

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 35

FIRE DEPARTMENTS - Schedule of workshifts;
FIREFIGHTERS - Hours of work;
FIREFIGHTERS - Receipt of compensatory time off;
HOURS OF WORK - Firefighters;
HOURS OF WORK - Repeal by implication of statutes providing criminal penalties for overtime work;
STATUTES - Repeal by implication;
MONTANA CODE ANNOTATED - Title 7, chapter 1, part 1, 7-5-4101, 7-33-4126, 7-33-4129, 7-33-4132, Title 39, chapter 3, part 4, 39-4-107;
OPINIONS OF THE ATTORNEY GENERAL - 36 Op. Att'y Gen. No. 63 (1970), 38 Op. Att'y Gen. No. 83 (1980);
UNITED STATES CODE - 29 USC § 201, et seq.

- HELD: 1. Work schedules for firefighters must conform to those set forth in section 7-33-4126, MCA.
2. A firefighter may receive compensatory time off for bonus hours worked in excess of forty in one week.

7 October 1981

James W. Spangelo, Esq.
City Attorney
P.O. Box 231
Havre, Montana 59501

OPINIONS OF THE ATTORNEY GENERAL

Dear Mr. Spangelo:

You have requested my opinion on the following questions:

1. May a municipal fire department, with the consent of its employees, schedule firefighters to work shifts of 24 hours on duty followed by 72 hours off duty when such a schedule results in firefighters working more than eight hours in one day and forty hours in one week?
2. May firefighters accept compensatory time off in lieu of additional monetary compensation for overtime work?

You raise two other questions which need not be answered in light of the disposition of these questions:

I.

38 Op. Att'y Gen. No. 83 (1980) examined the status of Montana's statutes providing for eight-hour work days. The statute in question there was 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 our municipal or county government, [or] the state government....

....

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

The opinion noted the enactment of maximum hour and overtime statutes and an opinion of the Montana Supreme Court authorizing payment of overtime salary to state employees working more than eight hours per day, Glick v. Department of Institutions, 162 Mont. 82, 509 P.2d 1 (1973), and concluded that section 39-4-107, MCA, does not prevent a local law enforcement agency from scheduling its employees to work a forty-hour week consisting of four ten-hour days.

OPINIONS OF THE ATTORNEY GENERAL

Section 39-4-107, MCA, was originally enacted in 1905 to promote the safety and well-being of workers through a system of criminal sanctions for overtime work. See Butte Miners' Union v. Anaconda Copper Mining Co., 112 Mont. 418, 436, 118 P.2d 148 (1941). Until 1938, the Legislature chose to regulate hours of work through imposition of such criminal sanctions, which, incidentally, applied to both employer and employee. State v. Livingston Concrete Building and Manufacturing Co., 34 Mont. 570, 577, 87 P. 980 (1906). In 1938, the federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA"), changed the direction of the law by creating the now well-known system under which workers are not prohibited from working more than the statutory maximum hours, but rather are granted additional compensation at a higher rate for the additional work. The FLSA was enacted pursuant to Congress' power to regulate interstate commerce, and it therefore controls, under the United States Constitution's Supremacy Clause, to the extent of any inconsistency with state laws on the subject. See Butte Miners' Union, 112 Mont. at 429-31. Since the FLSA provides for overtime compensation for extra hours worked, Montana's provisions for criminal penalties for such conduct may not be applied to employees and employers covered by the FLSA.

The public employees in question here are excluded from the coverage of the FLSA under the decision of the United States Supreme Court in National League of Cities v. Usery, 426 U.S. 833 (1976). It does not follow, however, that public employees and their supervisors are subject to criminal penalties for overtime work. The Legislature has enacted several statutes dealing with wages and hours. Such statutes are in pari materia with the eight hour day statutes, and all must therefore be read together. State ex rel. McHale v. Ayers, 111 Mont. 1, 5, 105 P.2d 686 (1940). Title 39, chapter 3, part 4, MCA, is Montana's version of the FLSA. Like the eight-hour day provision of section 39-4-107, MCA, its purpose is to promote the general well-being of the worker. 1971 Mont. Laws, ch. 417, § 1. It provides that workers are entitled to additional compensation when employed in a work week of more than forty hours. § 39-3-405, MCA. Since a statutory work week is forty hours, § 39-3-405, MCA, the overtime statute is obviously inconsistent with the criminal penalties provided in section 39-4-107, MCA. It is ridiculous to

OPINIONS OF THE ATTORNEY GENERAL

suggest that the Legislature intended to prohibit a person, on pain of criminal penalty, from exceeding eight hours of work per day or forty hours of work per week, as section 39-4-107, MCA, provides, while at the same time providing that employee with a premium in the form of one and one-half times his usual rate of compensation for overtime hours. The provisions relate to the same subject matter and they support the same objective, but they simply cannot be reconciled. While repeals by implication are not favored, Fletcher v. Paige, 124 Mont. 114, 119, 220 P.2d 484 (1950), I cannot escape the conclusion that by its later enactment of the overtime provision in section 39-3-405, MCA, the Legislature has implicitly repealed the earlier criminal penalties for overtime work in Title 39, chapter 4. See State ex rel. Jenkins v. Carisch Theatres, Inc., 172 Mont. 453, 458-59, 564 P.2d 1316 (1977). I reaffirm my holding to that effect in 38 Op. Att'y Gen. No. 83 (1980).

That opinion, however, does not control the answer to your question, since the Legislature has enacted other more specific provisions relating to firefighters. Section 7-33-4126, MCA, provides:

Hours of work of members of paid fire departments in cities of first or second class. (1) The city council, city commission, or other governing body in cities of the first or second class shall divide all members of the paid fire department into platoons of three shifts. The members of each shift shall not be required to work or be on duty more than 8 hours out of each consecutive 24 hours except in the event of a conflagration or other similar emergency when any of such members may be required to serve so long as the necessity therefor exists.

(2) Each member shall be entitled to at least 1 day off duty out of each 8-day period of service without loss of compensation.

Section 7-33-4132, MCA, provides a misdemeanor criminal penalty for violation of this statute. Unlike section 39-4-107, MCA, section 7-33-4126, MCA, does more than limit hours of work--it establishes a statutorily

OPINIONS OF THE ATTORNEY GENERAL

mandated work schedule consisting of eight hours on duty followed by sixteen hours of off duty with at least one full day off duty in each eight day period. A statute is repealed by implication only to the extent of its inconsistency with subsequent legislation. Thus, although the criminal penalties for overtime work provided in section 7-33-4132, MCA, cannot stand, the provisions of section 7-33-4126, MCA, establishing a work schedule for firefighters remain in force.

Your letter suggests that since section 7-33-4126, MCA, was enacted to further the health and well-being of firefighters, the employees may waive the benefit of the statute and agree to a work schedule other than that established by the Legislature. Initially, even if it is conceded that the statute was intended solely to benefit the firefighters, it does not follow that they may waive its protections. Livingston Concrete, 34 Mont. at 577. Further, although the purpose of the eight-hour day statute is "to avoid the continuous employment of workmen for such length of time as to imperil their lives or health," Livingston Concrete, 34 Mont. at 576, it is not at all clear that this was the sole motivation for the enactment of section 7-33-4126, MCA. It is conceivable, for example, that the Legislature might have concluded that work shifts longer than eight hours in each twenty-four hour period might detract from the efficiency of the firefighter's performance of his duty and thereby endanger the safety of persons or property in the community in the event of a fire. This possibility is enhanced by the fact that when section 7-33-4126, MCA, was enacted in 1937, firefighters had been protected from the "evils" of overtime work for some twenty years under an amendment to section 39-4-107, MCA, 1971 Mont. Laws, ch. 30, § 1. The work shift provisions of section 7-33-4126, MCA, do not add materially to the protections granted to firefighters under the eight-hour day statutes. I must therefore conclude that the Legislature had some other object in mind in enacting the work-shift provisions of section 7-33-4126, MCA, and that the firefighters may not waive the provisions of the statute.

When the Legislature prescribes the means by which a municipality with only general government powers is to do an act or perform a function, the municipality has no discretion to do otherwise. Dietrich v. City of Deer Lodge, 124 Mont. 8, 15, 218 P.2d 708 (1950). Section

OPINIONS OF THE ATTORNEY GENERAL

7-33-4126, MCA, leaves no discretion to the city--it must schedule its firefighters in shifts according to the statute.

In light of my conclusion that the work schedule provisions of section 7-33-4126, MCA, may not be waived by the employees, I need not reach the question of whether such a waiver may result from collective bargaining. Since I have concluded that the criminal penalties for overtime work have been repealed by implication, I likewise need not decide whether employee consent is a defense to prosecution under sections 7-33-4132 and 39-4-107, MCA.

II.

Your second question is whether firefighters may receive compensatory time off in exchange for hours worked in excess of forty in a workweek. I conclude that such a practice is permissible. Section 39-4-107(2), MCA, provides that a standard workweek for firefighters is forty hours. However, the statutes clearly authorize the performance of overtime work in cases "of a conflagration or other similar emergency," and the statutory work schedule would also allow an employee to work more than five eight-hour shifts per week. §§ 7-33-4126(1), 39-4-107(1), MCA. Under section 7-33-4129, MCA, firefighters are entitled to additional overtime compensation under Title 39, chapter 3, part 4, only if such entitlement is agreed upon through collective bargaining. The conclusion expressed in Part I of this opinion and in 38 Op. Att'y Gen. No. 83 (1980) is based largely on the Legislature's determination that employees who work more than the statutory maximum work week are entitled to compensation. If that compensation does not take the form of additional salary at one and one-half times the normal rate, it must come in the form of compensatory time off which gives the employee an average work week of forty hours. While there is no explicit statutory authorization for the granting of compensatory time off to public employees, 36 Op. Att'y Gen. No. 63 (1976) recognized that the power of county commissioners to manage the affairs of a county includes the power to grant compensatory time off to employees. Section 7-5-4101, MCA, gives the governing body of a city the power to manage the affairs of the city and take any action necessary to execute the municipal powers. The necessarily implied power recognized in 36

OPINIONS OF THE ATTORNEY GENERAL

Op. Att'y Gen. No. 63 (1976) allows the city to enter into a contract providing compensatory time off for firefighters.

In closing, it is important to bear in mind that the above discussion applies to cities with general government powers, as opposed to those cities which have adopted self-government charters. Such home rule local governments possess expanded powers to manage their own affairs without regard to most statutory limitations on general government powers. See Title 7, ch. 1, pt. 1, MCA. This opinion expresses no conclusions as to the relationship between a self-governing city and its firefighters.

THEREFORE, IT IS MY OPINION:

1. Work schedules for firefighters must conform to those set forth in section 7-33-4126, MCA.
2. A firefighter may receive compensatory time off for bonus hours worked in excess of forty in one week.

Very truly yours,

MIKE GREELY
Attorney General