Commissioner deemed a violation of the Ethics Code. First, Regent Sheehy asked: "Some of us are serving on the committee [the committee supporting passage of the 6-Mill Levy], some of us more actively than others. I've been unable to come to most of your meetings so far, but is there anything else we can do as Regents to support this effort?" Regent Sheehy then

followed up with a second question: "As you start the effort, do you have any impressions as to how informed the electorate is, how much work we have left to do?"

¶7 The Commissioner found in its Summary Decision on April 25, 2018, that, while Regent Sheehy volunteers her time as a member on the Board, she was a "public employee" subject to the jurisdiction of the Commissioner. The Commissioner further found that, though Bell's presentation to the Board was incidental to the Board's duties, Regent Sheehy's questions amounted to an ethical violation by soliciting support for a ballot issue in asking her questions while using public time, facilities, and equipment.

¶8 On May 25, 2018, Regent Sheehy filed a petition with the District Court seeking judicial review of the Commissioner's Summary Decision and declaratory relief. Regent Sheehy brought five separate claims and moved for summary judgment on two dispositive claims: 1) that she is not a "public employee" or a state employee subject to the jurisdiction of the Commissioner; and 2) that, regardless, she did not violate the Ethics Code.

¶9 On February 22, 2019, the District Court issued a declaratory ruling in favor of Regent Sheehy's two claims. The District Court ruled that the Commissioner did not have jurisdiction over Regent Sheehy since under § 2-2-136(1)(a), MCA, it is clear that the Legislature did not intend to grant the Commissioner jurisdiction over "public employees," and the Commissioner's jurisdiction to enforce the Ethics Code extends only to a "state officer, legislator, or state employee." The District Court also determined that Regent Sheehy is not a "public employee" and that, regardless, Regent Sheehy did not violate the Code of Ethics. The Commissioner now appeals.

STANDARDS OF REVIEW

¶10 This Court reviews a final agency decision and a district court's findings of fact under the same standard of review. *Molnar v. Fox*, 2013 MT 132, ¶ 17, 370 Mont. 238, 301 P.3d 824. We review the findings of fact to determine whether they are clearly erroneous and the conclusions of law de novo to determine whether they are correct. *Molnar*, ¶ 17. The interpretation of a statute is a question of law that is reviewed for correctness. *Mont. Dep't of Revenue v. Priceline.com, Inc.*, 2015 MT 241, ¶ 6, 380 Mont. 352, 354 P.3d 631. Regarding constitutional interpretation, we exercise plenary review. *Cross v. Van Dyke*, 2014 MT 193, ¶ 5, 375 Mont. 535, 332 P.3d 215.

DISCUSSION

¶11 Under the 1972 Montana Constitution, the Board is vested with the "government and control of the Montana university system" and is "responsible for long-range planning, and for coordinating and evaluating policies and programs for the state's educational systems." Mont. Const. art. X, § 9. The Board has the "full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system . . . ." Mont. Const. art. X, § 9.[1]

¶12 The 1972 Montana Constitution also established that the "legislature shall provide a code of ethics prohibiting conflict between public duty and private interest for members

[1] The Board of Regents and its members, as well as the entire MUS, is an independent board within the executive branch. *See* Mont. Const. art. III, § 1. "The power of the government of this state is divided into *three* distinct branches—legislative, executive, and judicial." Mont. Const. art. III, § 1 (emphasis added). The fact that members of the Board of Regents are appointed by the governor provides even more clarity that it is part of the executive branch. Mont. Const. art. X, § 9(2)(b).

of the legislature and *all* state and local officers and employees." Mont. Const. art. XIII, § 4 (emphasis added). As provided in the Montana Constitutional Convention Notes, the Ethics Code provision applies to not only legislators but also "*other public officials*." Mont. Const. art. XIII, § 4 (emphasis added). Indeed, the framers' concern centered on conflicts of interest arising between public duty and private interest. *Verbatim Transcript of February 23, 1972, 4 Montana Constitutional Convention*, at 796-97 (1981). As such, the Ethics Code enacted by the Legislature in 1977 is an aspect of Montana's Sunshine Laws and is liberally interpreted in favor of openness. *See Verbatim Transcript of February 23, 1972, 4 Montana Constitutional Convention*, at 796 (1981); *Associated Press v. Crofts*, 2004 MT 120, ¶ 22, 321 Mont. 193, 89 P.3d 971.

¶13 In interpreting statutes, our role is to "ascertain and carry out the Legislature's intent." *Mont. Fish, Wildlife & Parks v. Trap Free Mont. Pub. Lands*, 2018 MT 120, ¶ 14, 391 Mont. 328, 417 P.3d 1100 (citation omitted). First, we look to the plain language as enacted by the Legislature and "interpret the statute as a whole, without isolating specific terms from the context in which they are used by the Legislature." *Trap Free*, ¶ 14. Where the statutory language is clear and unambiguous, "the statute speaks for itself." *Trap Free*, ¶ 14. However, where the plain language of the statute is ambiguous, we will rely on "other canons of statutory construction." *Trap Free*, ¶ 14.

¶14 *Issue One: Whether a member of the Board of Regents is considered a public employee under the Montana Code of Ethics.*

¶15 The Commissioner asserts that the District Court erred by holding that a Regent member is not a public employee subject to the Ethics Code. The Commissioner argues

that a Regent member fits the definition provided in the Ethics Code of "public employee" since a Regent member is "a member . . . of a board, commission, or committee with rulemaking authority." Section 2-2-102(7)(c), MCA. We agree.

¶16 The purpose of the Ethics Code is to prohibit "conflict between public duty and private interests" for "other officers and employees of state government." Section 2-2-101, MCA. The Ethics Code specifically defines a public employee as "a member . . . of a board, commission, or committee with rulemaking authority." Section 2-2-102(7)(c), MCA.

¶17 The statute is clear and unambiguous. The plain language of the Ethics Code indicates that it applies to Regent Sheehy and members of the Board since they are members of a board with rulemaking authority. The Board's rulemaking authority is clear in that it is authorized to "adopt rules consistent with the constitution or laws of the state of Montana necessary for its own government or the proper execution of the powers and duties conferred upon it by law." Section 20-2-114(1), MCA. Moreover, the Board has rulemaking authority under § 20-25-301, MCA, that states it "shall provide, subject to the laws of the state, rules for the government of the system." Section 20-25-301(3), MCA. While the Board of Regents is specifically exempt from procedural rulemaking requirements of the Montana Administrative Procedure Act, § 2-4-102(2)(iii), MCA, it is still vested with rulemaking authority. Nothing in § 2-2-102(7)(c), MCA, creates or suggests a distinction or limit to rulemaking subject only to the Montana Administrative Procedure Act.

¶18 The District Court incorrectly held that Regent Sheehy was not a public employee subject to the Ethics Code. The Ethics Code is clear and unambiguous in that it is intended to apply to members of the Board as it is a board vested with rulemaking authority.[2]

¶19 *Issue Two: Whether the Commissioner of Political Practices has jurisdiction over members of the Board of Regents to enforce the Montana Code of Ethics.*

¶20 Section 2-2-136, MCA, grants the Commissioner the authority to enforce the Ethics Code. However, the Commissioner is granted enforcement jurisdiction only for violations committed by "state officers, legislators, and *state employees*," as well as county attorneys. Section 2-2-136(1), MCA (emphasis added). The Commissioner is an entity that has limited powers, to be ascertained by reference to statute. Any reasonable doubt as to the grant of a particular power will be resolved against the existence of power. *Mont. Power Co. v. Pub. Serv. Comm'n*, 206 Mont. 359, 371, 671 P.2d 604, 611 (1983) (citations omitted).

¶21 The Commissioner argues that since Regent Sheehy and other Board members are public employees, they are functionally equivalent to state employees and are subject to its enforcement jurisdiction under § 2-2-136, MCA. The District Court rejected this argument, finding that public employees are not the functional equivalent to state

[2] Moreover, the fact that Article XIII, Section 4, of the Montana Constitution does not specifically state it applies to the Board is not persuasive. Constitutional language is deliberately broad and not specific to particular entities. *Bryan v. Yellowstone Cnty. Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 23, 312 Mont. 257, 60 P.3d 381; *Crofts*, ¶ 22. Nor is it dispositive that § 2-2-102, MCA, does not specifically refer to the Board. Clearly, both provisions are designed to have broad application to personnel within state government. The statute, § 2-2-102(7), MCA, particularly cuts a wide swath in its distinction between public employees and state employees. *See infra* Issue Two.

employees, especially since Board members are not paid for their work as a Regent and there is no specific definition of a state employee in the Ethics Code.

¶22 Where the Legislature fails to define a statutory term, we consider the term to have its plain and ordinary meaning. *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 666. We may also consider "legislative history for guidance in interpreting a statute." *Giacomelli*, ¶ 18. Overall, our role is "simply to ascertain and declare what is in terms or in substance contained within the statute," but "not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA.

¶23 The Ethics Code unambiguously delineates between a "state employee" and a "public employee" in its definitions. In defining "public employee," the Ethics Code provides four separate definitions, including: "(a) any temporary or permanent employee of the state [i.e., a state employee]; (b) any temporary or permanent employee of a local government; (c) a member . . . of a board, commission, or committee with rulemaking authority; or (d) a person under contract to the state." Section 2-2-102(7), MCA. While a public employee encompasses a broad array of government personnel, it is clear from the plain language of the statute that not all public employees are considered state employees.

¶24 Of the four types of "public employees," as defined in § 2-2-102(7), MCA, the Legislature has specifically limited the Commissioner's jurisdiction to solely those public employees defined under § 2-2-102(7)(a), MCA, i.e., state employees. Section 2-2-136, MCA. Local government employees, who are also defined as "public employees" under § 2-2-102(7)(b), MCA, are not subject to the jurisdiction of the Commissioner; rather,

enforcement jurisdiction of the Ethics Code for local government employees lies with the respective county attorney. Section 2-2-144, MCA. Similarly, a "public employee" who is under contract with the state, as defined in § 2-2-102(7)(d), MCA, is not subject to the enforcement jurisdiction of the Commissioner. Likewise, a "public employee" who is a member of a board with rulemaking authority, as defined by § 2-2-102(7)(c), MCA, such as Regent Sheehy, is not subject to the enforcement jurisdiction of the Commissioner. It is clear from the statute that the Commissioner's enforcement jurisdiction is limited to ethics violations by a "state officer, legislator, or state employee," not a member of the Board of Regents. Section 2-2-136, MCA.

¶25 The legislative history surrounding the Commissioner's enforcement authority supports the conclusion that the Legislature did not intend for the Commissioner to have broad enforcement jurisdiction over all public employees. Starting in 1995, when the Legislature enacted the Commissioner's enforcement provisions for the Ethics Code, the Legislature limited the Commissioner's jurisdiction to state officers, legislators, and state employees and provided county attorneys with jurisdiction over local government officials and employees. 1995 Mont. Laws ch. 562, 1995 Mt. SB 136, codified at Title 2, chapter 2, part 1, MCA. The Legislature did not provide for jurisdiction over other public employees. In 2001, the Legislature amended § 2-2-136, MCA, to expand the Commissioner's jurisdiction over county attorneys, titling the amendment as "An Act . . . Clarifying the Enforcement Authority of the Commissioner of Political Practices." 2001 Mont. Laws ch. 122, § 4, codified at § 2-2-136, MCA. Tellingly, the Legislature did not expand the Commissioner's jurisdiction to other public employees,

like local government or contract personnel or members of a board with rulemaking authority.

¶26 The District Court correctly held the Commissioner does not have enforcement jurisdiction over members of the Board of Regents to enforce the Ethics Code.

¶27 *Issue Three: Whether Regent Sheehy's questions concerning the 6-Mill Levy violated the Montana Code of Ethics.*

¶28 We agree with the District Court that Regent Sheehy's questions did not violate the Ethics Code. The Ethics Code provides that a public employee may not use "public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to . . . the passage of a ballot issue *unless* the use is: (i) authorized by law; or (ii) properly incidental to another activity required or authorized by law . . . ." Section 2-2-121(3)(a), MCA (emphasis added). Regarding ballot issues, the Ethics Code details that "properly incidental activities" of a school board include consideration and dissemination of information concerning support or opposition to levies. Section 2-2-121(3)(b)(ii), MCA.

¶29 Regent Sheehy's statements were authorized by law as they were inherently part of her constitutional and statutory duties as a Board of Regents member. Implied in the Board of Regents' broad powers to "supervise, coordinate, manage, and control the [MUS]," is the power to do all things necessary and proper to the exercise of its general powers which would necessarily include support of a major financing source for the MUS. *See State ex rel. Veeder v. State Bd. of Educ.*, 97 Mont. 121, 133-34, 33 P.2d 516, 522 (1934) (holding the predecessor of the Board of Regents, the State Board of

Education, had the "implied power to do all things necessary and proper to the exercise of the general powers"). As prescribed by Article X, Section 9(2)(a), of the Montana Constitution, and § 20-25-301, MCA, a Board of Regents member has not only the power, but also the constitutional and statutory duty to ensure the health and stability of the MUS. Obviously included in such duties is ensuring the financial stability of the MUS. Supporting the passage of the 6-Mill Levy is hardly different than submitting a budget request to the Legislature, which the Board is required to do under Article X, Section 9(1), of the Montana Constitution; rather, instead of submitting the budget request indirectly to the Legislature, the request is sent directly to the people of Montana through the 6-Mill Levy ballot initiative. Accordingly, supporting and discussing the 6-Mill Levy, a major financing source for the MUS, is inherently an action authorized by law and properly incidental to Regent Sheehy's duties.

¶30 The Ethics Code's purpose of prohibiting conflict between public duty and private interest was not violated. As the District Court stated: "There is not one iota of evidence or any hint that Sheehy had some private financial interest or other inappropriate private interest in the passage of the 6-Mill Levy." Rather, Regent Sheehy was doing her duty as a member of the Board of Regents pursuant to the Constitution and statute.

CONCLUSION

¶31 The District Court incorrectly interpreted the Ethics Code in concluding that Regent Sheehy, as a Board of Regents member, was not a public employee as defined in § 2-2-102(7)(c), MCA. That ruling is reversed. However, the District Court was correct in interpreting the Commissioner's enforcement jurisdiction under § 2-2-136, MCA, to be

limited to state officers, legislators, and state employees, and not members of the Board of Regents. The District Court was also correct in concluding that Regent Sheehy's statements did not violate the Ethics Code.

¶32 The judgment in favor of Regent Sheehy is affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ JIM RICE

Justice Laurie McKinnon, specially concurring.

¶33 I strongly disagree with the Court's analysis and believe its attempt to fit a Regent into the Ethics Code definition of "public employee" misconstrues several statutes and constitutional provisions, and is akin to fitting a round peg into a square hole. I would hold that Regents are "public officers," and not "public employees" as the Court asserts. Opinion, ¶ 15. However, I believe that springing to a discussion of whether or not the legislature intended the Ethics Code to apply to the Board neglects to analyze a dispositive initial question: Does the legislature *have the power* to make the Ethics Code applicable to the Board? If the legislature has no authority to extend the Ethics Code to the Board, then it is unnecessary to further consider whether Regents fit within the definition of "public employee," "state officer," "public officer," or any other position under the statute. I will first examine constitutional provisions, statutes, and case law of

Montana and other states to determine whether applying the legislatively enacted Ethics Code to the Board would infringe upon the Board's constitutional authority, and is therefore outside the power of the legislature. Then, I will address my reasoning for why Regents are "public officers," not "public employees," under Montana law. Lastly, I will briefly address the accusations made against Regent Sheehy.

¶34 *1. Does the legislature have the power to extend the Ethics Code's applicability to include the Board of Regents?*

¶35 To determine whether the legislature has the power to make the Ethics Code applicable to the Board, a discussion of the Board's status under Montana law is the best starting point. Under the 1889 Montana Constitution, the legislature had the absolute authority to define the powers and duties of the Board: "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." Mont. Const. of 1889, art. XI, § 11. However, under the 1972 Montana Constitution, the Board's status was transformed from one of legislative devise to a constitutional department with the authority to "supervise, coordinate, manage and control the Montana university system." *See* Mont. Const. art. X, § 9(2)(a). This Court has previously confirmed the Board's need for reasonable constitutional autonomy, free from excessive legislative control, in *Duck Inn v. Mont. State Univ.-N.*, 285 Mont 519, 526, 949 P.2d 1179, 1183 (1997), and *Bd. of Regents v. Judge*, 168 Mont. 433, 449, 543 P.2d 1323, 1332 (1975). Beyond our

holdings in *Duck Inn* and *Judge*, this Court has not yet been asked to adjudge the framers' intent and further define the degree of the Board's autonomy.[1]

¶36 "[W]e have long held that we must determine constitutional intent not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. A review of the 1972 constitutional convention debate over Mont. Const. art. X, § 9, is helpful in determining the intent of the framers regarding the bounds of the Board's authority. The 1972 constitutional convention debate on Article X, Section 9, reveals the delegates' intention to place the Montana University System (MUS) beyond the political influence of the legislature, entrusting it instead to a Board which should be directly responsible and answerable to the people.2 The Education and Public Lands Committee (Education Committee) of the 1972 constitutional convention was responsible for proposing changes to the Montana Constitution which are now contained in Article X. *Education and Public Lands Committee Proposal*, 2 *Montana Constitutional Convention*, at 713 (1979). In its

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[1] *See* Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 7 J.L. & EDUC. 177, 191 (1978) ("State supreme court confirmation of the constitutional autonomy of the higher education governing board is *sine qua non* for resolution of the actual constitutional status of the board.").

[2] *See Verbatim Transcript of March 11, 1972*, 6 *Montana Constitutional Convention*, at 2057 (1981) ("[I]f a board is created for higher education and given the responsibility for education but not the authority to carry out such responsibility, how can they be held accountable to the people? If the real authority for carrying out the policies of higher education is dispersed among the bureaucratic political frameworks of other agencies, who then is accountable to the public? A healthy post-secondary educational system must have freedom from political changes of fortune, while still maintaining its responsibility and accountability to the state.").

report to the convention, the Education Committee provided a number of fundamental reasons for the establishment of a separate Board of Regents of higher education, chiefly because:

> Higher education is not simply another state service; the administrative structure of higher education cannot be considered an ordinary state agency. The unique character of the college and university stands apart from the business-as-usual of the state. Higher learning and research is a sensitive area which requires a particular kind of protection not matched in other administrative functions of the state.

2 *Montana Constitutional Convention*, at 736. The Education Committee's original proposal named the Board as "a body corporate," to "be considered a legal entity which has powers as a board rather than as individuals and which is perpetuated as a separate administrative entity." 2 *Montana Constitutional Convention*, at 739. However, the framers ultimately declined to retain the Board's description as "a body corporate," fearing such language risked establishing a fourth branch of government, and reasoning that the words "supervise, coordinate, manage and control" were sufficient to establish the Board's independence. *See* 6 *Montana Constitutional Convention*, at 2124-32.[3]

¶37 In fact, the Board in *Judge* "went so far as to state that indeed the [MUS] and its Board of Regents was a fourth branch of government," and its power derived from Mont. Const. art. X, § 9, was "indicative of the intent of the framers to vest complete control in the Regents to the exclusion of legislative and executive bodies."

[3] Notably, the Education Committee's Chairman, discussing the Committee's proposal in floor debates, was hesitant to describe the Board as having "autonomy" in the traditional sense of the term, providing, "I think we've been using [the term 'autonomy'] rather loosely, because autonomy means freedom, complete independence; and this isn't necessar[ily] . . . the case . . . with this board." 6 *Montana Constitutional Convention*, at 2053.

Judge, 168 Mont. at 442, 543 P.2d at 1329. In *Judge*, the legislature made appropriations to the MUS, contingent upon the Board's certification of compliance with prerequisite conditions for the funding. *Judge*, 168 Mont. at 449-50, 543 P.2d at 1332-33. While this Court agreed that the framers of the 1972 Montana Constitution intended a certain level of independence for the Board, we declined to follow the Board's assertions that it was excluded from certain checks by the executive and legislative branches: "The Regents are a constitutional body in Montana government subject to the [legislative] power to appropriate and the public policy of this state." *Judge*, 168 Mont. at 449, 543 P.2d at 1332. The Court in *Judge* made clear that each court ruling which attempts "to harmonize in a practical manner the constitutional power of the legislature to appropriate with the constitutional power of the Regents to supervise, coordinate, manage and control" the MUS should be limited to the specific legislative enactments at hand. *Judge*, 168 Mont. at 444, 543 P.2d at 1330. Where, as in *Judge*, the legislature attempts to exercise control of the MUS by legislative enactment, this Court must engage in a case-by-case analysis to determine whether the legislature's action impermissibly infringes on the Board's authority. *See Judge*, 168 Mont. at 451, 543 P.2d at 1333-34.

¶38 In *Duck Inn*, 285 Mont. at 525, 949 P.2d at 1182, the appellant argued that § 20-25-302, MCA, contained an unconstitutional delegation of legislative power to the Board because the statute failed to "prescribe a policy, standard or rule for implementing the powers delegated to an administrative agency." The Court disagreed with the appellant's contention because the statute's underlying policy was sufficiently stated in the statute's language, and provided proper constraints on the Board, consistent with a

legitimate delegation of legislative power. *Duck Inn*, 285 Mont. at 525, 949 P.2d at 1183. Discussing the Board's independent constitutional authority, the Court adopted United States Supreme Court reasoning under similar circumstances and held that limitations on legislative delegations are "less stringent" where, as in *Duck Inn*, "the entity exercising the delegated authority itself possesses independent authority over the subject matter." *Duck Inn*, 285 Mont. at 526, 949 P.2d at 1183 (quoting *United States v. Mazurie*, 419 U.S. 544, 556-57, 95 S. Ct. 710, 717 (1975)). Therefore, legislative delegations of authority to the Board are not required to meet usual standards applicable to delegations to other administrative entities, where the Board has independent constitutional authority over the subject matter, as in § 20-25-302, MCA.

¶39 *Duck Inn* and *Judge*, although informative, do not resolve whether a neutral law of state-wide concern prescribing requirements for ethical behavior, and not pertaining to an exclusively higher education affair, can be expanded to include Regents or, conversely, infringes upon the Board's autonomy. Among other states with similarly vested higher education governing boards, legislative enactments have been held unconstitutional, or inapplicable to the higher education system, where those statutes encroached upon the powers of the governing board as laid out in its constitutional mandate. For example, statutes requiring a board to move a college to a different location, *Sterling v. Regents of Univ. of Michigan*, 110 Mich. 369, 68 N.W. 253 (1896); changing the governance form of a college, *People ex rel. Hastings v. Kewen*, 69 Cal. 215, 10 P. 393 (1886); and restricting the manner of a board's employment of professors, officers, agents, or employees via a state-wide anti-nepotism statute, *Dreps v. Bd. of Regents of Univ. of*

Idaho, 65 Ida. 88, 139 P.2d 467 (1943), were each held unconstitutional or inapplicable to the higher education governing board.

¶40 In contrast, there are examples of legislative enactments which were upheld as proper exercises of legislative authority. For instance, in *Branum v. Bd. of Regents of Univ. of Michigan*, 5 Mich. App. 134, 145 N.W.2d 860 (1966), the Michigan board of regents asserted that, although the legislature had waived the governmental immunity of the state by statute in certain actions, the legislature did not have the authority to waive the immunity of the board. Although Michigan is generally regarded as having the most independently operated higher education system in the country,[4] the Michigan court ultimately denied the board's assertions, stating:

> The [board] is an independent branch of the government of the State of Michigan, but it is not an island. Within the confines of the operation and the allocation of funds of the University, it is supreme. Without these confines, however, there is no reason to allow the regents to use their independence to thwart the clearly established public policy of the people of Michigan.

Branum, 5 Mich. App. at 138-39, 145 N.W.2d at 862. In *Peters v. Michigan State Coll.*, 320 Mich. 243, 30 N.W.2d 854 (1948), the question was whether Michigan State College, a constitutional board, was subject to the provisions of Michigan's workmen's compensation act. The statute was upheld because:

> The act [was] approved as a piece of legislation aimed not at the [board] alone, nor against any of the activities of the [board] of a nature peculiar to [the board]. The act is of a broad scope addressed to the subject of the liability of employers in broad fields of employment. The workmen's

[4] Hugh V. Schaefer, *The Legal Status of the Montana University System under the New Montana Constitution*, 35 MONT. L. REV. 189, 200 (1974).

> compensation act does not undertake to change or disturb the educational activities of the . . . board.

Peters, 320 Mich. at 250, 30 N.W.2d at 857. Because the purpose of the Michigan workmen's compensation act was aimed at promoting the welfare of the people of the state, it did not infringe upon the Michigan board's constitutional authority. *Peters*, 320 Mich. at 249, 30 N.W.2d at 856-57. Similarly helpful is *Wallace v. Regents of Univ. of California*, 75 Cal. App. 274, 242 P. 892 (1925), where a challenge was brought to a state law which aimed to prohibit regents' regulation of vaccinations. The California court struck down the law, because it was not an attempt by the legislature to exercise its police power in the interest of public welfare; instead, the law was considered an attempt to limit the constitutional power granted to the regents. *Wallace*, 75 Cal. App. at 278-79, 242 P. at 894. The California court held, however, that under its police power, the legislature did have the "power to adopt and enforce regulations concerning health measures and to require vaccination as a prerequisite to the admission of a student to the University." *Wallace*, 75 Cal. App. at 278, 242 P. at 894. Had the legislature attempted to regulate the subject by appropriate legislation, there would be no question of its authority to do so:

> [T]he power vested under the constitution in the Regents is not so broad as to destroy or limit the general power of the legislature to enact laws for the general welfare of the public, including laws regulating the subject of vaccination, even though it might incidentally affect the University of California, as such a law would be paramount as against a rule of the Regents in conflict therewith.

Wallace, 75 Cal. App. at 278, 242 P. at 894.

¶41 These cases upholding legislative enactments as a proper exercise of the legislature's authority each embrace the same notion, informative to the discussion here. The Board may exercise all powers connected with the proper and efficient internal governance of the MUS; however, the constitutional grant of authority does not inhere the absolute power of self-government, and there are limitations and checks on the Board's power. The Board cannot abridge rights protected by the federal or state constitutions,[5] and is subject to state legislation enforcing state-wide standards for public welfare, health, and safety.

¶42 With the foregoing discussion in mind, I now turn to whether the constitutional power of the legislature to promulgate the Ethics Code—and application of the Ethics Code to Regents—infringes upon the Board's constitutional power to supervise, coordinate, manage and control the MUS. For the reasons stated below, I believe that application of the Ethics Code to Regents is a proper exercise of legislative authority.

¶43 Constitutional provisions must not be read or construed in isolation; "such a construction must, if possible, be adopted as will give effect to all of [the Constitution's] provisions." *State ex rel. Corry v. Cooney*, 70 Mont. 355, 374-75, 225 P. 1007, 1014 (1924). "[C]onstitutional provisions are conclusive upon the Legislature and prevent the enactment of any law which extinguishes or limits the powers conferred by the Constitution." *Cottingham v. State Bd. of Exam'rs*, 134 Mont. 1, 12, 328 P.2d 907, 912-13 (1958) (citing *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 76, 195 P. 841, 844

[5] *See, e.g.*, MONT. CONST. art. II, § 9 (constitutional right to know), and MONT. CONST. art. II, § 8 (constitutional right of participation).

(1921)). Those "who seek[] to limit the power of the [legislature] must be able to point out the particular provision of the Constitution which contains the limitation expressed in no uncertain terms." *Hilger v. Moore*, 56 Mont. 146, 163, 182 P. 477, 479 (1919) (quoting *State ex rel. Evans v. Stewart*, 53 Mont. 18, 25, 161 P. 309, 312 (1916)). It is necessary to analyze those constitutional provisions pertaining to the Board's authority, together with those defining the scope of the legislature's authority in enacting the Ethics Code, to determine whether including the Board in the Ethics Code requirements is a proper exercise of legislative power.

¶44 If we were to read Mont. Const. art. X, § 9(2)(a), literally, and without reference to the rest of the Constitution, that provision alone could arguably grant full autonomy to the Board, and severely limit the legislature's ability to expand the Ethics Code to include Regents. However, other provisions of the Montana Constitution place reasonable restraints upon the specific grant of autonomy in Article X, § 9. From our decisions in *Judge* and *Duck Inn*, and the language of Mont. Const. art. X, § 9, it is clear that the Board retains its reasonable constitutional autonomy but is still subject to the legislative functions of appropriation, audit, setting by statute Regents' terms of office, assigning additional educational institutions to the control of the Board, and permissible delegations of legislative authority. Additionally, the executive branch has indirect controls over the Board through the power of appointment of Regents, the governor's ex officio membership on the Board, and the constitutional power of the governor to request and obtain information in writing under oath from all officers and managers of state institutions. *See* Mont. Const. art. VI, § 15; Hugh V. Schaefer, *The Legal Status of the*

Montana University System under the New Montana Constitution, 35 Mont. L. Rev. 189, 198 (1974).

¶45 Three constitutional provisions are relevant to the legislature's power to promulgate the Ethics Code. The first, Mont. Const. art. III, § 1, reads:

> The power of the government of this state is divided into *three distinct branches*—legislative, executive, and judicial. *No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others*, except as in this constitution expressly directed or permitted.

(emphasis added). Secondly, Mont. Const. art. V, § 1, states: "The legislative power is vested in a legislature consisting of a senate and a house of representatives. The people reserve to themselves the powers of initiative and referendum." The third relevant provision, Mont. Const. art. XIII, § 4, provides: "The legislature shall provide a code of ethics prohibiting conflict between public duty and private interest for members of the legislature and all state and local officers and employees."

¶46 At the outset, it is important to note that the Ethics Code, on its face, does not interfere with the Board's authority to supervise, coordinate, manage and control the MUS; instead, the Ethics Code prescribes standards of conduct for all public officers, legislators, and public employees of the state to guide their efforts in fulfilling their constitutional duties to uphold the public trust. Section 2-2-103, MCA. The Ethics Code as we know it today was a result of Senate Bill 136 (SB 136), which amended the previous version of the statute so that the standards prescribed would better represent the spirit, purpose, and intent of the constitutional mandate in Mont. Const. art. XIII, § 4. *See* S.B. 136, 54th Leg., Reg. Sess. (Mont. 1995). Testimony from proponents in support

of SB 136 reveals another purpose for amending the Ethics Code: "Senate Bill 136 is designed to further the constitutional policy of separation of powers by reducing improper influence of the executive branch over the legislative branch." *S.B. 136: Hearing Before the S. Judiciary Comm.*, 54th Leg., Reg. Sess. Exhibit 3 (Mont. 1995) [hereinafter, *S.B. 136*]. Prior to the passage of SB 136, members of the executive branch were permitted to sit in the legislature on committees overseeing their own state agencies, or lobby and campaign on ballot issues—thereby involving themselves in the legislative process as executive branch employees—without regard to standing conflicts of interest. Therefore, in addition to fulfilling the constitutional mandate of Mont. Const. art. XIII, § 4, the Ethics Code is also meant to further the rule of separation of powers as contained in Mont. Const. art. III, § 1, by addressing the problem of executive branch interference in the legislature.

¶47 Because the Board executes the laws of the state, and is one of two bodies which make up the State Board of Education, it is part of the executive branch of government.[6] As members of the executive branch, individual Regents are susceptible to the same conflicts of interest as other executive branch officers and employees charged with

[6] Article X, Section 9, of the Montana Constitution provides that the Board of Regents, together with the Board of Public Education, are the two boards which make up the State Board of Education. The State Board of Education is, in turn, listed as part of the structure of the executive branch in § 2-15-104(1)(d), MCA; *see also State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991) (holding that, under a Nebraska constitutional provision prohibiting members of one branch of government from exercising powers of a coordinate branch, a state senator could not also serve as assistant professor at the state college, because the position of professor is a part of the executive branch).

carrying out the law.[7] The power vested in the Board under Mont. Const. art. X, § 9, is not so broad as to destroy or limit the general power of the legislature to enact laws mandated by other constitutional provisions. Just as the legislature cannot pass laws which directly infringe upon the Board's authority to supervise, coordinate, manage and control the MUS, the Board cannot renounce permissible exercises of legislative authority by ignoring constitutional mandates of separation of powers or eschewing ethics standards applicable to other executive branch members of like distinction. The Ethics Code is a law enacted for the general welfare of the public, and is of a broad scope, meant to prohibit transgressions which abuse the public's trust and violate public duty. Where, as here, the statute is not aimed at the Board alone, or at any activities under the authority of the Board, there is no reason to permit individual Regents to use their independence to frustrate the clearly established public policy of the people of Montana. The application of the Ethics Code to Regents does nothing to take away powers or duties conferred to the Board under the Constitution. While the Board is meant to function as a cooperative body, each Regent is answerable for any individual indiscretions that are unbecoming of the offices they hold as part of the collective Board. As such, the legislature possesses the authority to include Regents in the requirements of the Ethics Code.

[7] In fact, proponents for the passage of SB 136 argued that the statute was necessary because "[w]e have a member of the present Board of Regents who is also on the board of the MSU Foundation. In the private sector, if this person was a trustee on a pension plan who was also doing business with a brokerage house that was doing the investment for the brokerage plan, ERISA would prohibit such a relationship. We have had university professors voting and approving on HB 2 which is appropriations to the university." *S.B. 136*, 54th Leg. at 5 (testimony of Walter J. Kero, vice chairman, Montanans for Better Government).

¶48 *2. Are Regents "public officers" or "public employees" under the Ethics Code?*

¶49 As I believe it is clear that the legislature has the *authority* to make the Ethics Code applicable to Regents, I will now address whether the legislature *intended* the Ethics Code to apply to Regents. Our case law and statutory schemes depict a comprehensive system of laws which, when applied consistently together, provide an adaptable definition of the term "public officer." I believe that Regents fit within the description of "public officer" as referenced in those Court decisions and statutory schemes, including the Ethics Code. Presenting the relevant case law and statutes chronologically, from most to least descriptive, is the best way to illustrate the integrality of laws and decisions which provide differences in meaning applied to the terms "public officer" and "public employee."

¶50 The terms "public office" and "public officer" arise most frequently in Montana case law in the context of the constitutional prohibition on dual officeholding. *See* Montana Constitution of 1889, art. V, § 7;[8] and Mont. Const. art. V, § 9 (1972).[9] In 1927, this Court decided *State ex rel. Barney v. Hawkins*, 79 Mont. 506, 257 P. 411 (1927), the seminal decision in Montana on the meaning of "public office." There, the

[8] In the 1889 Montana Constitution, Article V, Section 7, provided: "No senator or representative shall, during the term for which he [or she] shall have been elected, be appointed to any civil office under the state; and no member of congress, or other person holding an office (except notary public, or in the militia) under the United States or this state, shall be a member of either house during his [or her] continuance in office."

[9] Today, Mont. Const. art. V, § 9, provides: "No member of the legislature shall, during the term for which he [or she] shall have been elected, be appointed to any civil office under the state; and no member of congress, or other person holding an office (except notary public, or the militia) under the United States or this state, shall be a member of the legislature during his [or her] continuance in office."

Court was tasked with deciding whether an auditor for the State Board of Railroad Commissioners was a public officer or an employee subject to the direction of others. The Court identified five elements as "indispensable" to properly categorizing a position as a public office:

> (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature and by it placed under the general control of a superior officer or body; [and] (5) it must have some permanency and continuity and not be only temporary or occasional.

Hawkins, 79 Mont. at 528-29, 257 P. at 418. These five elements were later reaffirmed in *State ex rel. Running v. Jacobson*, 140 Mont. 221, 225, 370 P.2d 483, 485 (1962) ("If any one of the five elements, recited in [*Hawkins*], is absent in a public service position, such position is an employment and not a public office, and the occupant thereof is an employee and not an officer. All the elements must be present."). The definition from *Hawkins* has since been applied frequently in cases where the Court is asked to distinguish between a public officer and an employee. *See, e.g.*, *State ex rel. Nagle v. Kelsey*, 102 Mont. 8, 55 P.2d 685 (1936); and *Forty-Second Legislative Assembly v. Lennon*, 156 Mont. 416, 481 P.2d 330 (1971). Numerous Attorney General advisory opinions have also followed these criteria to determine whether certain public servants are "public employees" or "public officers" under the law, usually in the context of prohibitions on dual officeholding. *See, e.g.*, Mont. Att'y Gen. Op. 16-245 (Feb. 3, 1936)

(deciding whether membership on the Montana Relief Commission is a public office); Mont. Att'y Gen. Op. 36-100 (Sept. 14, 1976) (determining whether members of the State Tax Appeals Board are employees or public officers); Mont. Att'y Gen. Op. 40-46 (Apr. 11, 1984) (discussing whether Mont. Const. art. V, § 9, prohibits an individual from serving as a state legislator and as a municipal officer at the same time); and Mont. Att'y Gen. Op. 42-50 (Jan. 5, 1988) (determining whether a high school district superintendent is an employee or public officer). The distinctions used to determine who holds public office, first made in 1927 in *Hawkins*, were later incorporated into Montana statutory law.

¶51 In 1977, the legislature integrated the five-pronged *Hawkins* test into the Montana Recall Act (Recall Act) definition of "public office." The Montana Recall and Advisory Act was enacted on November 2, 1976, by a ballot initiative vote of qualified electors of the state of Montana. *See H.B. 795: Hearing Before the S. State Admin. Comm.*, 45th Leg., Reg. Sess. Exhibit 1, at B-1 (Mont. 1977) [hereinafter *H.B. 795*] (research material to accompany HB 795 prepared by Research Division, Legislative Council). In its original form, the initiative provided for the recall of any person holding public office, either elected or appointed, for any reason, regardless of a good faith attempt to perform his or her duties. The ballot measure as passed also contained several technical problems, as it did not define words such as "public office," "elected officer," and "appointed officer," and thus, allowed for ambiguous interpretation. *H.B. 795*, 45th Leg. Exhibit 1, at B-3. Following the initiative's passage, the legislature asked the Research Division of the Legislative Council to prepare an in-depth analysis of the initiative's language, cost implications, distinctions between an officer and an employee, removal of public officers

in Montana, and the potential for abuse. *H.B. 795*, 45th Leg. Exhibit 1, at B-1. The legislature used this research to inform its promulgation of House Bill 795 (HB 795), the act which attempted to address the technical problems and ambiguities in the ballot initiative as passed.

¶52 HB 795 amended the ballot initiative to, among other things: (1) define "public office"; (2) alter the short title from the "Montana Recall and Advisory Act" to the "Montana Recall Act"; (3) limit the grounds for recall; and (4) clarify application of the act, so it was clear who could recall officers. *H.B. 795*, 45th Leg. Exhibit 1, at A-1 to A-4. Prior to passage of HB 795, the "distinction between a public officer and public employee ha[d] been clearly drawn by [the] Supreme Court, but this distinction ha[d] been much less clear in statutes." *H.B. 795*, 45th Leg. Exhibit 1, at B-2. As such, the definition of "public officer" used in HB 795 was intended to "follow the patterns of distinction established by the court by clearly defining terms within the law." *H.B. 795*, 45th Leg. Exhibit 1, at B-2.

¶53 The present-day Recall Act is codified in Title 2, Chapter 16, entitled "Public Officers." *See* §§ 2-16-601 to -635, MCA. It provides that "[a]ny person holding a public office of the state or any of its political subdivisions, either by election or appointment, is subject to recall from office." Section 2-16-603, MCA. Mirroring the five elements first described in *Hawkins*, § 2-16-602(2), MCA, of the Recall Act defines "public office" as:

> [A] position of duty, trust, or authority created by the constitution or by the legislature or by a political subdivision through authority conferred by the constitution or the legislature that meets the following criteria:

(a) the position must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public;
(b) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the constitution, the legislature, or by a political subdivision through legislative authority;
(c) the duties must be performed independently and without control of a superior power other than the law . . .; and
(d) the position must have some permanency and continuity and not be only temporary or occasional.

¶54 The Recall Act limits the grounds for recall to: "Physical or mental lack of fitness, incompetence, violation of the oath of office, official misconduct, or conviction of a felony offense enumerated in Title 45 . . . ." Section 2-16-603(3), MCA. Those felony offenses listed in Title 45, as referenced in § 2-16-603(3), MCA, include threats and improper influence, § 45-7-102, MCA, bribery in official and political matters, § 45-7-101, MCA, and gifts to public servants, § 45-7-104, MCA. "Official misconduct," one of the recall grounds, is defined by criminal statute at § 45-7-401, MCA. *See Foster v. Kovich*, 207 Mont. 139, 146, 673 P.2d 1239, 1244 (1983) ("A public servant is not guilty of official misconduct and subject to recall unless he has committed one or more of the acts specified in [§] 45-7-401, MCA."). Section 45-7-401(1), MCA, provides that the offense of "official misconduct" is committed where a public servant:

(a) purposely or negligently fails to perform *any mandatory duty* as required by law or by a court of competent jurisdiction;
(b) knowingly performs an act in an official capacity that the public servant knows is forbidden by law;
(c) with the purpose to obtain a personal advantage or an advantage for another, performs an act in excess of the public servant's lawful authority;
(d) solicits or knowingly accepts for the performance of any act a fee or reward that the public servant knows is not authorized by law; or
(e) knowingly conducts a meeting of a public agency in violation of [§] 2-3-203.

(emphasis added).

¶55 Review of these statutes and cases makes clear that Regents' positions on the Board satisfy the five *Hawkins* elements and the Recall Act definition of "public office." First, Regents' positions were created by supreme authority, namely, Mont. Const. art. X, § 9. Second, all of the necessary powers to carry out the purposes of the Board's creation are delegated by the Montana Constitution in Article X, § 9. Section 9 states, among other things, that the powers conferred are for the purpose of vesting the "government and control of the [MUS]" in the Board, "which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the [MUS]." Mont Const. art. X, § 9(2)(a). Naturally, the public's constitutional delegation of authority to supervise, coordinate, manage and control the entire higher education system of the state of Montana is meant "to be exercised for the benefit of the public" as required in the Recall Act. Section 2-16-602(2)(a), MCA. Third, as previously discussed, the constitutional delegation shows that the various powers and duties to be discharged by the Board are defined either directly or impliedly in Mont. Const. art. X, § 9. Fourth, Mont. Const. art. X, § 9, contains no provision allowing for another entity or power to control the Board. To the contrary, it reposes all powers in the Board. Although the Board of Regents is one of two boards which make up the State Board of Education, the State Board of Education does not exercise control over the Board of Regents' operations. Any controls exercised over the Board are those prescribed by law. Finally, the Board is a permanent institution under Montana law. There are no limitations upon its terms of

existence, either expressed or implied, in Mont. Const. art. X, § 9. The intent of the framers to provide for a permanent organization is further evidenced by the creation of the Board in the constitution. While individual officers on the Board may change, the position of Regent is perpetual and enduring. Additionally, like other public officers under Montana law, § 2-15-1508, MCA, expressly requires that Regents "shall take and subscribe to the constitutional oath of office and file it with the secretary of state before the person may serve as a member of . . . [the B]oard." Violation of this oath is grounds for recall under the Recall Act. Section 2-16-603(3), MCA.

¶56 Thus, Regents hold "public office," and are therefore "public officers" under the Recall Act. The Recall Act's purpose for including a definition of "public office" was to provide clarity as to which public servants were "public officers," and which were "public employees." For all the reasons Regents are "public officers" under the Recall Act, they do not qualify as "public employees." *See Jacobson*, 140 Mont. at 225, 370 P.2d at 485.

¶57 Distinctions between public officers and employees previously established by this Court and incorporated into the Recall Act were recognized by the legislature in its promulgation of the Ethics Code statement of purpose. Section 2-2-101, MCA ("This code recognizes distinctions between legislators, other officers and employees of state government, and officers and employees of local government and prescribes some standards of conduct common to all categories and some standards of conduct adapted to each category."). I believe the Ethics Code definition of "public officer"—the least descriptive of all other sources which define the term—was written to be intentionally

open-ended in order to incorporate distinctions made in other statutes in the MCA, such as the Recall Act.

¶58 "We have held . . . that 'when a word is defined in the code, that definition is applicable to other parts of the code except where the contrary is plainly indicated.'" *Judicial Standards Comm'n v. Not Afraid*, 2010 MT 285, ¶ 20, 358 Mont. 532, 245 P.3d 1116 (quoting *SJL of Mont. Assocs. LP v. City of Billings*, 263 Mont. 142, 147, 867 P.2d 1084, 1087 (1993)). In contrast to the exhaustive definition of "public employee" in § 2-2-102(7)(c), MCA,[10] the Ethics Code definition of "public officer" in § 2-2-102(9)(a) states: "'Public officer' *includes* any state officer and any elected officer of a local government." Section 2-2-102(9)(a), MCA (emphasis added). The legislature's use of the word "includes" is clear evidence of the legislature's intent that the definition of "public officer" is illustrative, not exclusive. Although every state officer and any elected officer of a local government is considered to be a "public officer" under the Ethics Code, the inverse is not true. The terms are not mutually inclusive; not all public officers are "state officers" or "elected officers of a local government." Notably, had the legislature intended the definition of "public officer" to

[10] The Ethics Code definition of "public employee" reads: "'Public employee' *means*: (a) any temporary or permanent employee of the state; (b) any temporary or permanent employee of a local government; (c) a member of a quasi-judicial board or commission or of a board, commission, or committee with rulemaking authority; and (d) a person under contract to the state." Section 2-2-102(7), MCA (emphasis added). When the legislature uses the word "means," the list which follows is meant to be exhaustive; any position not contained within the list does not qualify as a "public employee" for purposes of the statute. *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 392-93 n. 10, 99 S. Ct. 675, 684 (1979) ("As a rule, '[a] definition which declares what a term "means" . . . excludes any meaning that is not stated.'").

be exhaustive, it could have—as it did in the definition of "public employee"—opted to use the word "means" instead of "includes."

¶59 The legislature's purposeful exclusion of certain public officers from the enforcement authority of COPP is further evidence of the legislature's intention to avoid an exhaustive definition of public officer in the Ethics Code. Section 2-2-136(1)(a), MCA, provides, "A person alleging a violation of this part by a state officer, legislator, or state employee may file a complaint with the commissioner of political practices." The legislature decided against using the broader term "public officer," which includes "state officers," and instead limited the enforcement jurisdiction of COPP to state officers, legislators, and state employees. Instead, public officers who violate their duty of loyalty to uphold the public's trust under the Ethics Code could feasibly meet the definition of "official misconduct" under the Recall Act and § 45-7-401(1), MCA. This statutory scheme expresses the legislature's intent that those public officers who meet the Recall Act definition are subject to recall for violations of the Ethics Code.

¶60 The Ethics Code was promulgated in response to Mont. Const. art. XIII, § 4, and was meant to codify state-wide standards of conduct for public officers, legislators, and public employees, in order to protect the public's trust in our governing institutions. More specifically, § 2-2-103(1), MCA, describes the holding of public office or employment as "a public trust, created by the confidence that the electorate reposes in the integrity of public officers, legislators, and public employees," who are required to "carry out the individual's duties for the benefit of the people of the state." The office of Regent is a public trust which requires a duty of loyalty and responsibility to act in the best

interests of the university system and the public. *See* Montana Board of Regents Authority, Appointment, & Duties, Mont. Univ. Sys. (Office of the Comm'r of Higher Educ.), https://perma.cc/L872-WVX3. Regents, as public officers, must comply with Ethics Code requirements in order to ensure that the best interests of the public are prioritized.

¶61 I believe that the Ethics Code definition of "public officer," together with the Recall Act definition of "public office," is germane to the authority and duties prescribed to the Board. Designation as a public officer would subject Regents to the requirements of the Ethics Code and Recall Act, which together act as statutory checks on the Board's authority, in conjunction with constitutional limitations on the Board's operations. Such a conclusion preserves the Board's constitutional autonomy to oversee the administration of the MUS, while providing a mechanism to check the Board's self-government; this ensures that individual constitutional rights are not abridged and state-wide standards for public welfare, health, and safety are guarded.

¶62 It is inconceivable that the legislature intended Regents to be "public officers" for purposes of the Recall Act, but "public employees" for purposes of the Ethics Code, as such a reading produces absurd results. For all the reasons Regents are "public officers" under the Recall Act, they do not qualify as "public employees" as used in the Ethics Code. In my opinion, the Court is wrong in concluding that Regents are "public employees," because in doing so, the Court also holds that the Board is vested with rulemaking authority and leaves room for extrapolation upon the extent of that authority. Opinion, ¶ 15. The Court is in error, I believe, because the term "rulemaking authority"

as used in § 2-2-102(7)(c), MCA, was intended as a specialized term of art, with a generally accepted meaning established through other provisions of the MCA and this Court's precedent.

¶63 The MCA contains innumerable instances of the legislature delegating rulemaking authority to administrative agencies to adopt rules implementing provisions of a law. Black's Law Dictionary defines "rulemaking" as: "The *process* used by an administrative agency to formulate, amend, or repeal a rule or regulation." *Rulemaking, Black's Law Dictionary* (10th ed. 2014) (emphasis added). The term "rulemaking" is a term of art used to ensure to the public that certain processes will be undertaken by an administrative agency when formulating substantive rules, some with the force and effect of law, following a legislative delegation of authority. *See* §§ 2-4-101, -102(14), MCA.

¶64 Section 20-2-114(1), MCA, provides for adoption of rules by the Board "consistent with the constitution or laws of the state of Montana *necessary for its own government* or the proper execution of the powers and duties conferred upon it by law" (emphasis added). Nearly identical language found in § 20-25-301(2), (3), MCA, outlines Regents' powers and duties, and requires 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"; and "provide, subject to the laws of the state, *rules for government of the system*" (emphasis added). Notably, the Montana Administrative Procedure Act (MAPA) specifically excludes from the definition of "rule" those "statements concerning only the

internal management of an agency or state government and not affecting private rights or procedures available to the public . . . ." Section 2-4-102(11)(b)(1), MCA.

¶65 Prior to amendments to MAPA in 1977, "agency" was defined to mean "any board, bureau, commission, department, authority or officer of the state government authorized by law to make rules and to determine contested cases, except that the provisions . . . shall not apply to . . . (g) the administration and management of educational institutions." Revised Codes of Montana (1947), 82-4202. House Bill 77 (HB 77) was drafted by the Administrative Code Committee, a joint interim committee which submitted a report to the forty-fifth legislature that "include[d] four bills to amend [MAPA] and related statutes." Administrative Code Comm., Interim J. Rep., 45th Leg., at 1 (Mont. 1976). In this report, the Committee stated MAPA "is not a grant of authority to adopt rules—rather it controls the way in which some 350 other laws have granted rule making power." Administrative Code Comm., Interim J. Rep., at 1. The Committee examined the state educational agencies originally exempted from MAPA—the Board of Regents; the Board of Public Education; and the Office of the Superintendent of Public Instruction—and determined they "were left out, according to the 1970 Montana Administrative Procedures Study, because of [then-]pending revisions in the school laws." Administrative Code Comm., Interim J. Rep., at 17. The Committee ultimately recommended continued exemption of the Board of Regents after a lengthy explanation of its reasoning:

> The most cogent argument for exemption is that the Regents make rules under authority of the constitution rather than under statutory authority delegated by the legislature. Also, application of [MAPA's] contested case

> hearing procedures to student discipline matters, grade appeals, scholarship decisions and so forth would increase the expense and complexity of these proceedings. However, [MAPA] expresses certain principles of public participation and due process which are as appropriate for higher education as for any other area of government. The Regents have directed the Commissioner of Higher Education to recommend academic administrative procedures which are consistent with [MAPA] guidelines to further protect the constitutional right of citizens to participate in board decisions. The committee recommends continued exemption of the board and [MUS] on the understanding that this effort to develop equivalent procedures is continued with diligence.

Administrative Code Comm., Interim J. Rep., at 17.[11] HB 77 was passed by the forty-fifth legislature and the Board retains its MAPA rulemaking processes exemption to this day. *See* § 2-4-102(2)(a)(iii), MCA. The Board's exclusion from the rulemaking processes of MAPA, together with MAPA's exclusion of an agency's internal operating procedures from its definition of "rule," are clear and unambiguous indications of the legislature's compliance with and understanding of the unique constitutional authority of the Board.

¶66 Within the Ethics Code statutory scheme, the legislature's other use of "rulemaking board" provides context to the meaning intended by the legislature in its definition of "public employee" in § 2-2-102(7)(c), MCA. For example, § 2-2-121(8), MCA, provides: "A department head or a member of a quasi-judicial or *rulemaking* board

[11] The exemptions from MAPA rulemaking procedures for the Board of Public Education and the Office of the Superintendent of Public Instruction were deemed "no longer warranted" because "[s]everal of the statutes delegate policy-making in a muddled way, telling the Board of Public Education to adopt policies and the Superintendent to make regulations implementing the Board's policies." Administrative Code Comm., Interim J. Rep., at 18. As a result, the Committee recommended the two organizations "should publish their existing rules in the Administrative Code and thereafter follow [MAPA] requirements for notice and hearing on proposed rules," Administrative Code Comm., Interim J. Rep., at 18, a recommendation which was followed by the legislature when it enacted HB 77.

may perform an official act notwithstanding the provisions of subsection (2)(e) if participation is necessary to the *administration of a statute* and if the person complies with the disclosure procedures under [§] 2-2-131." (emphasis added). This subpart contemplates that any "official act" undertaken by a member of a "rulemaking board" is permissible where done in the "administration of a statute," i.e., in exercise of legislatively delegated authority.

¶67 I agree with COPP that MAPA does not confer rulemaking authority. However, the Board cannot be said to be authorized to conduct "rulemaking" in the understood sense of the term because it is not required to adhere to the rulemaking processes, as the authority to prescribe its own administrative policy is accorded to the Board by the Montana Constitution, not via legislative delegation. Adopting rules for its own government or government of the MUS system is qualitatively different from adopting rules by a quasi-judicial board or board with rulemaking authority. Given the Board's exclusion from MAPA, the ability to adopt internal operating rules and procedures does not qualify the Regents for inclusion in the definition of "public employee" in § 2-2-102(7)(c), MCA.

¶68 *3. Did Regent Sheehy violate the Ethics Code?*

¶69 As to Regent Sheehy's actions in particular, I would briefly add to the Court's analysis of the third issue and reiterate the determination of the District Court. In 1979, the Attorney General was tasked with determining whether a public officer voting against the wishes of constituents was a basis for recall under the Recall Act. Following a thoughtful consideration of the law, the Attorney General provided this apt conclusion:

> Under our republican form of government, public officials must have the freedom to make difficult and informed decisions based upon the best information available and be free from the threat of harassment from a minority of constituents who may not be aware of all the factors that serve as the basis for the decision.

Mont. Att'y Gen. Op. 38-41, at 141 (Sept. 18, 1979). The same guidance is felicitous to the circumstances in the present action. A Regent must engage in meaningful and public deliberations as part of her public function as a member of the Board. Any constraint on her deliberations, inquiries, or exchange of information and ideas is in direct conflict with Montana's guarantee of the public's right to know. Asking two specific questions at a properly noticed Board meeting established no conflict between Regent Sheehy's public duty or her private interest. Instead, Regent Sheehy was fulfilling her duty as mandated in § 20-25-301, MCA, by asking questions within her authority as a Regent to "supervise, coordinate, manage and control" the MUS. *See* Mont. Const. art. X, § 9.

¶70 COPP has argued that the Board should take its questions and concerns on important public issues, such as the 6 Mill Levy, outside of the public arena where the press and public will have no opportunity to know the operations of the Board. COPP's suggestion ultimately risks curbing a Regent's inclination to freely engage in public discussion and imperils the public's constitutional rights to know and participate. Regents should not be fearful of retribution for conducting open, noticed meetings, and asking questions pertaining to their constitutionally and statutorily defined duties. To suggest that their discussions should be conducted behind closed doors is antithetical to Montana's commitment to the open and meaningful exchange of governmental bodies in front of their constituents.

¶71 To conclude, I would hold that the legislature has the authority to extend the Ethics Code to apply to Regents. I would further hold that Regents are "public officers" under the Ethics Code, not subject to COPP's enforcement jurisdiction. Instead, I would reiterate that, as public officers, Regents are answerable to the public for violations of the Ethics Code, and other violations of their duties to the public, through the provisions of the Recall Act. Regent Sheehy's statements were part of her duties as a member of the Board, and she is answerable to Montana citizens through the public's right to know and observe the public meetings of its governing bodies.

/S/ LAURIE McKINNON