

VOLUME NO. 36**Opinion No. 6**

CITIES AND TOWNS — Police, appointment of officers; CITIES AND TOWNS — Police, salaries; CITIES AND TOWNS — Police, volunteer organizations; SHERIFFS — Deputies, power to appoint; SHERIFFS — Deputies, salaries; SHERIFFS — Deputies, volunteer organizations. Sections 11-1803, 11-1813, 11-1832, 16-2409, 16-2702, 16-2731, 16-3701, 16-3704, 16-3706, 25-604, Revised Codes of Montana, 1947; 7 Opinions of the Attorney General, p.107 (1917).

- HELD:**
- 1. Volunteer law enforcement groups which would perform the same duties as regular, full-time, salaried deputy sheriffs can be legally established by the sheriff of the county.**
 - 2. Volunteer law enforcement groups which would perform the same duties as regular, full-time, salaried police officers can be legally established by the mayor or city-manager except in cities of the first and second class.**
 - 3. No volunteer law enforcement group which would perform the same duties as regular, full-time, salaried police officers can be legally established in cities of the first or second class.**

May 8, 1975

Mr. Michael A. Lavin, Administrator
Crime Control Division
Department of Justice
1336 Helena Avenue
Helena, Montana 59601

Dear Mr. Lavin:

I am in receipt of your recent letter in which you request my opinion on the following questions:

1. Can volunteer law enforcement groups, which would perform the same duties as regular, full-time, salaried sheriffs or police officers, be legally established?
2. If such groups can legally be organized, under whose authority may such officers be appointed?

Since county sheriffs and city police departments are regulated by distinct statutory provisions it is necessary to discuss them separately.

With respect to deputy sheriffs, 16-3701, Revised Codes of Montana, 1947, provides in pertinent part:

The whole number of deputies allowed the sheriff is one undersheriff, and in addition not to exceed the following number of deputies: In counties of the first, second and third classes, six; in counties of the fourth class, two; in counties of the fifth, sixth, seventh and eighth classes, one. The sheriff in counties of the first, second and third classes may appoint two deputies, and in the fourth, fifth, sixth, seventh and eighth classes, one deputy who shall act as jailor and receive the same salary as other deputy sheriffs.

The final sentence of that statute has been held not to create a new class of deputies, or lodge in the sheriff exclusively the power of appointment without the consent or approval of the board of county commissioners, but simply to amount to an increase of the maximum number he may appoint, subject to the approval of the board. **Hogan v. Cascade County**, 36 Mont. 183, 187, 92 P. 529 (1907).

Section 16-3704, R.C.M. 1947, authorizes the board of county commissioners to allow county officers to appoint a greater number of deputies than is permitted by 16-3701 and to fix the salary of these additional deputies not to exceed the maximum salary provided by law.

Apparently conflicting statutes confuse the matter. Section 16-2409, R.C.M. 1947, as amended, states:

Every county and township officer, except justice of the peace, may appoint as many deputies or assistants as may be necessary for the faithful and prompt discharge of the duties of his office. All compensation or salary of any deputy or assistant shall be as provided in this Code.

Section 16-2702, R.C.M. 1947, enumerates the duties of the sheriff, one of which is:

6. Command the aid of as many male inhabitants of his county as he may think necessary in the execution of these duties; ...

In **McCarthy v. Anaconda Copper Mining Co.**, 70 Mont. 309, 225 P.391 (1924), the Montana Supreme Court found that a sheriff has a great deal of discretion in summoning and directing a posse comitatus.

All of the statutes involved in the resolution of this issue originated with either the Bannack Statutes or the Political Code of 1895 and have evolved to this date with relatively few changes. Consequently the pertinent case law dates back to the turn of the century but remains as applicable today in most instances. In **State v. Crouch**, 70 Mont. 551, 227 P. 818 (1924), the Supreme Court held that section 16-3706 which limits the number of deputy county attorneys did not preclude a county attorney from appointing a deputy to act without compensation. The appointment had been made:

In spite of the fact that the board of county commissioners of Pondera County did not authorize the appointment of Hottersly as deputy county attorney, and at the time of his appointment there was in effect a resolution of the board of county commissioners to the effect that no deputy officer should be appointed nor the salary of any deputy fixed without first obtaining authority from the board of county commissioners. At page 554.

In an earlier case the Court held that the board of county commissioners has the power to determine, within the maximum limits prescribed by law, the number and compensation of deputies allowed by the sheriff. **Jobb v. County of Meagher**, 20 Mont. 424, 51 P. 1034 (1897). However, the Court continued by stating at p. 431:

An examination of the course of legislation with reference to the compensation of the sheriff and his deputies impels us to the conclusion that the people entertained no objection to the appointment by the sheriff of as many deputies as he desired, so long as the results of the exercise of such power in no wise entailed expense to the people; in other words, the territory, and afterwards the state granted permission to that officer to appoint and employ, and himself pay, such number of deputies as he might wish.

A number of opinions have been written by early Attorneys General construing the predecessors of the Statutes at issue here. The majority of those opinions dealt with deputies seeking compensation who were appointed by the sheriff without the authorization of the board of county commissioners and in excess of the number of deputies allowed by the predecessor of section 16-3701. In those cases the obvious conclusion is that no compensation can be obtained. In one opinion, however, Attorney General Ford stated that:

... a sheriff may appoint a deputy to serve without salary or compensation from the county, and if the appointment and oath of office of such deputy is filed in the office of the Clerk and Recorder, he has authority to act as a deputy sheriff in exactly the same manner as a salaried deputy, but that fees collected by such deputy cannot be retained by him as compensation for his services, but that the same except mileage must be by the sheriff paid into the county treasury. 7 Opinions of the Attorney General, p. 107 (1917).

The applicable law, although amended many times since Attorney General Ford's opinion in 1917, remains substantially similar to the laws construed in that early opinion. Therefore, I agree that the statutory limitation on the number of deputies which may be appointed and the requirement that their appointment be first authorized by the board of county commissioners is applicable only to salaried or otherwise compensated deputies. The purpose was apparently to limit the authority of the sheriff to commit county funds for personnel salaries without prior authorization. There could be no logical explanation for a conclusion that a sheriff could not increase the number of deputies available if such would cause no expense to the county.

In addition, another statute, section 16-2731, R.C.M. 1947, may legitimize, if not create, the existence of voluntary reserve organizations:

The board of county commissioners shall purchase liability insurance protecting the sheriff, under-sheriff, deputy sheriffs, and members of any voluntary reserve organization acting under the direction of the sheriff ...

That section was enacted as Section 1, Chapter 482, Laws of 1973. The enactment of that statute together with the legislature's failure to preclude the existence of such organizations by statute must be construed as a tacit approval of the practice. **State ex rel. Rolder v. State Board of Equilization**, 133 Mont. 393, 324 P.2d 1057 (1958).

With respect to city policemen, Section 11-1803, R.C.M. 1947, requires that all appointments to the police force be made by the mayor or manager and confirmed by the city council or commission after formal application has been made to the mayor or manager and certification by the police commission that the applicant has successfully passed a required examination. Unlike the provisions for the appointment of deputy sheriffs section 11-1803 is the exclusive statutory provision for the appointment of policemen. While section 16-2409 allows county officers to appoint additional personnel if necessary, no corresponding provision permits city officers to do the same. In addition to active policemen section 11-1818, R.C.M. 1947, provides for the existence of a police reserve to be established from the ranks of retired police officers who may be called into active service and who are to be paid from a reserve fund. Your question clearly does not contemplate police reserves as constituted by section 11-1818 *et seq.*

Apparently the legislature has determined that a greater interest in centralized control of additional personnel exists with respect to city law enforcement than exists with respect to county law enforcement. Thus the only law enforcement groups which may be lawfully constituted by a city are those whose members are appointed by the mayor or city-manager. Further, section 11-1832, R.C.M. 1947, as amended in 1973, sets a minimum salary to be paid to each duly confirmed member of police departments of the first and second class. Since no policeman in a city of the first or second class may receive less than the statutory minimum no volunteer law enforcement organization may exist in those cities.

No such minimum salaries exist for police officers of cities not of the first or second class nor does such a requirement exist as to deputy sheriffs. Section 25-604, R.C.M. 1947, which sets salaries for deputy county officers has been construed by the Montana Supreme Court to allow salaries to be set for temporary extra duty deputies at any rate which may be deemed expedient, provided that it does not exceed the rate paid the regular deputies. **Modesitt v. Flathead County**, 57 Mont. 216, 187 P. 911 (1920); **Farrell v. Yellowstone County**, 68 Mont. 313, 218 P. 559 (1923).

THEREFORE, IT IS MY OPINION:

1. Volunteer law enforcement groups which would perform the same duties as regular, full-time, salaried deputy sheriffs can be legally established by the sheriff of the county.
2. Volunteer law enforcement groups which would perform the same duties as regular, full-time, salaried police officers can be legally established by the mayor or city-manager except in cities of the first and second class.
3. No volunteer law enforcement group which would perform the same duties as regular, full-time, salaried police officers can be legally established in cities of the first or second class.

Very truly yours,

ROBERT L. WOODAHL
Attorney General