

April 10, 1953.

Mr. Gordon T. White  
 County Attorney  
 Valley County  
 Glasgow, Montana

Dear Mr. White:

You have requested my opinion on the following questions:

1. "May the board of county commissioners grant a sixty (60) day leave without pay to a duly elected county officer for purposes of a vacation outside the state of Montana?"
2. "May the board of county commissioners provide for a sixty (60) day leave of absence with pay during the entire period of absence, for said duly elected county officer for purposes of a vacation outside the state of Montana?"

Basically your question involves two problems: 1. May the county commissioners grant a sixty (60) day leave of absence? And, 2. If so, is the leave to be with or without pay?

Section 16-2417, R.C.M., 1947, provides:

"A county officer must in no case, other than herein specified, absent himself from the state for a period of more than sixty days, and for no period longer than five (5) days without the consent of the board of county commissioners, and if he does so absent himself he forfeits his office; provided, however, the sheriff, undersheriff, or deputy sheriffs of any county may absent themselves from the state, with the permission of the board of county commissioners, for a period of more than sixty days for the sole purpose of attending a recognized and accredited law enforcement training school without effecting forfeiture of their offices."

Therefore, in view of the above statute, a county officer may leave the state for a period of sixty (60) days upon receiving the consent of the county commissioners.

There is no specific statute authorizing vacations for elected county officials. However, this office in 5 Opinions of the Attorney General, p. 584, ruled:

**Opinion No. 17.**

**County Officers—Vacations—County Commissioners — Powers of County Commissioners — Salary For Vacations — Leave of Absence.**

HELD: The county commissioners may grant a duly elected county officer a sixty day leave of absence.

When the county commissioners, in their discretion, grant such a leave of absence, the officer receiving the leave is entitled to the salary which attaches to his office.

"There is not any provision in the law relating to vacations by either employees or officials. Hence, in contemplation of law, all employees as well as all officials, are continually in the discharge of their duties as such, and vacations or permission to be absent, are not granted for financial gain, but as a matter of recreation, and at a time when the work in the office will permit the party being absent, and the work in the office is in the meantime kept up by other members of the force, or held in abeyance until the return of the party.

It is also fundamental that where the statute fixes a salary, emolument or compensation, no authority rests in any board or individual to increase or diminish this amount."

The portion of that opinion which deals with "employees" has been superceded by the enactment of Chapter 131, Laws of 1949, as amended by Chapter 152, Laws of 1951. However, that Act specifically provides that "the term 'employee' . . . does not refer to or include elected state, county, or city officials, or school teachers." (Sec. 7, Ch. 131, Laws of 1949).

Again in 15 Opinions of Attorney General 278, No. 398, it was held:

"The county commissioners have no authority to diminish the salary of an officer or deputy whose salary is fixed by law because of such officer taking a reasonable vacation."

This is a reiteration of the well recognized constitutional provision which prohibits the increase or decrease of a salary of a public officer after his election or appointment. (Section 31, Article V, Constitution of the State of Montana.)

This right of a public officer to a fixed and definite compensation during his term of office cannot be defeated by actions of the county commissioners in affixing a condition to the vacation—that the vacation shall be without pay. *United States vs. Andrews*, 240 U. S. 90, 60 L. Ed. 541, 36 S. C. 349.

In 67 C.J.S., *Officers*, Sec. 83, p. 320, the general rule as to compensation of a public officer is stated as follows:

"Where provision is made for compensation for a public office, the right to the compensation is an incident to the office or to the right or title thereto, and the person rightfully holding the office is entitled to the compensation attached thereto. In general, the right of compensation is not an incident of the exercise of the functions or the performance of the duties of the office; hence in the absence of constitutional or statutory provision to the contrary, the fact that officers have not performed the duties of the office does not deprive them of the right to compensation, provided their conduct does not amount to an abandonment of the office. Thus it has been held that the right of an officer to salary is not necessarily impaired by his occasional or protracted absence from his office. . . ." (Citing *Miller vs. Robinson*, 306 Ky. 653, 208 S.W. (2d) 977.)

This is the rule in Montana. (*Wright vs. City of Butte*, 45 Mont. 417, 123 Pac. 531; *Rusch vs. Board of County Commissioners of Yellowstone County*, 121 Mont. 162, 191 Pac. (2d) 670.)

It is therefore my opinion that the county commissioners may grant a duly elected county officer a sixty day leave of absence.

It is further my opinion that when the county commissioners, in their discretion, grant such a leave of absence, the officer receiving the leave is entitled to the salary which attaches to his office.