

VOLUME NO. 38

OPINION NO. 83

PUBLIC EMPLOYEES - Hours of work;
MONTANA CODE ANNOTATED - Sections 7-32-2111, 39-3-405,
39-4-107.

HELD: Local law enforcement agencies may, with the consent of the affected employees, schedule a forty-hour work week consisting of four consecutive ten-hour days.

26 June 1980

Harold Hanser, Esq.
Yellowstone County Attorney
Yellowstone County Courthouse
Billings, Montana 59101

Dear Mr. Hanser:

You have requested my opinion on the following question:

May local law enforcement agencies, with the consent of their employees, schedule a forty-hour workweek consisting of four consecutive ten-hour days?

Your question involves the application of section 39-4-107, MCA, which provides:

(1) A period of 8 hours constitutes a day's work in all works and undertakings carried on or aided by any municipal or county government, [or] the state government.... In cases of emergency when life or property is in imminent danger this subsection does not apply.

(2) For firefighters in cities of the first and second class, a workweek consists of a maximum of 40 hours during a 5-day week.

(3) In counties where regular road and bridge departments are maintained, the county commissioners may, with the approval of the employees ..., establish a 40-hour workweek consisting of four consecutive 10-hour days.

(4) Every person, corporation, stock company, or association of persons who violates any of the provisions of this section is guilty of a misdemeanor....

Early cases held that this section constituted an absolute penal prohibition against any work in excess of eight-hours in one day. Melville v. Butte Balaclava Copper Co., 47 Mont. 1, 130 P. 441 (1913); State v. Hughes, 38 Mont. 468, 100 P. 610 (1909); State v. Livingston Concrete Building and Manufacturing Co., 34 Mont. 570, 87 P. 980 (1906). The question is whether this turn-of-the-century interpretation of the statute survives more recent court decisions, legislative pronouncements, and modern policy consideration.

Two decisions of the Montana Supreme Court cast doubt on the continuing validity of the construction of the predecessor of section 39-4-107, MCA, adopted in these early cases. In Butte Miner's Union v. Anaconda Copper Mining Co., 112 Mont. 418, 118 P.2d 148 (1941), the Court considered the interaction of the eight-hour workday statute and the overtime provisions of the federal Fair Labor Standards Act (FLSA). The FLSA established a forty-hour maximum workweek and provided for the payment of overtime. The Montana Supreme Court held that there was no inconsistency between the maximum hour and overtime provisions of the FLSA and the eight-hour day provisions of the then-existing version of section 39-4-107, MCA. This holding implicitly recognizes that the eight-hour day statute does not bar an employee from working more than eight hours in a day if he is compensated for the excess under an applicable overtime statute. In Glick v. Department of Institutions, 162 Mont. 82, 509 P.2d 1 (1973), the Court reiterated the view expressed in Butte Miner's Union by recognizing that certain state employees within the purview of the eight-hour day statute could work in excess of eight hours and be compensated under the overtime provisions of the FLSA.

The FLSA no longer applies to state, county, or municipal employees. National League of Cities v. Usery, 426 U.S. 833 (1976). In 37 Op. Att'y Gen. No. 16 (1977), I held that applicable statutes and administrative regulations require payment of overtime for hours in excess of forty worked in any week, relying on Glick, section 39-3-405, MCA, and the regulations codified at 24-3.14B11(38)-S14290 of the Administrative Rules of Montana. I continue to adhere to this holding. See also § 7-32-211, MCA. The cited opinion also holds that counties may not schedule employees other than bridge and road maintenance workers to work a forty-hour week consisting of four consecutive ten-hour days. I have reconsidered this holding and find it to be incorrect. In Glick and Butte Miner's the Montana Supreme Court implicitly held that section 39-4-107, MCA, is not an

absolute prohibition against working more than eight hours in one day, but rather is merely descriptive of the length of a work-day under normal conditions. The cases recognize that an employee may work more than eight hours per day if he is compensated for hours in excess of forty worked in any week under section 39-3-405, MCA. These holdings appear to nullify the plain meaning of the eight-hour day statute. However, they constitute the definitive construction of the statute by the Montana Supreme Court, and I am therefore bound to follow them.

In 37 Op. Att'y Gen. No. 16 I held that a county could not schedule four ten-hour days for all employees on the basis of a 1975 amendment which explicitly permitted counties to schedule road and bridge workers on a four-day week consisting of ten-hour days, reasoning that the express mention of such authority only for road and bridge crews necessarily excluded such authority for all other state workers. See Stephens v. City of Great Falls, 119 Mont. 368, 175 P.2d 408 (1946). This result is flatly inconsistent with the Court's reasoning in Glick, which implicitly recognized that the Department of Institutions had the authority to structure working hours for its employees in schedules other than the traditional work week consisting of five eight-hour days. If the rule of construction applied in my prior opinions was the correct one, the result in Glick could not have been reached. I can only conclude that under Glick state agencies and local governments may permit their workers to work four ten-hour days per week. 37 Op. Att'y Gen. No. 16 is overruled to the extent it is inconsistent with this opinion.

It would be appropriate for the Legislature to amend the strict language of section 39-4-107, MCA, to make it compatible with current employment practices and court interpretations.

THEREFORE, IT IS MY OPINION:

Local law enforcement agencies may, with the consent of the affected employees, schedule a forty-hour work week consisting of four consecutive ten-hour days.

Very truly yours,

MIKE GREELY
Attorney General