

**Registration Officials—Extra Pay for Overtime—Employment of Deputies.**

If the work in any county office so increases that it cannot be handled by regular deputies, county commissioners have authority to authorize the appointment of extra deputies. County officials and deputies cannot receive a greater compensation than that provided by law regardless of overtime work.

August 9th, 1917.

Hon. H. S. Magraw,  
State Examiner,  
Helena, Montana.

Dear Sir:

I have your letter of August 9th., from which it appears that in various counties it devolves upon some of the county officials, in addition to their regular duties, to do extra work in connection with the registration and drafting of men for military service in the United States army.

You have requested my opinion upon the question of whether or not county officials and their deputies or extra employes are entitled to extra pay by virtue of this extra work which they are required to do, and if so, from what fund should such compensation be paid.

Section 3119 of the Revised Codes of 1907, as amended by Chapters 93 and 119 of the 1909 Session Laws provides for the maximum number of deputy clerks and deputy sheriffs in the several classes of counties. (See State ex rel Hay v. Hindson, 40 Montana. 353, for an interpretation of these two amendments.) Section 3118 of the Revised Codes, as amended by Chapter 132 of the Session Laws of 1911, provides the annual compensation which shall be allowed to any deputy or assistant in the counties of the several classes. Section 3136 of the Revised Codes is as follows:

**"APPOINTMENT OF DEPUTIES.** The number of deputies allowed to county officers and their compensation must not exceed the maximum limits prescribed in this chapter. The officers entitled to deputies must within thirty days after this code takes effect file a certificate of appointment of the deputies in their office with the county clerk. The salaries must be allowed and paid monthly upon the order of the board of county commissioners and paid out of the contingent fund." But Section 3123 provides as follows:

"That the Board of County Commissioners in each County is hereby authorized to allow to the several county officers to appoint a greater number of deputies than the maximum number allowed by law, when, in the judgment of the Board of County Commissioners, such greater number of deputies is needed for the faithful and prompt discharge of the duties of any county office, and to fix the salary of such deputies appointed in excess

of the maximum allowed by law; PROVIDED, such salary shall not exceed the maximum salary of deputies provided by law."

The following quotation is from the decision of our Supreme Court in *Penwell v. County Commissioners*, 23 Mont. at 357, decided before the enactment of Section 2123 above:

"\* \* \* a policy prevailing the statutes which generally gives to the board of county commissioners power to control the number and compensation of deputy county officials. The legislature has selected such boards as best fitted to guard the economic interests of the county, in view of the fact that the county is to pay the deputies, a discretionary power in respect to their number and salaries might be exercised with more impartial regard to the public needs by boards of county commissioners, acting within certain bounds, than could be exercised by any other power, not excepting the legislature itself."

Therefore, if the work in any county office has so increased that it cannot be properly handled by the regular number of deputies as provided by law, the board of county commissioners should make an order authorizing the employment of extra help, fixing their salaries within the maximum compensation provided by law. But it will be noticed from the above sections of the code, that the compensation of deputies must not exceed the maximum limits prescribed in the code, and I am therefore of the opinion that county officials and their deputies cannot receive a greater compensation for their services than that provided in the above sections of the code, regardless of any overtime work which it may be necessary for them to do. By Section 3136 above it will be noticed that the salaries of regular deputies must be allowed and paid monthly out of the contingent fund of the county.

It is a general rule that a change in the duties of an office during the term of the incumbent does not affect the compensation. See 29 Cyc 1424, and cases cited, including *Raymond v. Commissioners*, 5 Mont. 103, 2 Pac. 306. In *United States v. King*, 147 U. S. 676, 37 L. Ed. 328, it was said that Congress has a right to impose additional duties upon public officers without additional compensation is not denied. And on page 679 it is said:

"The question of compensation for extra services has been a subject of considerable discussion in this court and of some legislation by Congress. The ordinary rule, in the absence of legislation, is that, if the statute increases the duties of an officer by the addition of other duties germane to his office, he must perform them without extra compensation \* \* \*"

In *Dellemagne v. Moisan*, 197 U. S. 169, 174, 49 L. Ed. 709, it was said:

"It has long been held that power may be conferred upon a state officer, as such, to execute a duty imposed under an act of Congress, and the officer may execute the same, unless its execution is prohibited by the constitution or legislation of the State. *Prigg v. Pennsylvania*, 16 Pet. 539, 622; *Robertson v. Baldwin*, 165 U. S. 275 \* \* \*"

Although the Federal Government may confer powers upon certain state and county officials, yet it was said in *Ex Parte Kentucky v. Dennison*, 24 Howard 66, 108; 16 L. Ed. 717, 729:

"And we think it clear that the Federal Government under the Constitution, has no power to impose on a state officer, as such, any duty whatever, or compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

"It is true that Congress may authorize a particular state officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal \* \* \*."

But there are exceptions and limitations upon the rule just stated, for as was said by Chief Justice Marshall in *The United States v. Bevens*, 3 Wheat at 390; 4 L. Ed. at 417, the government possesses the broad power of war, which may provide and maintain a navy, which makes rules for the government and regulation of the land and naval forces. In determining the questions which you have submitted, I do not believe that it is necessary to determine whether or not Congress has the power to impose certain duties upon county officials in connection with the registration and drafting men for the United States army, for I think that it may be taken for granted that every public official in Montana possesses sufficient patriotism to gladly and willingly perform every duty which may be imposed upon him by the Federal Government in connection with the present war without the slightest thought of receiving any extra compensation therefor. However, if they perform the duties imposed upon them by the Federal Government, there can be no doubt but that they are not entitled to any compensation for their services in excess of the amount provided by the Revised Codes, it being contemplated that the salary therein provided is in full for all services which they may render in connection with their office.

Respectfully,

S. C. FORD,

Attorney General