Opinion No. 9

CITIES AND TOWNS, Offices and Officers, Who are; CITIES AND TOWNS, Offices and Officers, City Clerk; OFFICES AND OFFICERS, Who are; OFFICES and OFFICERS, Cities and Towns, Vacations; VACATIONS, Cities and Towns; Public offices not entitled to pay; SECTIONS 11-702, 11-719, 11-723, 11-731, 11-805, 59-1001, and 59-1003, R.C.M., 1947.

HELD: City clerks are not entitled to pay for unused annual vacations after termination of their term of office, they are entitled to take annual vacations with pay during their term of office.

————————

July 19, 1963

Mr. Albert E. Leuthold
State Examiner
Capitol Building
Helena, Montana

Dear Mr. Leuthold:

You have requested my opinion on the following question:

Is the City Clerk, of a city of the third class, entitled to accumulated vacation pay upon termination of his term of office?

Cities of this state must grant annual vacations to their employees, as 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-quarter (1¼) working days for each month of service."

Under certain conditions, city employees are entitled to cash compensation for unused vacation leave upon termination of their employment, section 59-1003, R.C.M., 1947. It has long been the law in this state that the words of a statute must be given their plain and ordinary meaning, **State v. Bowker** (1922) 63 Mont. 1, 205 Pac. 961. Nor can a statute be construed where its meaning is clear and free from ambiguity, **Smith v. Iron Mountain Tunnel Co.** (1912) 46 Mont. 13, 125 Pac. 649. Therefore, the word "employee" as used in section 59-1001, supra, must be given its plain and ordinary meaning. Webster's New International Dictionary, Second Edition Unabridged, defines employee as:

"One employed by another; one who works for wages or salary in the service of an employer;—distinguished from official or officer. See Office."

The same authority defines "Office" as:

"5. A special duty, trust, charge, or position, conferred by an exercise of governmental authority and for a public purpose; a position of trust or authority conferred by an act of governmental power; a right to exercise a public function or employment and receive the emoluments (if any) thereto belonging; as, an executive or judicial office; a municipal office; —distinguished from an employment.***"

The word "employee" has a distinct meaning, and such meaning does not include the term "Public Officer." Therefore, the benefits of this act extend only to governmental employees, section 59-1001, supra. To answer your question it is necessary to determine whether a City Clerk is a city employee or a city officer.

Cities of the third class are not required to have City Clerks; however, should they choose to have one, such office is authorized by statute, section 11-702, R.C.M., 1947, provides:

> "The officers of a city of the second and third classes consist of one mayor, two aldermen from each ward, one police judge, one city treasurer, who may be ex-officio tax collector, who must be elected by the qualified electors of the city as hereinafter provided. There may also be appointed by the mayor, with the advice and consent of the council, one city clerk, who is ex-officio city assessor, one chief of police, one city attorney, **and any other officer** necessary to carry out the provisions of this title. The city council may prescribe the duties of all city officers, and fix their compensation, subject to the limitations contained in this title." (Emphasis added)

In the case of **Sandquist v. Rogers,** 93 Mont. 355, 361, 18 Pac. 2d 617, it was recognized that, under this statute, cities may have appointed city officers. The duties of the City Clerk are specified by section 11-805, R.C.M., 1947. City officers are required to take an oath of office and file an official bond, sections 11-719, 11-723, and 11-731, R.C.M., 1947. Our Supreme Court, in the case of **State ex rel. Running v. Jacobson** (1963) 140 Mont. 221, 224, 370 Pac. 2d. 483, reiterated the indices of a public officer, by saying:

> "In the case of State ex rel. Barney v. Hawkins, 79 Mont. 506, 528, 257 Pac. 411, 418, 53 A.L.R. 583, this court stated:
>
> '***we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature; (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature and by it placed

under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a commission or other written authority, and give an official bond, if the later be required by proper authority.' (citing cases)

"If any one of the five elements, recited in State ex rel Barney v. Hawkins, supra, is absent in a public service position, such position is an employment and not a public office, and the occupant thereof is an employee and not an officer. All the elements must be present."

The application of this test to the position in question, City Clerk, would lead to but one conclusion, that is, that a City Clerk is a public officer. As previously stated, a public officer is not entitled to the benefits granted by Chapter 10, Title 59, Revised Codes of Montana, 1947.

It is therefore my opinion that a City Clerk of a City of the third class is a public officer, and as such, is not included within the terms of section 59-1001, R.C.M., 1947, pertaining to annual vacation leave for public employees.

This is not to say that public officers are not entitled to annual vacations, as this office has repeatedly held that such is not the case. Volume 15, Opinion No. 398, Report and Official Opinions of the Attorney General, held that public officers are entitled to vacation leave during their term of office.

Volume 22, Opinion No. 104, page 171, Report and Official Opinions of Attorney General, said:

"A public officer may take his vacation or decline to take it as he likes, (In re Croler (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."

Furthermore, public officers may only receive such compensation as has been specifically authorized by statute, **State ex rel. Mat-**

son v. O'Hern et al. (1937) 104 Mont. 126, 142, 65 Pac. 2d 619. This rule applies with equal force to municipalities, **Peterson v. City of Butte** (1912) 44 Mont. 401, 407, 120 Pac. 483. In **Leischner v. Knight** (1959) 135 Mont. 109, 112, 337 Pac. 2d 359, the Court said:

> "It is well-settled law in this state that cities have only those powers granted them by statute or which are necessarily implied as adjuncts to powers granted by statute. This court has repeatedly stated that 'unless a power is vested in the municipality by express law [or by necessary implication therefrom], the presumption is against the exercise by the city of any such power.' " (citing case).

It is my opinion that City Clerks are not entitled to pay for unused annual vacations after termination of their term of office. They are entitled to take annual vacations with pay during their term of office.

Very truly yours,
FORREST H. ANDERSON
Attorney General