

Opinion No. 22

**Contracts, County Labor and Maintenance Men—County Employees—
Employees, County—Holidays
—Salaries**

Held: That all county employees that are employed on a monthly basis shall receive their regular monthly salaries, without increase or decrease, whether or not they work on such holidays, unless there is a prevailing custom or supplemental agreement to the contrary.

April 7, 1947

Mr. Arthur Solberg
County Attorney
Daniels County
Scobey, Montana

Dear Mr. Solberg:

You have requested an opinion upon the following questions:

1. Are all county employees that are employed by the month, including highway maintenance crews and other laborers, entitled to holidays with pay on any or all of the days listed as legal holidays in Section 10, R.C.M., 1935?
2. If so, are they then entitled to extra pay if they are requested to work, and do work on any of those days?

At the outset, I must state that I am in accord generally with your opinion to the effect that the question of holidays for county highway maintenance crews and other laborers is governed by the prevailing custom and by agreement between the parties. However, it is necessary to render such opinion with the following interpretations in mind.

It must be noted that in the state of Montana Sundays and other holidays are of like type and not placed in the category of special and general holidays as is often done in other states. Section 10, R.C.M., 1935, in listing the holidays lists Sunday and then follows with the list of the holidays, without making such a differentiation. Likewise, while some states provide that acts done on Sun-

days are void this is not true in Montana, except that Section 8850 provides certain holidays shall be non-judicial days. (See 40) C.J.S., p. 416, Section 6).

In addition to this it is well to note that Sections 453, R.C.M., 1935, and 4736, R.C.M., 1935, do not prohibit business in state and county offices, from being open on holidays, but rather merely provide when those offices **must** be open.

In spite of the fact that Section 10 of the Montana code provides in the last sentence as follows:

"All other days than those herein mentioned are to be deemed business days for all purposes", which might imply that holidays are not business days, this will not hold when we consider the case of State ex rel Hay v. Alderson, 49 Mont. 387, page 410; 142 Pac. 210, in which it was held that: "There is no prohibition against the performance of any business act on Sunday as such", and further; in commenting on Section 12, R.C.M., 1935, "Instead of such a prohibition, this section merely provides an extra day of grace. Any of the enumerated acts may be done lawfully on a holiday but are in time if not done until the next business day."

In line with this question it is well to note that generally the compensation of employees is differentiated from the compensation of officers and has been explained in Dillon—Municipal Corporation, 5th Ed., 1911, at page 737, as follows:

"In the case of an officer the compensation—usually a salary—is attached to the office as an incident and is not dependent upon the performance of actual services, while the salary or compensation of an employee is intended as remuneration for services actually rendered, and generally speaking can only be recovered in respect of services rendered or tendered to the municipality."

This is likewise true of officers and employees of the county or of the state. In spite of the above statement as to employees' compensation I believe that the question, in the end, is governed by the same rules as

govern Master and Servant in private transactions. It was noted in McCormack v. Mayor, etc. of New York, 14 Misc. Reports, 35 NYS 757, 1895;

"It is no less difficult to recover for extra compensation against a public than a private employer—. It is clear that if a stipulated remuneration has been agreed upon the servant has no claim to additional remuneration on the mere ground of his performance of additional services; unless he can prove some contract, either express or implied, on the part of his master, to pay an increased salary for the additional services he can recover no remuneration for them." Page 759.

Under the ordinary rules of Master and Servant it will be necessary that a special contractual provision be provided to enable the servant to recover for additional or extra work. As was stated on McKelvey vs. Choctaw, 52 Okla. 81; 162 Pac. 414, 1915:

"It is a settled rule of law that compensation for work within the scope of one's duties which he was employed to perform, in addition to the usual, but not fixed hours for a day's work, cannot be recovered, in the absence of a contract or a showing that the usual and controlling custom was to receive pay for such overtime work."

Montana approved this rule by implication in the case of Doane v. Marquisee 63 Mont., 166; 205 Pac. 426, 1922, by stating that the only time that additional compensation had to be granted was when the extra work was of a charter different from that contemplated by the original contract of employment.

Thus it would appear that in spite of the fact that public employees receive remunerations generally for services rendered, where such employees are on a contract or monthly basis, the contract or the custom will govern whether there will be extra pay. It is usual to expect that where a contract is silent as to extra pay for services on holidays or otherwise, that in the absence of other proof, all extra work done on holidays will be deemed to have been performed under the contract.

Guthrie v. Merrill
4 Kans., p. 194, 1867

Further, if the parties have not made any provision for holidays, the employees apparently would have to work on those days in the absence of custom to the contrary.

In this particular case it is well to note that county commissioners must take into consideration in enacting such contracts, Section 1626, R.C.M., 1935, which provides rates in contracts for such laborers and maintenance men on highways in Montana if they act under a road supervisor.

It is therefore my opinion, that all county employees that are employed on a monthly basis shall receive their regular monthly salaries, without increase or decrease, whether or not they work on such holidays, unless there is a prevailing custom or supplemental agreement to the contrary.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General