VOLUME NO. 41 OPINION NO. 58

COUNTY OFFICERS AND EMPLOYEES - Minimum wage and maximum hours, compensatory time;
EMPLOYEES, PUBLIC - Minimum wage and maximum hours, compensatory time;
HOURS OF WORK - Application of federal and state maximum hours acts;
MINIMUM WAGE - Application of federal and state minimum wage acts;
PEACE OFFICERS - Minimum wage and maximum hours, compensatory time;

POLICE - Minimum wage and maximum hours, compensatory time;
CODE OF FEDERAL REGULATIONS - 29 C.F.R. §§ 553.3, 553.4;
MONTANA CODE ANNOTATED - Sections 7-4-2509, 7-32-2111, 7-32-4118, 39-3-204, 39-3-401 to 39-3-408;
PUBLIC LAWS - Pub. L. No. 99-150, § 2(a) (1985);
UNITED STATES CODE - 29 U.S.C. §§ 201 to 219.

HELD: 1. State and local government employees who are covered by the Fair Labor Standards Act (FLSA) are not subject to the provisions of the Montana Minimum Wages and Maximum Hours Act (MWMHA).

2. State and local government employees who are covered by the FLSA may reach agreement with their employers to receive compensatory time in lieu of cash overtime.

3. Provisions of state law, other than the MWMHA, which set shorter workweeks for specified groups of employees are to be given effect.

17 April 1986

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Gentlemen:

You have requested my opinion on the following questions which have arisen due to recent changes in federal law:

1. Are state and local government employees covered by both the federal and the Montana minimum wage and overtime acts?

2. If the answer to question no. 1 is affirmative, does the federal provision allowing compensatory time apply?

3. How are law enforcement and fire protection employees to be treated for purposes of overtime?

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 to 219, as enacted in 1938, did not include state and local government employees within the scope of its minimum wage and overtime provisions. In 1974, the FLSA was amended to extend to employees of the states and their political subdivisions, with certain enumerated exceptions. 29 U.S.C. § 203(2). These amendments were subsequently challenged and were restricted by the United States Supreme Court in National League of Cities v. Usery, 426 U.S. 833 (1976), which held that Congress lacked the power to enforce the FLSA against the states in areas of traditional government functions. Thus, for nearly a decade, most state and local government employees have been exempt from the federal act. The Court retreated from this position in its decision in Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005 (1985), overruling National League of Cities, supra, in effect reinstating coverage by FLSA of most state and local government employees.

Amendments to the FLSA, which are effective as of April 15, 1986, eased the transition for the states by providing that the states are not liable for violations of FLSA prior to April 15, 1986, unless the employee was covered by the FLSA on January 1, 1985. The amendments also allow, within limits, compensatory time-and-one-half in lieu of cash payment for overtime. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2(a), 99 Stat. 787 (1985).

During the decade in which the National League of Cities rule controlled, most public employees in Montana were subject to the Montana Minimum Wages and Maximum Hours Act (MWMHA), §§ 39-3-401 to 408, MCA, rather than the FLSA. The state and federal acts currently differ in a few important respects, inter alia:

1. The Montana law has no provision of compensatory time in lieu of cash for overtime.

2. The Montana law exempts certain law enforcement and fire protection employees while the federal law does not.

3. The FLSA allows for a longer maximum work period for law enforcement and fire protection employees than does the MWMHA.

In other respects, the state and federal acts, as well as the enforcing agencies' interpretations thereof, are virtually identical. For example, both acts have exemptions for professional, administrative, and executive employees.

Your first question is whether state and local government employees are subject to the wage and overtime provisions of both the FLSA and the MWMHA. It has been determined by the Montana Supreme Court that the FLSA did not preempt the entire field of wages and hours to the exclusion of any state regulation. Plouffe v. Farm & Ranch Equip. Co., 176 Mont. 31, 570 P.2d 1106 (1977). The Plouffe case involved an employee who was expressly exempted from the FLSA, but not from the MWMHA. Had the Montana court decided that the FLSA preempted the field, the Montana wage law could not have eliminated the exemption granted by federal law. However, the Court held to the contrary. Thus, the MWMHA remains effective for those employees who are not covered by or who are exempt from the FLSA.

The Plouffe opinion does not address the question posed herein, i.e., whether the MWMHA is to be given any effect where an employee is covered by the FLSA. This question is answered by section 39-3-408, MCA, which provides:

> The provisions of this part shall be in addition to other provisions now provided by law for the payment and collection of wages and salaries but shall not apply to employees covered by the Fair Labor Standards Act.

Discussing this provision in State v. Holman Aviation Co., 176 Mont. 31, 575 P.2d 923, 925 (1978), the Court stated:

> Section [39-3-408], by its plain meaning provides merely that "the provisions of this

> act", the Montana Minimum Wages and Maximum Hours Act, shall be applicable to set minimum wages and maximum hours for certain Montana employees in occupations not covered by the F.L.S.A., and that the F.L.S.A. shall apply to those employees which the federal act specifies. [Emphasis added.]

Therefore, by the provisions of the MWMHA itself, the act is not to be given any effect if the employee is covered by the FLSA. The Montana Legislature has clearly spoken on this question. In 1973, the Legislature refused to adopt an amendment to the predecessor to section 39-3-408, MCA, which would have provided that the FLSA would apply only if it required a higher standard than the MWMHA. H.B. 279, 43d Leg. (1973).

Some confusion exists about the meaning of the following language in the FLSA which appears to require deference to state law:

> No provision of this chapter or of any other thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter.

29 U.S.C. § 218(a), in part. In the absence of section 39-3-408, MCA, the MWMHA would control if it set a higher minimum wage or a shorter work period than the FLSA. However, section 39-3-408, MCA, clearly states that the MWMHA provisions are not applicable to employees covered by the FLSA. The Legislature has expressed its clear intent to defer to the federal act. Therefore, in my opinion, an employee covered by the FLSA is bound solely by the FLSA, and the MWMHA does not apply.

This conclusion also answers your second question concerning compensatory time. If an employee is not exempt from the FLSA, then the recent amendments permitting government employees and employers to agree to payment of compensatory time-and-one-half in lieu of cash overtime will apply as of April 15, 1986. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2(a), 99 Stat. 787 (1985). Private sector employees do not have the option of compensatory time, nor do employees who are exempt from the FLSA and covered by the MWMHA.

It has been argued that section 39-3-204, MCA, compels the conclusion that compensatory time cannot be allowed even for employees covered by the FLSA. I do not so interpret that section. Even if that section could be interpreted to prohibit compensatory time, it would be inconsistent with the FLSA. Where a state law is inconsistent with a federal law on the same subject, the federal law controls by virtue of the Supremacy Clause of the United States Constitution. Butte Miners' Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. 418, 118 P.2d 148 (1941). Nothing in the FLSA compels an opposite conclusion, since § 218, above quoted, applies only to minimum hourly wage or maximum work period and not to the form of compensation.

Your final question concerns the treatment of law enforcement and fire protection employees of state and local governments. Pursuant to the FLSA, these employees are covered unless the department or agency employs less than five persons in these activities. 29 U.S.C. § 213(a)(20). Whether a particular employee is engaged in fire protection or law enforcement activities for the purposes of FLSA coverage may be determined from the definitions of 29 C.F.R. §§ 553.3 and 553.4. Any employees who are exempt from the FLSA are governed by the MWMHA, including the exclusions therefrom. The MWMHA does not apply in any respect to employees covered by the FLSA However, provisions found elsewhere in the Montana Code Annotated which establish shorter work periods than does the FLSA are to control, according to 29 U.S.C. § 218. See, e.g., §§ 7-4-2509, 7-32-2111, 7-32-4118, MCA. Employees in these special circumstances remain eligible for compensatory time if they exceed the maximum hours of work.

THEREFORE, IT IS MY OPINION:

1. State and local government employees who are covered by the Fair Labor Standards Act (FLSA) are not subject to the provisions of the Montana Minimum Wages and Maximum Hours Act (MWMHA).

2. State and local government employees who are covered by the FLSA may reach agreement with their employers to receive compensatory time in lieu of cash overtime.

3. Provisions of state law, other than the MWMHA, which set shorter workweeks for specified groups of employees are to be given effect.

Very truly yours,

MIKE GREELY
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