

VOLUME NO. 36**Opinion No. 63**

OFFICES AND OFFICERS — 90% limitation on deputies' salaries; Sections 13-801, 16-1024, 16-1025, 16-1027, 25-604, 41-2303, 69-4411, 69-4421, 93-401-15, 93-401-16, Revised Codes of Montana 1947.

- HELD:**
- 1. Deputy county officers who receive the full 90% salary allowed by section 25-604, R.C.M. 1947 cannot collect additional compensation for overtime.**
 - 2. Deputy county officers who receive the full 90% salary allowed by section 25-604, R.C.M. 1947 may receive local registrar fees in addition to their salary.**

March 31, 1976

Mr. Edward J. DeGeorge, Chairman
Board of County Commissioners
Silver Bow County
Butte, Montana 59701

Dear Mr. DeGeorge:

You have requested my opinion on the following questions:

1. May a chief deputy county officer receiving the full 90% salary collect overtime?

2. May a chief deputy county officer receive local registrar fees which, when combined with her salary, amount to over 90% of the office holders salary?

I will first examine whether a deputy receiving the full 90% salary can receive additional compensation for overtime. Section 25-604, R.C.M. 1947 states in pertinent part:

That the boards of county commissioners in the several counties in the state shall have the power to fix the compensation allowed any deputy...; **provided the salary of no deputy or assistant shall be more than ninety per cent (90%) of the salary of the officer under whom such deputy or assistant is serving;**... (Emphasis supplied)

It is a generally accepted principle that laws concerning compensation earned by public officers must be strictly construed in favor of the government and such officers are only entitled to receive the amount specifically provided for by law. **Matson v. O'Hern**, 104 Mont. 126, 142, 65 P.2d 619 (1937).

The Montana Minimum Wage Act was adopted in 1971 and provides in section 41-2303 (b) R.C.M. 1947 that:

No employer shall employ any of his employees for a work week longer than forty (40) hours, unless such employees receive compensation for his employment in excess of forty (40) hours in a work week at a rate of not less than one and one-half (1½) times the hourly wage rate at which he is employed...

It is evident that there is a conflict between the provisions of section 25-604, *supra*, and 41-2303 (b), *supra*. It should be noted that the Minimum Wage Act was adopted by the 1971 Legislature, which also amended section 25-604, *supra*. This conflict was addressed by the Montana Supreme Court in **City of Billings v. Smith**, 158 Mont. 197, 490 P.2d 221 (1971) concerning the salaries of sheriff's deputies. The court noted that section 25-604, *supra*, specifically referred to county deputies while the Minimum Wage Act was a general act. The court went on to state:

In the construction of a statute the office of the court is to ascertain and declare what is in terms or in substance contained in the statute, and where there are several provisions or particulars such a construction is, if possible, to be adopted as will give effect to all (section 93-401-15, R.C.M. 1947). In the construction of a statute the intention of the legislature is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it (section 93-401-16, R.C.M. 1947)

Where one statute deals with a subject in general and comprehensive terms, and another deals with a part of the same subject in a more minute and definite way, the latter will prevail over the former to the extent of any necessary repugnancy between them. **Barth v. Ely**, 85 Mont. 310, 278 P. 1002; **In re Stevenson's Estate**, 87 Mont. 486, 289 P. 566.

In **State ex rel. State Aeronautics Comm. v. Board of Examiners**, 121 Mont. 402, 417, 194 P.2d 633, 641, this Court said:

[I]t is a canon of statutory construction that a later statute general in its terms and not expressly repealing a prior special or specific statute, will be considered as not intended to affect the special or specific provisions of the earlier statute, unless the intention to effect the repeal is clearly manifested or unavoidably implied by the irreconcilability of the continued operation of both, or unless there is something in the general law or in the course of legislation upon its subject matter that makes it manifest that the legislature contemplated and intended a repeal.

The specific intention of the legislature indicates, from the very provisions of the Act, in Section 7, that the legislature intended all of the provisions of law relating to minimum wages and hours to be cumulative. The Minimum Wage Act of 1971 did not repeal any prior acts. This is reinforced by the fact that in 1971, at the same time and in the same session as the passage of the Minimum Wage Act, the legislature also amended section 25-604, R.C.M. 1947, thereby at the same time placing its stamp of approval upon the provisions of that statute.

Where statutes relate to the same general subject they should be so construed together, where there is no inconsistency between them, so as to give effect to both where possible. **State ex rel. Ronish v. School District No. 1 of Fergus County**, 136 Mont. 453, 348 P.2d 797. All acts relating to the same subject, or having the same general purpose as the statute being construed, should be read in connection with such statute. **State ex rel. McHale v. Ayers**, 111 Mont. 1, 105 P.2d 686. Statutes passed at the same time, and relating to the same general subject are to be construed together and both given effect if possible. **Belote v. Bakken**, 139 Mont. 43, 359 P.2d 372.

The provisions of section 25-604, R.C.M. 1947, and the provisions of the Minimum Wage Act of 1971 are in conflict. In such case the special act will prevail over the general provisions of the Minimum Wage Act. Moreover, the salaries granted to county officers are based upon an annual wage rather than a monthly wage. The maximum salary of 95% or 90%, as the case may be, for undersheriffs and deputies is also the minimum fixed by that statute. Because a maximum is provided in section 25-604, which in most cases is also the minimum salary, it is obvious that the time and a half for overtime for hours in excess of 40 hours per week could not be enforced. Section 16-2414, R.C.M. 1947, requires county offices to be open for five days a week from 8:00 a.m. until 5:00 p.m., but does not set forth the hours of work for employees in the offices. The reenactment of section 25-604 in the 1971 Session, by an amendment indicates a legislative intent to keep that statute specifically in force.

Although the court in **Smith** was specifically concerned with deputy sheriffs, the same reasoning applies to all county deputies. It should also be pointed out that even though the labor contract entered into by county employees specifies double time for overtime, this does not apply to chief deputies who receive the full 90% salary as allowed by section 25-604, *supra*. The reason for this is the well known legal principle that a person cannot contract in contravention of law. Section 13-801, R.C.M. 1947; **New Silver Bell Min. Co. v. Lewis and Clark County**, 129 Mont. 269, 284 P.2d 1012 (1955).

In answer to your first question therefore, in view of the above cited Montana Law, it is clear that chief deputies who receive the full 90% salary allowed by section 25-604, *supra*, cannot collect additional overtime compensation.

It is also apparent, however, that the county commissioners have the inherent, discretionary power to grant a deputy the equivalent time off for the hours of overtime worked. This authority is granted by the following statutes:

Section 16-1024, R.C.M. 1947, provides, in part:

The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law: To represent the county, and have the care of the county property, and the management of the business and concerns of the county in all cases where no other provision is made by law...

Section 16-1025, R.C.M. 1947, provides:

The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law: To make and enforce such rules for its government, the preservation of order and the transaction of business, as may be necessary.

Section 16-1027, R.C.M. 1947, provides:

The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law: To perform all other acts and things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government.

These statutes, for example, were held by then Attorney General Olson to grant county commissioners the discretionary power to grant holidays with pay to county employees although there was no specific statutory or judicial authority in Montana conferring such a benefit. **24 Opinions of the Attorney General**, No. 106.

Your second question concerns whether a chief deputy county officer may receive local registrar fees which, when combined with her salary amount to over 90% of the officer holders salary. The pertinent section here, in addition to section 25-604, *supra* is section 69-4421, R.C.M. 1947 which reads as follows:

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The department may specify by regulation a fee to be paid each local registrar for each complete birth, death or fetal death certificate forwarded by the local registrar to the department,... The department shall annually certify to the county treasurer the number of births, fetal deaths and deaths, or monthly reports received from his county with the names of the local registrar and the amount due him. The treasurer shall pay each local registrar out of the county general fund.

Section 25-604, *supra*, does provide for a 90% limitation on the salary of county deputies. "Salary", when used in connection with county officers or employees has been held to mean, "... what it ordinarily means: a fixed compensation, made by law to be paid periodically for services,..." *Scharrenbroich v. Lewis and Clark County*, 33 Mont. 250, 83 P. 482 (1905). The services referred to in this case would be those required of a deputy county clerk and recorder. The question now becomes whether the sending of vital statistics to the Department of Health is within the normal duties of a deputy clerk and recorder.

There is no statutory authority that provides for any county officer to send vital statistics reports to the Department of Health. Title 69, Chapter 44, R.C.M. 1947 makes it the duty of the local registrar to send the vital statistics reports to the Department of Health. In addition Chapter 44 requires that the local registrar's work with the county clerk and recorder's office in filing the required certificates. Section 69-4411, R.C.M. 1947. One can conclude therefore that the salary paid a chief county deputy does not include compensation for performing the duties of a local registrar.

Since the local registrar fee received by a chief county deputy officer is not for services required to be performed as a deputy county officer, it cannot be considered as additional salary for the position. The 90% limitation prohibits any additional compensation for services rendered as a deputy, and does not prohibit compensation for other services.

THEREFORE, IT IS MY OPINION:

1. Deputy county officers who receive the full 90% salary allowed by section 25-604, R.C.M. 1947 cannot collect additional compensation for overtime.
2. Deputy county officers who receive the full 90% salary allowed by section 25-604, R.C.M. 1947 may receive local registrar fees in addition to their salary.

Very truly yours,
ROBERT L. WOODAHL
Attorney General