VOLUME NO. 43 OPINION NO. 49

COURTS - Selection of temporary substitute justices of peace;
COURTS, JUSTICE - Hours of business;
JUSTICES OF THE PEACE - Selection of temporary substitute justices;
MONTANA CODE ANNOTATED - Sections 3-10-102, 3-10-208, 3-10-231, 3-10-234;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 4 (1987), 40 Op. Att'y Gen. No. 26 (1983) (overruled in part).

HELD: 1. A justice of the peace has the authority to select his substitute during a temporary absence. If the justice is sick, disabled or absent and is unable to call a substitute, the county

commissioners are authorized to call in a substitute. The justice, or when appropriate, the county commissioners, must look to the following substitution choices: (1) another justice, if available, (2) a city judge, or (3) a person from the list provided for in section 3-10-231(2), MCA. In the event a justice is on vacation or attending a training session, if there is no other justice in the county then the justice, and not the county commissioners, must look to the same substitution choices as those listed above.

2. A county is generally required to compensate a substitute justice of the peace. However, the substitute justice may elect to waive compensation.

3. The office hours of a justice court are set by the county commissioners, and during those hours the court is always open for the transaction of business, such as the filing of court documents with the clerk. However, a justice of the peace is not statutorily required to be present in justice court during every hour the justice court is open for business. Thus, a justice of the peace is not precluded from acting as a city judge during the office hours of the justice court. 40 Op. Att'y Gen. No. 26 at 100 (1983) is overruled as to holding number four, to the extent that it concludes that the board of county commissioners sets the hours of a justice of the peace.

December 18, 1989

Mike Salvagni
Gallatin County Attorney
Law and Justice Center
615 South 16th Avenue
Bozeman MT 59715

Dear Mr. Salvagni:

You have requested my opinion on the following questions:

1. Who has the authority to select a substitute for the justice of the peace and is there a prescribed process for that selection?

2. Is a county required to compensate a substitute justice of the peace?

3. May a justice of the peace act as a city judge during the hours that the justice court is open for business?

Section 3-10-231, MCA, provides for appointment of substitute justices of the peace. It states:

> (1) Whenever a justice of the peace is disqualified from acting in any action because of the application of the supreme court's rules on disqualification and substitution of judges, subdivision 1, 2, or 3, he shall either transfer the action to another justice's court in the same county or call a justice from a neighboring county to preside in his behalf.
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> (2) Within 30 days of taking office, a justice of the peace shall provide a list of persons who are qualified to hold court in his place during a temporary absence when no other justice or city judge is available. The county commissioners shall administer the oath of office to each person on this list within the ensuing 30 days or as soon thereafter as possible.
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> (3) Whenever a justice is sick, disabled, or absent, the justice may call in another justice, if there is one readily available, or a city judge or a person from the list provided for in subsection (2) to hold court for the absent judge until his return. If the justice is unable to call in a substitute, the county commissioners shall call in another justice, a city judge, or a person from the list provided for in subsection (2).
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> (4) During the time when a justice of the peace is on vacation or attending a training session, another justice of the peace of the same county shall be authorized to handle matters that otherwise would be handled by the absent justice. When there is no other justice of the peace in the county, the justice of the peace may designate another person in the same manner as if the justice were sick or absent.
>
> (5) A justice of the peace of any county may hold the court of any other justice of the peace at his request.

Portions of this statute were construed in 40 Op. Att'y Gen. No. 26 at 100 (1983) but the statute has since been substantially amended by 1985 Montana Laws, chapter 482, section 1 and, in any event, that opinion is not helpful in answering your first question.

Section 3-10-231(3) and (4), MCA, distinguishes between two types of temporary absences--unplanned absences and preplanned absences. In the event of an unplanned absence, when a justice is sick, disabled or absent, the justice of the peace is authorized to select a substitute. If the justice is unable to call in a substitute, one may be called in by the county commissioners. § 3-10-231(3), MCA. The justice, or when appropriate, the county

commissioners, may call in another justice, if there is one readily available, or a city judge or a person from the list of other qualified persons assembled by the justice of the peace pursuant to section 3-10-231(2), MCA. See 42 Op. Att'y Gen. No. 4 (1987).

The word "absent" in section 3-10-231(3), MCA, does not include vacation or attendance at a training session, since these preplanned temporary absences are specifically covered in section 3-10-231(4), MCA. When a justice is absent due to vacation or attendance at a training session, a justice of the same county shall be called in unless there is no other justice of the peace in the county. In that event the justice may select another justice, if there is one readily available, or a city judge or a person from the list provided for in section 3-10-231(2), MCA. There is no provision for the county commissioners to appoint a substitute during this type of absence.

Therefore, I conclude that under section 3-10-231, MCA, a justice of the peace has the primary authority to select his substitutes during temporary absences. In the event the justice is sick, disabled, or absent and is unable to call in a substitute, one may be called in by the county commissioners. The justice or the county commissioners must look to the following substitution choices: (1) another justice if available, (2) a city judge, or (3) a qualified person from the list provided for in section 3-10-231(2), MCA. In the event the justice is on vacation or attending a training session, if there is no other justice in the county then the justice must look to the same substitution choices.

You have also asked if a county is required to compensate a substitute justice of the peace, and if a substitute justice may waive compensation. Section 3-10-234, MCA, provides:

> Whenever a justice of the peace or another person is called in to preside over the court of a justice under 3-10-231, the visiting justice or other person shall be paid his actual and necessary travel expenses, as defined and provided in 2-18-501 through 2-18-503. If the acting justice is not a justice of the peace receiving a salary, he shall also receive such compensation as is proper for the time involved. The cost of implementing this section is a proper charge against the county where the court is held.

The language of the statute concerning the county's obligation to compensate a substitute justice is unambiguous. The visiting justice or other person must be paid his or her actual and necessary travel expenses. If the acting justice is not a justice of the peace receiving a salary, he shall also receive such compensation as is proper for the time involved.

You have also asked whether a substitute justice can waive a right to compensation. The answer to this question is addressed in common law.

Some courts have held that, when the compensation of a public officer is fixed by statute, the officer cannot waive compensation since such waiver is contrary to public policy. Glavey v. United States, 182 U.S. 595, 608 (1901); Allen v. City of Lawrence, 61 N.E.2d 133, 135-36 (Mass. 1945). However, even if Montana were to follow that rule, it has been held to be inapplicable to "deputy officers or one who holds office at the pleasure of the appointing power and who may be removed at any time." Hodges v. Daviess County, 148 S.W.2d 697, 699 (Ky. Ct. App. 1941).

A substitute justice temporarily holds office at the pleasure of the justice of the peace or county commissioners who made the appointment, and may be removed at any time, thereby satisfying the Hodges exception. Therefore, I conclude that under section 3-10-234, MCA, although the county is required to offer compensation to a substitute justice of the peace, the substitute justice may elect to waive such compensation.

Your final question concerns whether an elected justice of the peace may act as a city judge during the hours prescribed as office hours for the justice's court.

You point out that in order to resolve this question, it must be determined whether the hours of a justice of the peace are prescribed. Section 3-10-102, MCA, provides:

> **When courts open.** A justice's court is always open for the transaction of business, except on legal holidays and nonjudicial days.

Prior to 1983, section 3-10-208, MCA, specifically mandated the county commissioners to designate hours of a justice of the peace:

> **Office hours.** In the resolution providing for the salary, the county commissioners shall designate the office hours for each justice. Office hours shall be commensurate with the salary provided. [Emphasis added.]

That section, which was amended by 1983 Montana Laws, chapter 492, section 1, now provides:

> **Office hours.** In the resolution providing for the salary, the county commissioners shall designate the office hours for each justice's court. Office hours shall be commensurate with the salary provided. [Emphasis added.]

In construing a statute, I must presume that the Legislature intended to make some change in the law by passing it. See Cantwell v. Geiger, 44 St. Rptr. 1574, 742 P.2d 468 (1982). Through the 1983 amendment, the Legislature

clearly made a distinction between the office hours of a justice's court and the office hours of a justice. The 1983 amendment clarifies that the county commissioners are to set the office hours of the justice's court, not the office hours of the justice. This interpretation partially overrules holding number four of 40 Op. Att'y Gen. No. 26 at 100 (1983) which held that, under section 3-10-208, MCA, "the office hours that must be kept by a justice of the peace are set by the county commissioners."

Accordingly, I conclude that the office hours of the justice court must be set by the county commissioners and that the justice's court must be open during those hours for the transaction of business, such as the filing of court documents with the clerk, every day except legal holidays and nonjudicial days. However, a justice of the peace is not statutorily required to be present during the designated office hours of the justice court. Thus, a justice of the peace is not precluded from acting as a city judge during the office hours of justice court.

THEREFORE, IT IS MY OPINION:

1. A justice of the peace has the authority to select his substitute during a temporary absence. If the justice is sick, disabled or absent and is unable to call a substitute, the county commissioners are authorized to call in a substitute. The justice, or when appropriate, the county commissioners, must look to the following substitution choices: (1) another justice, if available, (2) a city judge, or (3) a person from the list provided for in section 3-10-231(2), MCA. In the event a justice is on vacation or attending a training session, if there is no other justice in the county then the justice, and not the county commissioners, must look to the same substitution choices as those listed above.

2. A county is generally required to compensate a substitute justice of the peace. However, the substitute justice may elect to waive compensation.

3. The office hours of a justice court are set by the county commissioners, and during those hours the court is always open for the transaction of business, such as the filing of court documents with the clerk. However, a justice of the peace is not statutorily required to be present in justice court during every hour the justice court is open for business. Thus, a justice of the peace is not precluded from acting as a city judge during the office hours of the justice court. 40 Op. Att'y Gen. No. 26 at 100 (1983) is overruled as to holding number four, to the extent that it concludes that the board of county commissioners sets the hours of a justice of the peace.

Sincerely,

MARC RACICOT
Attorney General