

Opinion No. 94**Firemen — Vacation Period —
Working Days — Statutes —
Ordinances Conflict With
State Statute — Statute Prevails**

HELD: 1. In computing the vacation leave of firemen, as well as all other state, county or city employees, only working days are to be considered in the computation, and non-working days, days off, and legal holidays, are to be excluded therefrom.

2. The municipal ordinance, Section 6-114, is in conflict with our State Statutes, Section 59-1001 and 59-1002, R.C.M., 1947, and is therefore invalid, and thus, a fireman or other city employee may accumulate his vacation leave to a maximum of Thirty (30) working days.

November 24, 1956

Mr. Richard V. Bottomly
County Attorney
Cascade County
Great Falls, Montana

Dear Mr. Bottomly:

You have requested my opinion concerning the vacation periods of fire department employees.

Your first question may be stated as follows:

In computing the annual vacation leave of firemen, are days off to be included in the vacation period?

Your letter of inquiry also raised a second question which may be phrased as follows:

Where a city ordinance and a state statute conflict — which prevails?

The answer to the first question must be answered in the negative. Section 59-1001, R.C.M., 1947, provides:

“Each employee of the state, or any county or city thereof, who shall have been in continuous employment and service of the state,

county or city thereof, for a period of one (1) year from the date of employment is entitled to and shall be granted annual vacation leave with full pay at the rate of one and one-fourth (1¼) **WORKING** days for each month of service." (Emphasis supplied.)

Section 11-1931, R.C.M., 1947, providing for hours of work and days off for firemen in cities of the first class reads:

"The city council, city commission or other governing body in cities of the first class, shall divide all members of the paid fire department into platoons of three shifts. The members of each shift shall not be required to work or be on duty more than eight (8) hours of each consecutive twenty-four hours, except in the event of a conflagration or other similar emergency when such members or any of them may be required to serve so long as the necessity therefor exists. **Each member shall be entitled to at LEAST one (1) day off duty out of each eight-day period of service without loss of compensation.**" (Emphasis Supplied.)

With reference to the above quoted statutes, it is clear that a fire department employee is entitled to one and one-quarter (1¼) **WORKING DAYS** vacation leave for each month of service. This has been held to be a matter of right and not a privilege. (24 Reports and Official Opinions of the Attorney General, N. 37). Further, it is clear that a fireman is entitled to at **LEAST** one day off out of each eight (8) day period. To allow more days off is discretionary with the city.

Thus, under our statutes, a "working day" is a day where actual service is required and does not include non-working days, days off or legal holidays. (See *Pedersen v. Eugster*, 14 F. 422; *Field v. Chase*, N.Y. Labor's Supp. 50, 52; 45 Words & Phrases, Permanent Ed. p. 502).

Therefore, computing the vacation leave of firemen, only working days are to be considered in the compu-

tation, and non-working days, days off, and legal holidays, are to be excluded therefrom.

In answer to your second inquiry, it is a fundamental principle that municipal ordinances are inferior in status and subordinate to the laws of the state. An ordinance in conflict with a state law of general character and state-wide application is universally held to be invalid. The Supreme Court of Montana made such a pronouncement as early as 1908 in the case of *McGillic v. Corby*, 37 Mont. 249, 253, 95 Pac. 1063, 17 L.R.A. (NS) 1263, wherein our court stated:

"Statute law and by-laws are intended to meet different wants and exigencies, and to serve different purposes. The former, when general in its nature and operation, is intended to furnish a rule for the government of the people of the state everywhere. The latter, made by the corporation under derivative authority, are local regulations for the government of the inhabitants, or the regulation of the local concerns of the incorporated place; and of course they must be void, unless specially authorized by the charter or organic Act of the corporation, whenever they are repugnant to, or inconsistent with, the general law of the land. **No implied power to pass by-laws, and no express general grant of the power, can authorize a by-law which conflicts with the statutes of the state or with the general principles of the common law adopted or in force in the state.**" (1 Dillon's Municipal Corporations, sec. 366.) Much less can an ordinance which directly contravenes the provision of the law creating the municipality be held to be valid." (Emphasis supplied.)

In the instant situation, Section 59-1001, R.C.M., 1947, *supra*, provides for one and one-quarter (1¼) working days vacation leave for each month of service of a state, county or city employee. Section 59-1002, R.C.M., 1947, provides for the accumulation of thirty (30) working days vacation leave and is as follows:

"Such annual vacation leave may be accumulated to a total not to exceed thirty working days."

These two sections are in direct conflict with Section 6-114, Revised Ordinances of the City of Great Falls, 1952, which reads in part as follows:

" . . . shall be granted a vacation for a period of not exceeding fifteen days (15) during each year of service . . . and, if such vacation shall not be taken during the calendar year which the employee may be entitled thereto, under this ordinance, that the same shall be deemed as having been waived by such employee and in the next calendar year he shall be entitled only to fifteen days (15) on full pay."

Thus, it is clear that Section 6-114, Revised Ordinance of the City of Great Falls, 1952, is in conflict with our state statutes in that Section 59-1001, R.C.M., 1947, provides for one and one-quarter (1¼) WORKING DAYS vacation leave for each month of service, whereas, the ordinance provides that the vacation leave of employees shall not exceed fifteen (15) days. Further, the ordinance is in conflict with Section 59-1002, R.C.M., 1947, which allows the accumulation of thirty working days for vacation leave, whereas, the ordinance prohibits the accumulation of vacation leave. Because of these conflicts, the ordinance (Section 6-114, supra) is invalid.

The most recent pronouncement of our Supreme Court upholding this conclusion is *City of Billings v. Harold*, Mont., Pac. (2d), 13 St. Rep. 110, 113, wherein our Court stated:

" . . . 'Municipal by-laws must also be in harmony with the general laws of the state, and with the provisions of the municipal charter. Whenever they come in conflict with either, the by-law must give way.' (Cooley on Const. Lim. (7th Ed.) 278) 'Public highways are under legislative control . . . ' (People v. Eaton, 100 Mich. 208, 59 N.W. 145, 24

L.R.A. 721). 'The power conferred upon incorporated towns by the general incorporation Act is but a mere grant of limited power to the municipality, which it holds subject to the general laws of the state.' (In re O'Brien, 29 Mont. 530, 75 P. 196) 'But municipal corporations are subordinate parts of the state, and invested with limited powers. The legislature, in granting such powers, does not divest itself of any power over the inhabitants of the district which it possessed before the charter was granted.' (Wilcox v. Deer Lodge County, 2 Mont. 574) '**No city or village has the power by ordinance or by-laws to make the general laws of the state inoperative.**' (People v. Kirsch, 67 Mich. 539, 35 N.W. 157) See, also, Section 4703, Political Code of Montana, which prescribes a limitation upon the powers of cities. Compare *Gamewell Co. v. City of Phoenix*, 216 F. 2d 928, 933, and *City of Tucson v. Polar Water Co.*, 76 Ariz. 404, 265 Pac. (2d) 773, 774." (Emphasis Supplied.)

It is therefore my opinion that in computing the vacation leave of firemen, as well as all other state, county or city employees, only working days are to be considered in the computation, and non-working days, days off, and legal holidays, are to be excluded therefrom.

It is also my opinion that the municipal ordinance, Section 6-114, heretofore referred to, is in conflict with our State Statutes, Sections 59-1001 and 59-1002, R.C.M., 1947, and is therefore invalid, and thus, a fireman or other city employee may accumulate his vacation leave to a maximum of Thirty (30) working days.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.