

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 21

COUNTY COMMISSIONERS - Discretion to pay overtime to undersheriffs and deputy sheriffs;
COUNTY OFFICERS AND EMPLOYEES - Sheriff: salary;
COUNTY OFFICERS AND EMPLOYEES - Undersheriffs and deputy sheriffs: compensation, longevity payments, and overtime;
LABOR RELATIONS - Undersheriffs and deputy sheriffs: overtime compensation;
SALARIES - Compensation to undersheriffs and deputy sheriffs;
SALARIES - Longevity payments to undersheriffs and deputy sheriffs;
SALARIES - Sheriffs;
SHERIFFS - Deputies and undersheriffs: compensation computation;
SHERIFFS - Deputies and undersheriffs: amount and time of longevity payments;
SHERIFFS - Deputies and undersheriffs: overtime;
MONTANA CODE ANNOTATED - Sections 7-4-2503, 7-4-2505, 39-3-405, 39-3-406;
OPINIONS OF THE ATTORNEY GENERAL - 35 Op. Att'y Gen. No. 25;
SESSION LAWS OF 1981 - House Bill 558, Senate Bill 50, Senate Bill 305, Chapter 466, Chapter 605.

- HELD: 1. Under House Bill 558 (1981 Mont. Laws, ch. 603), an individual undersheriff or deputy sheriff is entitled to an initial longevity payment on his or her first employment anniversary occurring after October 1, 1981.
2. Under section 5 of House Bill 558, years of service prior to October 1, 1981, must be considered in determining the amount of longevity payments to deputy sheriffs and undersheriffs.

OPINIONS OF THE ATTORNEY GENERAL

3. The "minimum base annual salary" for calculating longevity payments under House Bill 558 is the statutory minimum level for the county involved, as specified in section 2(1) and (2) of the bill.
4. The "salary" of a sheriff, for purposes of calculating the annual compensation of deputy sheriffs and undersheriffs, includes the additional \$2,000 received by the sheriff pursuant to section 7-4-2503(2)(b), MCA.
5. Under section 4 of House Bill 558, the payment of overtime compensation to undersheriffs and deputy sheriffs is within the discretion of the individual boards of county commissioners.

22 June 1981

Richard P. Heinz, Esq.
Lake County Attorney
Lake County Courthouse
Polson, Montana 59860

Dear Mr. Heinz:

My opinion has been requested on the following questions relating to House Bill No. 558 (1981 Mont. Laws, ch. 603):

1. At what point will individual deputy sheriffs and undersheriffs become entitled to longevity payments?
2. Must years of service prior to October 1, 1981, be considered in determining the amount of longevity payments to deputy sheriffs and undersheriffs or is longevity to be measured only from the effective date of House Bill 558?
3. Should the one percent for each year of service be calculated initially by applying the accumulated years of service to the individual's then annual salary or to the annual salary being received by

OPINIONS OF THE ATTORNEY GENERAL

the individual on each anniversary date of his employment?

4. What constitutes the "salary" of a sheriff for purposes of calculating the compensation of deputy sheriffs and undersheriffs?
5. Must deputy sheriffs and undersheriffs be compensated for hours worked overtime?

House Bill 558 generally revises the compensation provisions of Montana law relating to undersheriffs and deputy sheriffs. The questions raised by the bill pertain primarily to section 5, which requires longevity payments, in addition to compensation, based on years of service with the sheriff's department. Section 5 provides:

Beginning on the date of his first anniversary of employment with the department and adjusted annually, a deputy sheriff or undersheriff is entitled to receive a longevity payment amounting to 1% of the minimum base annual salary for each year of service with the department. This payment shall be made in equal monthly installments.

Because no specific effective date is set forth in House Bill 558, its compensation and longevity payment provisions will not become effective until October 1, 1981. 1981 Mont. Laws, ch. 446 (SB 305). Therefore, although there may be deputy sheriffs and undersheriffs who have already been employed in sheriffs' offices for a number of years, no individual will be entitled to a longevity payment until his or her first employment anniversary occurring on or after October 1 of this year.

The delay in the effective date of HB 558, however, does not mean that an individual who has served with the department for several years will be entitled to a payment of only 1% on his or her first qualifying anniversary date. The amount of the longevity payments that will become due to undersheriffs and deputy sheriffs after October 1, 1981, is, by the specific terms of the bill, to be calculated on the basis of "each year of service with the department." The

OPINIONS OF THE ATTORNEY GENERAL

Legislature did not modify that phrase in any manner or restrict it to cover only those years following the date of approval of the new provision. It is a basic principle of statutory construction that the plain meaning of the words used in a statute controls its application and that words or phrases that alter the plain meaning of the law may not be inserted when it is being interpreted. Chennault v. Sager, ___ Mont. ___, 610 P.2d 173, 176 (1980). Therefore, based on the language used in section 5 of HB 558, it is my opinion that each year in service with the department, whether occurring before or after October 1, 1981, must be considered in fixing the longevity payments to be made to deputy sheriffs and undersheriffs.

Another issue raised by section 5 of HB 558 concerns the proper figure upon which to calculate the 1% longevity payment for deputy sheriffs and undersheriffs. In the early stages of the legislative process, HB 558 referred to "1% of his minimum base annual salary," thereby requiring calculations based on the specific salary level of each individual undersheriff or deputy sheriff. After being considered by a conference committee, however, the bill's language was changed to establish the amount of payment as "1% of the minimum base annual salary." From this change, it must be concluded that the Legislature intended to standardize the base figure for longevity payment calculations by statutorily setting that figure at the minimum permissible level for each county, as set forth in the categories in section 2(1) and (2) of HB 558.

HB 558 has also raised certain questions unrelated to longevity payments. One such question concerns the appropriate figure to be used as the basis for computing the compensation for deputy sheriffs and undersheriffs. Section 2 of the bill and the statute it amends require the fixing of the compensation of those working under a sheriff at a percentage of his salary. See § 7-4-2505, MCA. Section 7-4-2503, MCA, establishes the amount to be paid annually to a sheriff as a basic salary, dependent on the size of the sheriff's county, and, in addition, "the sum of \$2,000 per year." See SB 50. Neither HB 558, section 7-4-2505, MCA, nor section 7-4-2503, MCA, specifically explains whether the additional sum of \$2,000 is to be considered as part of a sheriff's "salary" for purposes of the calculations in section 2 of HB 558.

OPINIONS OF THE ATTORNEY GENERAL

The salary received by a county officer has been broadly defined by the Montana Supreme Court as "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, 257, 83 P. 482, 483 (1905). This definition plainly encompasses both statutory amounts paid to a sheriff under section 7-4-2503, MCA. Moreover, in 35 Op. Att'y Gen. No. 25 at 52 (1973), it was specifically held that the additional "sum" received by a sheriff must be considered part of his salary when determining the compensation to be paid to deputy sheriffs, and, by the same reasoning, to undersheriffs.

A final question raised by HB 558 is whether undersheriffs and deputy sheriffs are entitled to compensation for overtime. It is well-established in Montana law that, under the payment schedules established by currently operative statutes for undersheriffs and deputy sheriffs, those persons are excluded from the provisions of the Minimum Wage Act and need not be paid extra compensation for working more than forty hours per week. City of Billings v. Smith, 158 Mont. 197, 212, 490 P.2d 221, 230 (1971); see § 39-3-406(1), MCA. The same reasoning used by the Supreme Court in the Billings case is equally applicable to the payment schedule set forth in HB 558.

HB 558 contains a new provision, section 3, which gives sheriffs' departments the option of establishing work periods other than standard workweeks, with a maximum schedule of 2,040 hours per employee per year. In apparent contemplation that persons on such a schedule could arguably fall under the coverage of the Minimum Wage Act, the Legislature specifically added an exclusion to such coverage for "an employee of a sheriff's department who is working under an established work period in lieu of a workweek pursuant to [section 3]." HB 558, § 6 (adding (m) to § 39-3-406(2), MCA). Therefore, regardless of their type of work arrangement, deputy sheriffs and undersheriffs will not be covered by the mandatory overtime provisions of section 39-3-405, MCA.

HB 558, however, does include a new provision relating to overtime payments for deputy sheriffs and undersheriffs. Section 4 of the bill provides:

OPINIONS OF THE ATTORNEY GENERAL

The board of county commissioners may by resolution establish that any undersheriff or deputy sheriff who works in excess of his regularly scheduled work period will be compensated for the hours worked in excess of the work period at a rate to be determined by that board of county commissioners.

By the use of the word "may" in section 4, it is plain that the Legislature intended to leave any action regarding possible overtime payment to the discretion of the individual boards of county commissioners.

THEREFORE, IT IS MY OPINION:

1. Under House Bill 558 (1981 Mont. Laws, ch. 603), an individual undersheriff or deputy sheriff is entitled to an initial longevity payment on his or her first employment anniversary occurring after October 1, 1981.
2. Under section 5 of House Bill 558, years of service prior to October 1, 1981, must be considered in determining the amount of longevity payments to deputy sheriffs and undersheriffs.
3. The "minimum base annual salary" for calculating longevity payments under House Bill 558 is the statutory minimum level for the county involved, as specified in section 2 (1) and (2) of the bill.
4. The "salary" of a sheriff, for purposes of calculating the annual compensation of deputy sheriffs and undersheriffs, includes the additional \$2,000 received by the sheriff pursuant to section 7-4-2503(2)(b), MCA.
5. Under section 4 of House Bill 558, the payment of overtime compensation to undersheriffs and deputy sheriffs is within the discretion of the individual boards of county commissioners.

Very truly yours,

MIKE GREELY
Attorney General