

VOLUME NO. 38

OPINION NO. 22

COUNTY GOVERNMENT - Appointment of full-time county attorney in counties with less than 30,000 population, procedure, salary and qualification;

COUNTY OFFICERS AND EMPLOYEES - County Attorney--Appointment of full-time county attorney in counties with less than 30,000 population--procedure, salary and qualification;

ELECTIONS - Residence for voting purposes;

RESIDENCE - Residence for voting purposes;

MONTANA CODE ANNOTATED - Sections 1-2-201, 7-4-2206, 7-4-2503, 7-4-2504, 7-4-2701, 13-1-111, 13-1-112;

REVISED CODES OF MONTANA, 1947 - Sections 16-2406, 16-3107, 23-2701, 23-3022, 25-608, 25-609.1, 43-507.

HELD: 1. Pursuant to House Bill No. 682, Laws of Montana (1979), a county with a population of less than 30,000 may establish a full-time county attorney position on July 1 of any year. However, the

full-time position need not be filled on July 1. The Board of County Commissioners may provide that the full-time position commence at some specified reasonable time after July 1.

2. The salary of a full-time county attorney in a county of less than 30,000 population is the same salary as that provided in section 7-4-2503, MCA, (section 25-608, R.C.M. 1947) for a full-time county attorney in a county having more than 30,000.
3. A practicing attorney who has declared his intention to make a county his permanent home; is actively seeking a permanent residence in that county; and is in the process of terminating his personal business affairs at his former residence, has become a resident of the county and is eligible for appointment as a full-time county attorney once he has resided in the county for thirty days if he becomes a qualified registered elector and meets other qualification requirements for the office.

27 June 1979

Robert L. Fletcher, Esq.
Sanders County Attorney
Sanders County Courthouse
Thompson Falls, Montana 59873

Dear Mr. Fletcher:

You have requested an opinion concerning the establishment of a full-time county attorney's position in Sanders County under House Bill 682. That bill was enacted by the 1979 Montana Legislature. Section 1 provides:

Section 1. County attorney may be full time --resolution--salary. In any county with a population of less than 30,000, the county commissioners may, upon the consent of the county attorney, on July 1 of any year by resolution establish the office of county attorney as a full-time position subject to the provisions of 7-4-2701 and 7-4-2704. The salary for this position is the salary provided by 7-4-2503 for the office of county attorney in a county with a population in excess of 30,000.

Several questions have arisen concerning the mechanics of establishing a full-time position and the amount of salary.

Your first question concerns the July 1 date specified by the section for establishing the position. July 1 is significant because it is the first day of the new fiscal year, and the day provided for fixing salaries of county officials for the next fiscal year. § 7-4-2504, MCA (§ 25-609.1, R.C.M. 1947). It is also the effective date of House Bill 682 since a different date is not expressly provided. § 1-2-201, MCA (§ 43-507, R.C.M. 1947). The power to establish a full-time position becomes effective on July 1. The July 1 date, however, should not be interpreted to require the Commissioners to appoint a full-time county attorney on July 1 or to require that an appointee accept his appointment and commence his full-time duties on July 1. Such a reading would be overtechnical and unreasonable. The new section contains no requirement that the position be filled or commence on July 1. Since a full-time position cannot be legally established until July 1, the Commissioners must have time to seek out and appoint a qualified attorney for the position and to provide for the transition of a part-time to full-time office of county attorney. Absent a specific statutory direction as to the means which are to be employed in exercising an express power, the Commissioners may adopt any appropriate and reasonable means. See Thompson v. Gallatin County, 120 Mont. 263, 184 P.2d 263 (1947).

The salary for any full-time position which may be established on July 1, 1979, "is the salary provided for the office of county attorney in a county with a population in excess of 30,000." The provision is plain and unambiguous. However, a subsequent section of House Bill 689 has created some question concerning salary. Section 4 provides in relevant part:

(D) In those counties where the office of the county attorney has been established as a full-time position pursuant to (section 1), the salary of the county attorney shall be set by resolution of the county commission but it shall not exceed the salary of the county attorney in a county with a population in excess of 30,000.

That section must be reconciled if possible with the salary requirement of section 1. Indeed, the two sections can be reconciled by interpreting section 4(D) as providing the mechanics for fixing the salary. Compare section 7-4-2504, MCA (section 25-609.1, R.C.M. 1947), which requires county

commissioners to fix salaries of county officials on July 1, even though the actual amount of salary is fixed by statute. If a full-time county attorney is paid the same amount as a county attorney of a county having more than 30,000 population, as required in section 1, such amount would "not exceed" the salary of the county attorney in a county with a population in excess of 30,000.

Finally, you have asked whether the person appointed to the position of full-time county attorney must be a qualified elector of the county at the time of his appointment. Section 7-4-2701, MCA (section 16-3107, R.C.M. 1947) provides, "No person is eligible to a county office who at the time of his election is not *** (3) an elector of the county in which the duties of the office are to be exercised." Section 7-4-2206, MCA (section 16-2406, R.C.M. 1947), permits the county commissioners to fill any vacancy in a county office but makes no mention of any requirement that the appointee be an elector of the county at the time of the appointment. However, it is unnecessary to research the matter further to reach a final conclusion since the facts you have furnished this office indicate that the person the Commissioners are presently considering for the position can satisfy the "qualified elector" requirement by the time of his appointment, if he is appointed. Specifically, you have indicated that the attorney under consideration has practiced law in and been a resident of another Montana county for a number of years. He has declared his intention to reside on a permanent basis in Sanders County; and he is actively seeking a permanent residence in Sanders County. He is currently closing out his personal and business affairs in the other county while simultaneously establishing a new residence in Sanders County. These actions demonstrate a change in residence and an intent to permanently reside in Sanders County. Residency, which is a prerequisite to voting, is principally a question of intent. Rules for determining residence for voting purposes are set forth in section 13-1-112, MCA (section 23-3022, R.C.M. 1947), the most important of which are:

(1) The residence of a person is where his habitation is fixed and to which, whenever he is absent, he has the intention of returning.

(9) A change of residence can only be made by the act of removal joined with intent to remain in another place.

In addition to other requirements, eligibility for voter registration requires residence in the county for thirty days. § 13-1-111, MCA (§ 23-2701, R.C.M. 1947). The facts indicate the person under consideration by the Commissioners has already established a new residence in Sanders County. His actions constitute an ongoing "act of removal" accompanied by an intent to make Sanders County his permanent home. Since the Commissioners presently intend to make the county attorney position full-time on August 1, 1979, the person under consideration can become a qualified elector before that time and if otherwise qualified will be eligible for appointment to the position.

THEREFORE, IT IS MY OPINION:

1. Pursuant to House Bill No. 682, 1979 Montana Laws, a county with a population of less than 30,000 may establish a full-time county attorney position on July 1 of any year. However, the full-time position need not be filled on July 1. The Board of County Commissioners may provide that the full-time position commence at some specified reasonable time after July 1.
2. The salary of a full-time county attorney in a county of less than 30,000 population is the same salary as that provided in section 7-4-2503, MCA, for a full-time county attorney in a county having more than 30,000.
3. A practicing attorney who has declared his intention to make a county his permanent home; is actively seeking a permanent residence in that county; and is in the process of terminating his personal business affairs at his former residence, has become a resident of the county and is eligible for appointment as a full-time county attorney once he has resided in the county for thirty days if he becomes a qualified registered elector and meets other qualification requirements for the office.

Very truly yours,

MIKE GREELY
Attorney General