

## Opinion No. 104

Offices and Officers—Cities—  
Vacations.

- Held:** 1. Since the amendment of Section 5025, Revised Codes of Montana, 1935, a city clerk may not draw more money from the city for salary and compensation than that provided by ordinance for the office of city clerk, regardless of whether or not he takes his vacation or performs additional duties not ordinarily identified with the office of city clerk.
2. A public officer may not claim additional compensation for a vacation not taken where there is no statutory authority for such claim.
3. City officers receiving payment of increase in salary, not authorized by law, must make refund of the unauthorized amount to the city.

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February 27, 1948

Mr. W. A. Brown  
State Examiner  
Capitol Building  
Helena, Montana

Attention:

Mr. A. M. Johnson, First  
Assistant State Examiner

Dear Mr. Brown:

You have asked my opinion on the legality of the payment indicated by the following facts:

"The examination of a city revealed that Claim No. 17331 was paid June, 1947, to the City Clerk for 'Accumulated vacation due to absence of City Eng. 1943-44-45-46, \$550.00.'"

Since the city has the aldermanic form of government, Section 5025, Revised Codes of Montana, 1935, governs the salary of the city clerk for the years 1943 and 1944, and the 1945 amendment of that section governs for the years 1945 and 1946.

Section 5025, Revised Codes of Montana, 1935, as amended by Chapter 124, Laws of 1945, provides, in part:

"The annual salary and compensation of the city or town clerk must be fixed by ordinance, and in cities of the first class must not exceed thirty-six hundred (\$3,600.00) dollars; in cities of the second class must not exceed twenty-four hundred (\$2,400.00) dollars. **The compensation above provided for shall be in full for all services rendered by any such clerks in any and every capacity. . . .**" (Emphasis mine.)

This section, as amended, leaves no doubt as to the intent of the legislature. The compensation provided by the ordinance is the limit the clerk may draw from the city for his services in whatever capacity performed, whether only for the duties of the clerk, or for any additional duties usually performed by other officers or employees.

Therefore, it is my opinion, since the amendment of Section 5025, Revised Codes of Montana, 1935, a city clerk may not draw more money from the city for salary and compensation than that provided by ordinance for the office of city clerk, regardless of whether or not he takes his vacation or performs additional duties not ordinarily identified with the office of city clerk.

The years of 1943 and 1944 are governed by Section 5025, Revised Codes of Montana, 1935, which provided, in part:

"The annual salary and compensation of the city clerk must be fixed by ordinance, and in cities of the first class must not exceed

twenty-four hundred dollars, which is for all services rendered by him in any capacity; in cities of the second class must not exceed fifteen hundred dollars; in cities of the third class must not exceed twelve hundred dollars, which compensation, for cities of the second and third class, includes services rendered by him as city attorney; . . ."

In interpreting this section, this office held in Opinion No. 181, Volume 18, Report and "Official Opinions of the Attorney General:

"If a city clerk in a city of the second class should render services as assistant city engineer there is nothing in Section 5025, R.C.M. 1935, to prevent the city from paying for such services in addition to the maximum salary fixed by the statute for services as city clerk."

Section 5025, before amendment, did not provide the same limitation on the amount to be paid city clerks for additional services in cities of the second and third class as it did in the case of cities of the first class and towns. Therefore, prior to the amendment, city clerks in cities of the first class were under the same limitation as under the amendment whereas city clerks in cities of the second and third class were not under the limitation that their compensation, as fixed by ordinance, should be for "all services rendered by him in any capacity."

Under the facts stated, the extra compensation was received by the city clerk for "Accumulated vacation." This brings up the question of vacations for city employees. Montana law does not provide for vacations for city and county officers and employees. In Opinion No. 398, Volume 15, Report and Official Opinions of the Attorney General, this office held:

"While there is no express provision in our statutes relating to vacations, it is my opinion that an officer or deputy whose office is determined by law and whose salary is fixed by law, which the commissioners have no right to increase or diminish, should be permitted to take a reasonable vacation for recreation or for the benefit of his health at a time when the work in

the office will permit it with no additional cost or loss to the county."

While the above opinion holds that officers or deputies "should be permitted to take a reasonable vacation," it does not suggest that the officer should have a vacation as a matter of right. A public officer may take his vacation or decline to take it as he likes, (In re Croker (1903) 175 N. Y. 158, 67 N.E. 307) but if he does not take it he has not such a right in it that he may demand or accept **additional compensation** for the time worked which might have been spent on vacation with pay.

It is, therefore, my opinion a public officer may not claim additional compensation for a vacation not taken where there is no statutory authority for such claim.

City officers receiving payment of increase in salary, not authorized by law, must make refund of the unauthorized amount to the city. (See Opinion 126, Volume 20, Report and Official Opinions of the Attorney General.)

Sincerely yours,  
R. V. BOTTOMLY,  
Attorney General