

VOLUME NO. 38

OPINION NO. 90

COUNTY COMMISSIONERS - Power of county commissioners to change justices' of the peace salaries during term of office;
JUSTICES OF THE PEACE - Power of county commissioners to change justices' of the peace salaries during term of office;
SALARIES - Power of county commissioners to change justices' of the peace salaries during term of office;
MONTANA CODE ANNOTATED - Sections 3-10-207, 3-10-208;
1972 MONTANA CONSTITUTION - Article VII, section 7(1).

HELD: 1. The reduction of a full-time justice of the peace to a part-time justice of the peace with a salary commensurate to the workload and office hours

constitutes a salary diminution within the language of the 1972 Montana Constitution, Article VII, section 7(1).

2. Absent a voluntary waiver by the incumbent, the proper time at which to reduce a full-time justice of the peace position to a part-time position is before the next election.
3. Any pay raises given a justice of the peace must stand for the remainder of the term and only at the beginning of the next term may such raises be diminished.

16 July 1980

Bruce E. Becker, Esq.
Park County Attorney
P.O. Box 823
Livingston, Montana 59047

Dear Mr. Becker:

You have requested my opinion concerning the following question:

May a full-time salaried, justice of the peace assume part-time status in exchange for reduced remuneration during his term of office?

Your letter informs me that the Board of County Commissioners has determined there is a need for two part-time justices of the peace, located in two towns in the county, instead of the present full-time salaried justice of the peace. The two part-time justices would be paid on an hourly basis with total wages roughly equalling the present justice's full-time salary. If the incumbent assumes one of the part-time positions, his total yearly remuneration will decrease. The question then arises whether he may assume part-time status in mid-term in light of Article VII, section 7(1), 1972 Montana Constitution, which provides:

All justices and judges shall be paid as provided by law, but salaries shall not be diminished during terms of office.

Article VII, section 7(1) of the 1972 Montana Constitution is functionally equivalent to Article V, section 31 of the 1889 Montana Constitution which provided that:

[n]o law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election or appointment.

This latter provision has been interpreted by the Supreme Court of Montana to "remove from the lawmakers the temptation to control the other branches of government by promises of reward in the form of increased compensation or threats of punishment by way of reduced salaries...." State ex rel. Jackson v. Porter, 57 Mont. 343, 347, 188 P. 375 (1920). The prohibition against salary increases was deleted in the 1972 Constitution but the restraint on salary diminution remained.

Using this background then, all relevant statutes must be construed in light of the Montana Constitution, article VII, section 7(1). The Park County Commissioners have authority under 3-10-101, MCA, to appoint one additional justice of the peace. Under sections 3-10-207 and 3-10-208, MCA, the commissioners may by resolution set the salary and hours of the justice of the peace within statutory guidelines. Combining the statutory and constitutional provisions it is apparent that once a justice of the peace is elected his or her salary cannot be diminished during that term. The county commissioners statutory authority is limited to salary increases only.

The term salary is generally understood to mean compensation for the duties of the office at a fixed sum and not computed by an hourly wage; State v. Ash, 53 Ariz. 197, 87 P.2d 270 (1939). Section 7-4-2502, MCA, regarding pay schedules of county officers, indicates that salary is computed on a monthly or bi-monthly basis. Applying this definition, Article VII, section 7(1), prohibits any decrease during his or her term in the amount of compensation actually received by the justice of the peace. If the law allowed the commissioners to reduce a justice's remuneration by reducing his hours, the commissioners could impose a more subtle form of coercion merely by suggesting that a single justice's hours of work, and therefore his compensation, should be reduced. This result is directly contrary to the reasoning of the court in Jackson.

Article VII, section 7(1) prohibits a decrease in a justice's salary during his term. Since the justice will, under the facts presented, receive less compensation when he or she assumes part-time status, the determination that a

full-time justice is not needed and that a full-time salary will be split between two part-time individuals may generally be made only prior to the general election so that the decrease will be effective at the beginning of a new term.

There is one possible alternative for the changes proposed in Park County. The constitutional prohibition in Article VII, section 7(1) may, under certain circumstances, be waived. In Jackson, the court stated that "[s]o far as there is a reason for the rule which underlies the limitations, it must be enforced with the utmost rigor, but whenever the reason for the rule ceases, so does the rule itself." The statement's implication is that should the current full-time justice of the peace voluntarily agree to reduce his status to part-time and accept the resulting decrease in salary, the reason for the rule--the maintenance of an independent judiciary--ceases and, therefore, so does the rule. If, however, the current justice wishes to retain his full-time position and salary, the constitutional provision applies and the status cannot be changed until the next election. The key factor involved is the voluntary waiver for without such a waiver no action may be taken.

Regarding your collateral questions concerning what effect, if any, pay raises have on the term "salary," the plain language of the Constitution must again control. Since section 7(1) disallows any decrease in salary, any pay raises given a justice of the peace during his or her term must stand until the next election. To allow otherwise would be to diminish a salary.

THEREFORE, IT IS MY OPINION:

1. The reduction of a full-time justice of the peace to a part-time justice of the peace with a salary commensurate to the workload and office hours constitutes a salary diminution within the language of the 1972 Montana Constitution, Article VII, section 7(1).
2. Absent a voluntary waiver by the incumbent, the proper time at which to reduce a full-time justice of the peace position to a part-time position is before the next election.
3. Any pay raises given a justice of the peace must stand for the remainder of the term and only at

the beginning of the next term may such raises be diminished.

Very truly yours,

MIKE GREELY
Attorney General