VOLUME NO. 40 OPINION NO. 3

COUNTIES - General relief, work as prerequisite;
COUNTY GOVERNMENT - General relief, work as prerequisite;
COUNTY GOVERNMENT - Poor fund, rate of payment for work;
LABOR RELATIONS - Davis-Bacon Act, prevailing wages for similar work;
LABOR RELATIONS - Prevailing wage not minimum wage;
LABOR RELATIONS - Work as prerequisite for eligibility for general relief;
PUBLIC ASSISTANCE - Requirement for prevailing wage for similar work;
PUBLIC ASSISTANCE - Work as prerequisite for general relief;
MONTANA CODE ANNOTATED - Sections 18-2-401, 53-3-204, 53-3-304.

HELD: 1. Section 53-3-304, MCA, requires all participants in the "workfare" program to be paid, i.e., receive benefits, at the prevailing rate of wages paid by the county for similar work.

2. The prevailing wage is the most frequent or commonly used rate of pay.

3. The county may pay the minimum wage only if similar work has generally been performed for the minimum wage or if the county has never had similar work performed.

4. To determine what is similar work the county should classify the work to be performed under the program with other work closely resembling the type currently being done for the county.

24 January 1983

John D. LaFaver, Director
Department of Social and
Rehabilitation Services
Room 301, SRS Building
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Dear Mr. LaFaver:

You have requested my opinion regarding the "workfare" provisions of the general relief statutes of the State of Montana.

Under Montana law county governments are obligated to provide general relief assistance to those individuals whose "income and resources are insufficient to provide the necessities of life." § 53-3-204, MCA. General relief is the bottom rung on the public assistance ladder. Often individuals lacking eligibility for other public assistance programs are referred to general relief as the last resort. As a prerequisite to eligibility for general relief an individual may be required to perform public service work, § 53-3-304, MCA.

Your first question is whether section 53-3-304, MCA, requires all participants in the program to be paid the prevailing rate of wages. Section 53-3-304, MCA, provides:

> Power of county department to require recipient to perform county work. If the county has work available which a recipient of general relief is capable of performing, then the county department of public welfare may require the recipient to perform the work at the prevailing rate of wages paid by that county for similar work, to be paid from the county poor fund in place of granting him general relief. The county department of public welfare shall provide coverage under the Workers' Compensation Act for those recipients of general relief working under the provisions hereof and may enter into such agreements with the division of workers' compensation of the department of labor and industry as may be necessary to carry out the provisions of this section. [Emphasis added.]

A cardinal principle of statutory construction is that the intent of a legislative body must first be determined from the plain meaning of the words used, and if the interpretation of the statute can be so determined, courts may go no further and apply any other means of interpretation. Keller v. Smith, 170 Mont. 399, 553 P.2d 1002 (1976). Where the language of the statute is plain, unambiguous, direct and certain, the language speaks for itself and there is nothing left to construe. Dunphy v. Anaconda Company, 151 Mont. 76, 438 P.2d 660 (1968).

The statute is not ambiguous. If the county chooses to have the recipient perform the work, then the county must account for all of the work performed at the prevailing rate of wages paid by the county for similar work.

Your next question concerns the circumstances under which the county may pay the minimum wage. Section 53-3-304, MCA, requires the county to pay "the prevailing rate of wages paid by that county for similar work." The term "prevailing rate of wages" is a term of art in labor law and has been the subject of

considerable litigation. The term has been defined in cases which involved the federal Davis-Bacon Act, 40 U.S.C. § 276a-77, and similar state laws. Montana's "Little Davis-Bacon Act" is codified at section 18-2-401, MCA.

"Prevailing wage" has generally been defined to mean the market or the most frequent or commonly used rate of pay. Department of Labor and Industry v. Altemose Const., 368 A.2d 875 (Pa. 1977); Union School District of Keene v. Commissioner of Labor, 176 A.2d 332 (N.H. 1961). In Campbell v. City of New York, 244 N.Y. 317, 155 N.E. 628 (1927), Judge Cardozo approved a definition of the prevailing rate of wages to be the "rate paid to a majority" in the same trade or, if not a majority, at the same rate as the rate paid "the greatest number" or under certain circumstances the "average rate."

Prevailing rate does not mean the minimum wage. The minimum wage is the lowest wage--the county cannot pay less than the minimum wage. The state minimum wage is currently $2.75 per hour for work which is not subject to the federal minimum wage of $3.35 per hour. A county worker may be subject to the Fair Labor Standards Act (federal minimum wage) if the employee is performing "nontraditional" work for the county: that is, work which is not a normal government service. The county may determine if the work is subject to the FLSA by calling the Wage and Hour Division of the United States Department of Labor in Salt Lake City, Utah.

If the Legislature had wanted the prevailing wage to be only the minimum wage rate, it would have said "minimum wage." In ordinary usage the word "prevailing" is not synonymous with the word "minimum." Thus the county can pay the minimum wage only when it is the prevailing wage paid by that county for the type of work being performed. It may also be appropriate to pay the minimum wage if similar work has never been performed for the county.

The final question you raise is related to interpretation of the term "similar work." Like prevailing wage, "similar work" is a term of art in labor law. While neither the Davis-Bacon Act nor the Little Davis-Bacon Act refers to "similar work," these acts do refer to "work of similar character."

> The "character similar" language...requires only that the Secretary's determination reflect the similarity of the labor to be performed under government contracts to other labor being performed in the locality, not to other types of work on government projects. In other words, the minimum wages determined for laborers on bridges of a certain size must be the prevailing wages paid to laborers on similar bridges in the local area. [Emphasis added.]

Tennessee Roadbuilders Ass'n v. Marshall, 446 F. Supp. 399, 402 (M.D. Tenn. 1977); R.S. Audley Inc. v. State, 408 A.2d 410 (N.H. 1979). Black's Law Dictionary 1554 (4th ed.) defines "similar" to mean "nearly corresponding; resembling in many respects; somewhat like; having a general likeness." In State ex rel. City Council of Butte v. Weston, 29 Mont. 125, 132, 74 P. 415 (1903), the Montana Supreme Court stated: "The word 'similar' does not mean identical in form and substance."

The county should establish categories for similar work. Recipient work should be placed in a category that most closely resembles work which has been performed for the county. It would be appropriate to categorize the work which the recipient performs into such general classifications as carpentry, plumbing, painting, etc. Then if a recipient is asked to perform custodial work, he should be paid at the prevailing rate received by the county's custodians. Moreover, it makes no difference that the recipient only works part-time or performs services that would not be performed but for the program. Finally, if the work falls within the coverage of a collective bargaining agreement that agreement may control the wages to be paid to the recipients. Anderson v. County of Jo Daviess, 401 N.E.2d 265 (Ill. 1980).

There is little doubt that the legislative purpose of section 53-3-304, MCA, is similar to the congressional purpose in passing the Davis-Bacon Act. Davis-Bacon was designed to protect employees of government contractors from substandard wages and to promote the hiring of local labor rather than cheap labor from distant sources. U.S. v. Binghampton Construction, 347 U.S. 171 (1953); North Georgia Building and Construction Trades

v. Goldschmidt, 651 F.2d 697 (5th Cir. 1980). Davis-Bacon also serves to "protect local contractors from unfair competition and to prevent disturbance of the local economy." U.S. v. Cappeletti Bros. Inc., 621 F.2d 1309, 1313, n.11 (5th Cir. 1980).

Section 53-3-304, MCA, was designed to prevent "workfare" from depressing the wage rate being paid to existing county employees or employees of contractors for the county, and to prevent the replacement of existing county employees or contractors with recipients of general relief. The Legislature sought to prevent the counties from using general relief funds to supplant regular funds used to perform the normal services which are provided by the county. The counties must implement the program in a manner that is consistent with these goals.

THEREFORE, IT IS MY OPINION:

1. Section 53-3-304, MCA, requires all participants in the "workfare" program to be paid, i.e., receive benefits, at the prevailing rate of wages paid by the county for similar work.

2. The prevailing wage is the most frequent or commonly used rate of pay.

3. The county may pay the minimum wage only if similar work has generally been performed for the minimum wage or if the county has never had similar work performed.

4. To determine what is similar work the county should classify the work to be performed under the program with other work closely resembling the type currently being done for the county.

Very truly yours,

MIKE GREELY
Attorney General