

VOLUME NO. 40

OPINION NO. 55

COUNTY COMMISSIONERS - Discretion to set compensatory time policies;

COUNTY OFFICERS AND EMPLOYEES - Deputy sheriffs and undersheriffs, compensatory time;

EMPLOYEES, PUBLIC - Deputy sheriffs and undersheriffs, compensatory time;

HOURS OF WORK - Deputy sheriffs and undersheriffs, compensatory time;

SALARIES - Deputy sheriffs and undersheriffs, compensatory time;
SHERIFFS - Deputy sheriffs and undersheriffs, compensatory time;
ADMINISTRATIVE RULES OF MONTANA - Section 2.21.1513;
MONTANA CODE ANNOTATED - Title 39, chapter 3, part 4; sections 1-2-109, 7-4-2509(2);
OPINIONS OF THE ATTORNEY GENERAL - 36 Op. Att'y Gen. No. 63 (1976), 39 Op. Att'y Gen. No. 21 (1981).

HELD: Deputy sheriffs and undersheriffs may not receive cash payments in lieu of compensatory time off for overtime hours worked prior to July 1, 1981.

25 June 1984

William A. Douglas
Lincoln County Attorney
P.O. Box 795
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Dear Mr. Douglas:

You have requested my opinion concerning whether deputy sheriffs and undersheriffs who have accumulated compensatory time prior to October 1, 1981, may now be given either a cash payment or time off equivalent to these accumulated hours.

Prior to the enactment in 1981 of section 7-4-2509(2), MCA, there was no statutory authorization for payment for overtime hours worked by deputy sheriffs and undersheriffs. As noted in 39 Op. Att'y Gen. No. 21 (1981), deputy sheriffs and undersheriffs are exempt from the provisions of the Minimum Wage and Overtime Act, Tit. 39, ch. 3, pt. 4, MCA. City of Billings v. Smith, 158 Mont. 197, 490 P.2d 221 (1971). Former Attorney General Woodahl held that while a deputy county officer could not receive additional compensation for overtime hours worked, the county commissioners have the inherent discretionary power to grant equivalent time off for overtime hours worked. 36 Op. Att'y Gen. No. 63 (1976).

According to your letter, there has existed the practice in Lincoln County whereby deputy sheriffs and

undersheriffs recorded and reported their overtime hours with the understanding that they would receive compensatory time off at a later time to be designated by their supervisor. Lincoln County has no ordinances or resolutions with regard to overtime or compensatory time. Due to a heavy workload, the employees have been unable to use most of their compensatory time earned prior to 1981.

The first issue presented by your question is whether the employees may be given a cash payment for pre-1981 overtime hours in lieu of compensatory time off, either at the time of their retirement or separation from service or while they continue to work regular hours. It has long been the rule in Montana that public officers and employees can only claim compensation for services where such compensation is provided by law, and that where no compensation is so provided the rendition of services is deemed to be gratuitous. State ex rel. Matson v. O'Hern, 104 Mont. 126, 65 P.2d 619 (1937). It is presumed that all extra services similar in nature to the employee's regular duties are compensated by the employee's salary. Keith v. Kottas, 119 Mont. 98, 172 P.2d 306 (1946); Doane v. Marquisee, 63 Mont. 166, 206 P. 426 (1922). To overcome this presumption, the public employee must point to specific statutory authorization. No such statutory authorization existed prior to 1981.

In 1981, the Legislature enacted section 7-4-2509(2), MCA, which provides:

The board of county commissioners may by resolution establish that any undersheriff or deputy sheriff who works in excess of his regularly scheduled work period will be compensated for the hours worked in excess of the work period at a rate to be determined by that board of county commissioners.

Interpreting this subsection, I have previously held that the Legislature intended to leave any action regarding possible overtime payment to the discretion of the individual boards of county commissioners. 39 Op. Att'y Gen. No. 21 (1981). However, the new subsection does not grant retroactive authority to the county commissioners to make payments for overtime earned prior to October 1, 1981. No statute is retroactive unless expressly made so. § 1-2-109, MCA. An employee's

rights to compensation are set by the law applicable at the time the services are rendered. Longshore v. County of Ventura, 598 P.2d 866 (Cal. 1979). Since no statutory right to compensation for overtime for deputy sheriffs and undersheriffs existed prior to 1981, I conclude they cannot now be given a cash payment for such overtime.

Other jurisdictions which have considered the question of cash payments in lieu of compensatory time off have reached the same conclusion. In the leading case of Martin v. Henderson, 255 P.2d 416, 420 (Cal. 1953), the California Supreme Court rejected state employees' claims for payment for overtime, stating:

Obviously, efficient management and satisfactory employment relations require the state to fix reasonable work hours. In the absence of a statutory provision therefor, time off granted for work done in excess of those hours is not granted as of right, but is allowed in accordance with the necessities of the duties to be performed. [Citation omitted.] The fact that normal hours of work are established and compensating time off is provided for work beyond those hours does not, of itself, give the employee a right to payment for overtime.

See also Longshore v. County of Ventura, supra. Accord Weber v. City of Atlanta, 231 S.E.2d 100 (Ga. App. 1976); State v. Bogenrife, 513 P.2d 13 (Alaska 1973); State ex rel. Beck v. Carter, 471 P.2d 127 (Wash. App. 1970).

Your second question is whether the undersheriffs and deputy sheriffs may now be granted time off equivalent to the pre-1981 overtime hours accrued. The answer to this question is dependent upon the various policies, agreements, ordinances, or resolutions in effect within each individual county. Compensatory time off is generally conditioned upon the mutual agreement of the employee and the employer. See § 2.21.1513, ARM (compensatory time and overtime rule governing state employees). The use of compensatory time is therefore inherently limited by the scheduling problems faced by each supervisor. Unused compensatory time is lost upon separation from service, and may be further limited by policies, agreements, ordinances, or resolutions in each

individual county. The county commissioners have the discretion to set policies regarding the use of compensatory time. Compensatory time may also be a subject of collective bargaining and may be controlled by provisions of collective bargaining agreements in the counties. Due to the numerous possible factual situations in the individual counties, your second question is inappropriate for an Attorney General's Opinion.

THEREFORE, IT IS MY OPINION:

Deputy sheriffs and undersheriffs may not receive cash payments in lieu of compensatory time off for overtime hours worked prior to October 1, 1981.

Very truly yours,

MIKE GREELY
Attorney General