VOLUME NO. 37 OPINION NO. 16

CONSTITUTIONAL LAW - Regular days work - what constitutes; CONSTITUTIONAL LAW - Hours of labor - limitation; PUBLIC EMPLOYEES - Hours of labor - limitations; LABOR - Regulations - Eight-hour day statute; LABOR - Regulations - Hours of labor; LABOR - Annual leave, legal holidays, jury duty and military leave as counted in overtime computation; PUBLIC EMPLOYEES - Annual leave, legal holidays, jury duty and military leave as counted in overtime computation; PUBLIC EMPLOYEES - Four consecutive ten-hour days as applying to county road and bridge departments; COUNTIES - Regular road and bridge departments, forty-hour week consisting of four ten-hour days; REVISED CODES OF MONTANA, 1947 - Sections 41-1121 and 41-2303; CONSTITUTION OF MONTANA, 1972 - Article XII, section (2).

HELD: 1. An agency of state government may permit an employee to work more than eight (8) hours in any work day.

2. Overtime need only be paid for hours worked in excess of forty (40) hours in any one work week.

3. Paid days off for annual leave, legal holidays, jury duty and military leave are not counted as hours worked in the computation of weekly overtime.

4. Only regular county road and bridge departments may schedule a forty (40) hour work week consisting of four consecutive ten hour days, if the schedule is agreed to by the employees.

18 April 1977

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Dear Mr. Doney:

You have requested my opinion on the following questions concerning the applicability of the Montana "eight-hour law" (section 41-1121, R.C.M. 1947) and the Montana Minimum Wages and Hours Act, Title 41, chapter 23, R.C.M. 1947:

1. May an agency of the state government permit a state employee to work more than eight (8) hours in any one work day?

2. Is a state employee to be paid overtime for hours worked in excess of eight hours a day, or for hours worked in excess of forty hours in any one work week?

3. Whether annual leave, legal holidays, jury duty and military leave must be counted as hours of work for the purpose of computing overtime pay?

4. May any state agency regularly schedule a group of its employees to work a forty (40) hour work week consisting of four consecutive ten hour days?

The U.S. Supreme Court in National League of Cities v. Usery, ____ U.S. ____, ____ L.Ed.2d ____, ____ S.Ct. ____, 44 L.W. 4974 (decided June 24, 1976) struck amendments to the Fair Labor Standards Act (F.L.S.A.) which previously extended federal regulation of wages and hours to state employees. National League clearly precludes congressional authority under the commerce clause to regulate minimum wages and overtime provisions in areas of traditional govern-

ment operation and thus returns to Montana the power to regulate the wages and hours of its employees. Thus, state employees are not covered by the Minimum Wages and Hours Act, Title 41, chapter 23, R.C.M. 1947.

At the outset it should be noted that the Montana act is a minimum wages and hours act, similar to the F.L.S.A., and does not prohibit parties from contracting with reference to hours and compensation at will, provided the compensation agreed upon does not fall below its required minimum standards. In other words it is permissable for an employee to bargain for and receive compensation and benefits higher than those set forth in the act. Cf., Reeves v. Howard County Refining Company, (1940, D.C.) 33 F.Supp. 90, Walling v. Bello Corporation, 316 U.S. 624, 86 L.Ed., 1716, 62 S.Ct. 1223 (1942), Allen v. Moe, (1941, D.C.) 39 F.Supp. 5.

1. The initial question for determination is whether an agency of state government may permit a state employee to work more than eight hours in any one work day. Article XII, section (2) of the 1972 Montana Constitution provides:

> (2) A maximum period of eight hours is a regular day's work in all industries and employment except agriculture and stock raising. The legislature may change this maximum period to promote the general welfare. (Emphasis added.)

Additionally, section 41-1121, R.C.M. 1947 states:

> A period of eight hours shall constitute a day's work in all works and undertakings carried on or aided by any municipal, county, or state government...no employee shall be required to work in excess of eight (8) hours in any one (1) work day if they prefer not to. (Emphasis added.)

Standing alone, two old Montana cases, State v. Livingston Concrete, etc. Manufacturing Company, 34 Mont. 570, 87 P. 980 (1906) and Melville v. Butte Balaklava Copper Company, 47 Mont. 1, 130 P. 441 (1913) appear to preclude a state employee from working more than eight hours a day.

Through the enactment of the Minimum Wages and Hours Act, and other labor oriented legislation, the welfare of the working person has changed dramatically from conditions existing at the time of Melville, and Livingston Concrete. Consequently, the holdings in these cases should be evaluated in light of recent legislation and case law.

In 1971 the Legislature enacted the Minimum Wages and Hours Act. Section 41-2301 of the act says:

> It is declared to be the policy of this act (1) to establish minimum wage and overtime compensation standards for workers at levels consistent with their health, efficiency and general well being; (2) to safeguard existing minimum wage and overtime standards which are adequate to maintain the health, efficiency and general well being of workers against the unfair competition of wage and hour standards which do not provide such adequate standards of living; and (3) to sustain purchasing power and increase employment opportunities.

From this policy statement it can be seen that the Legislature considers overtime to be proper and consistent with the best interests of employees if the workers are adequately compensated for such extra work.

This legislative intent does not conflict with the language contained in Article XII of the Montana Constitution or section 41-1121, R.C.M. 1947. The constitutional and statutory provisions on their face define what constitutes a normal work day.

In Glick v. State of Montana, Department of Institutions, 162 Mont. 82, 509 P.2d 1 (1973), the court found that employees at the Montana Children's Center were working sixty-five to seventy hours per week, that this was permissable, and that the employees were entitled to overtime pay for labor in excess of forty hours per week and the court said (at page 89):

> ...it is not denied that each employee was paid on a basis of a forty hour week and for time and half hours worked in excess of forty. We find this formula is proper... .

The Montana Supreme Court has overruled by implication its earlier decisions and currently finds it permissable for state employees to work in excess of eight hours per day. Two prior Attorney General Opinions issued in 1943 construing a different constitutional provision regarding the eight-hour day and stating the Legislature had no power to increase the number of hours constituting a day's work (20 OP. ATT'Y GEN. NOS. 70 and 105) are distinguished.

While eight hours constitutes a day's work and no one has to work more, they certainly may agree to do so.

2. The second question presented asks whether overtime is payable to a state employee for time worked in excess of eight hours per day or whether overtime is only payable for hours in excess of forty per week. As was determined above, the eight-hour provision merely defines the number of hours constituting a legal day's work. The provision does not delineate a formula for determining the number of hours of overtime.

In construing a statute the intention of the Legislature must be determined from the plain meaning of the words used (State ex. rel. Hoffman v. District Court, 154 Mont. 201, 461 P.2d 847 (1969)). The duty of the court is simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted or to omit what has been inserted, State ex. rel. Cashmore v. Anderson, 160 Mont. 175, 500 P.2d 921 (1972).

Section 41-2303(b), R.C.M. 1947, states explicitly that:

> No employer shall employ any of his employees for a week longer than forty (40) hours, unless such employee receives 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 (1-1/2) times the hourly wage rate at which he is employed. (Emphasis added.)

While overtime may be computed on the basis of an eight-hour day since the forty-hour base is a minimum which an employer may exceed, it is clear the Legislature intended to compute overtime on a basis of a forty-hour work week.

The Montana Department of Labor has interpreted section 49-2303(b), R.C.M. 1947 and their administrative regulations are persuasive in their area of expertise. The labor department regulations at 24-3.14BII(38)-S14290 of the Montana Administrative Code say:

> Hours worked in excess of the statutory maximum in any work week are overtime hours under the statute; a work week no longer than the prescribed maximum is a non-overtime work week under the law, to which the pay requirements of subsection (a) of section 41-2303, R.C.M. 1947 (minimum wage) but

> not those of subsection (b) of section 41-2303, R.C.M. 1947 (overtime payment) are applicable.

Similarly the Labor Department has said in 24-3.14BII(38)-S14300:

> Since there is no absolute limitation on the number of hours an employee may work in any work week, he may work as many hours a day as he and his employer see fit, so long as the required overtime compensation is paid him for hours worked in excess of the maximum work week prescribed by section (b) of section 41-2303, R.C.M. 1947. The law does not require, however, that an employee be paid overtime compensation for hours in excess of eight per day.... If no more than the maximum number of hours prescribed in the law are actually worked in the work week, overtime compensation pursuant to subsection (b) of section 41-2303, R.C.M. 1947, need not be paid.

From the above language it is clear that overtime should be computed on a basis of a forty-hour week. This does not mean, however, that the state cannot compute overtime on the basis of an eight-hour day if it desires to do so. The forty-hour basis set forth in the act is only the minimum requirement. Since an eight-hour basis exceeds this standard and is more beneficial to the employee, it is a proper method of figuring overtime. Although the state has the option of using the eight-hour basis, it is only required to pay overtime on hours worked in excess of forty per week.

3. You have asked if paid annual leave, military leave, legal holidays and time off for jury duty need be counted as hours of work for computation of overtime.

Because no judicial interpretation of Montana's overtime statute, section 41-2303, R.C.M. 1947, resolves the question, we turn to case law construing a similar provision of the Fair Labor Standards Act. 29 U.S.C., section 207(a), provides that no employer may employ anyone for a work week in excess of forty hours unless he pays compensation at a rate of at least one and one-half times the regular hourly rate, i.e., "time and a half pay."

The Supreme Court of the United States has established a three-pronged test to compute the number of hours an employee has worked for determination of overtime under

section 207(a) as follows: (1) the work related activity must require physical or mental exertion; (2) the exertion must be controlled or required by the employer; (3) the exertion must be pursued necessarily and primarily for the benefit of the employer and his business. Tennessee Coal v. Muscade Local No. 123, 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949 (1944), rehearing denied 322 U.S. 771, 64 S.Ct. 1257, 88 L.Ed. 1596 (1944); Jewell Ridge Corporation v. Local No. 6167, 325 U.S 161, 65 S.Ct. 1063, 89 L.Ed. 1534 (1945) rehearing denied 325 U.S. 897, 65 S.Ct. 1575, 89 L. Ed. 2007 (1945).

Reference may also be made to factors for determining whether overtime must be paid for "idle time." The court has said the factors are:

> (1) Whether, the time is spent predominantly for the employer's or employee's benefit; (2) whether the time is of sufficient duration and taken under such conditions that it is available to employees for their own use and for purposes disassociated from their employment. Blumm v. Great Lakes Carbon Corp., 418 F.2d 283 (5th Cir., 1969); Mitchell v. Griener, 235 F.2d 621 (10th Cir., 1956).

Application of the above rationale in the instant case establishes that hours absent from work for paid legal holidays, jury duty, annual or military leave need not be counted in the computation of overtime. During the specified days absent with pay, the employees are neither under the control of the employer nor engaged in an activity primarily beneficial to the employer. In fact, the respite from work is for the benefit of the employee and enables him to engage in personal activities unrelated to the employment.

In weeks where there is a statutory day off a state employee must be paid for that day at the regular rate of pay. This time, however, need not be counted when computing overtime for the week in question.

However, the Legislature obviously has provided for a statutory forty-hour work week and further provided for paid time off on statutory days off.

Therefore it should be noted that requiring employees to work a full forty hours in addition to such statutory days off is contrary to public policy as expressed by the intent of these statutes. The fact that overtime compensation

would not have to be paid should not encourage employers to follow a policy of requiring extra working hours in weeks containing holidays or other statutory leave.

4. The final question asks whether a state agency may regularly schedule a group of its employees to work a forty-hour work week consisting of four consecutive ten-hour days. This office answered a similar question in 35 OP. ATT'Y GEN. NO. 57. In that opinion we found that county commissioners were precluded by section 41-1121, R.C.M. 1947, from assigning county road crews to work ten hours per day, four days per week.

Subsequent to that opinion the Legislature amended section 41-1121, R.C.M. 1947 to specifically allow county road and bridge departments to work a four day work week if agreed to by the employees. As amended the statute makes no provision for other state employees to work a four-day week. The express mention of one thing in a statute implies exclusion of another. Stephens v. The City of Great Falls, 119 Mont. 368, 175 P.2d 408 (1946). Accordingly, since the amendment to section 41-1121, R.C.M. 1947 only mentions county road and bridge crews it must be reasoned that the exception does not apply to other state employees. Thus, section 41-1121, R.C.M. 1947, precludes employees, other than county road and bridge crews, from working a four-day work week.

THEREFORE, IT IS MY OPINION:

1. An agency of state government may permit an employee to work more than eight (8) hours in any work day.

2. Overtime need only be paid for hours worked in excess of forty (40) hours in any one work week.

3. Paid days off for annual leave, legal holidays, jury duty and military leave are not counted as hours worked in the computation of weekly overtime.

4. Only regular county road and bridge departments may schedule a forty (40) hour work week consisting of four consecutive ten hour days, if the schedule is agreed to by the employees.

Very truly yours,

MIKE GREELY
Attorney General