

VOLUME NO. 41

OPINION NO. 70

COUNTY GOVERNMENT - Transition provisions for holdover officers when a new form of government is approved;
LOCAL GOVERNMENT - Transition provisions for holdover officers when a new form of government is approved;
LOCAL GOVERNMENT STUDY COMMISSIONS - Transition provisions for holdover officers when a new form of government is approved;
MONTANA CODE ANNOTATED - Sections 2-16-213(1), 7-3-156, 7-3-158, 7-3-193(1), 7-3-193(2)(c);
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 44 (1986).

HELD: "Holdover" officers of an existing governing body are not permitted to remain in office once a new form of local government has been adopted and the new governing body has been elected and qualified, unless the exclusive exceptions found in section 7-3-158(3), MCA, are implemented. Other elected or appointed officers and employees whose positions are not abolished by the new form of government continue to perform their duties unless special provisions are made for the discontinuance of those duties.

20 June 1986

Loren Tucker
Madison County Attorney
P.O. Box 36
Virginia City MT 59755

Dear Mr. Tucker:

You have requested my opinion on a question which I have characterized as follows:

Is section 7-3-158(3), MCA, an exclusive list of exceptions to the general rules which provide for the transition of officers and employees who hold government positions on the date that a new plan of government takes effect?

Your question involves the procedures to be followed in implementing an alternative form of local government proposed by a local government study commission and approved by the voters. Section 7-3-158, MCA, sets forth the transition provisions for "holdover" personnel, i.e., officers and employees who hold government positions at the time a new plan of government is adopted. That section applies to study commission proposals by operation of section 7-3-193(1), MCA, and is set forth below.

7-3-158. Transition provisions affecting personnel. (1) The members of the governing body holding office on the date the new plan of government is adopted by the electors of the local government continue in office and in the performance of their duties until the

governing body authorized by the plan has been elected and qualified, whereupon the prior governing body is abolished.

(2) All other employees holding offices or positions, whether elective or appointive, under the government of the county or municipality continue in the performance of the duties of their respective offices and positions until provisions are made for the performance or discontinuance of the duties or the discontinuance of the offices or positions.

(3) A charter or a petition proposing an alteration to an existing form of local government may provide that existing elected officers shall continue in office until the end of the term for which they were elected or may provide that existing elected officers shall be retained as local government employees until the end of the term for which they were elected, and their salaries may not be reduced.

Section 7-3-158, MCA, was one of the statutes addressed in 41 Op. Att'y Gen. No. 44 (1986). In that opinion I concluded that, pursuant to section 7-3-158(1), MCA, "holdover" officers are not permitted to remain in office once the new governing body has been elected and qualified, unless the adopted study commission proposal includes a specific provision that they be retained, pursuant to section 7-3-158(3), MCA. Subsection (1) sets forth the general rule that holdover officials continue in office only until the new officers are elected and qualified.

Two exceptions to this rule are permitted under subsection (3). A charter or petition proposing the change in government may provide that a holdover elected officer serve out his full term of office or that he be retained for his full term as a local government employee (in a different capacity), with no reduction in salary. If neither exception is provided for by charter or petition, then the general rule in subsection (1) would operate to abolish the prior governing body at the time the new body is elected and qualified for office. This interpretation is consistent with section 7-3-193(2)(c), MCA, which provides that study

commissions "may provide for existing elected officers under 7-3-158(3)." (Emphasis added.)

The statutes provide for no other exceptions to the general rule, and I conclude that no other exceptions are authorized. Where there is an express mention of certain authority, the mentioning of it implies the exclusion of any other. Reed v. Reed, 130 Mont. 409, 413, 304 P.2d 590, 592 (1956).

The general rule set forth in subsection (1) of section 7-3-158, MCA, applies to officers of an existing governing body. Subsection (2) is the general rule for all other elected or appointed officers and employees. These officers and employees continue in the performance of their duties "until provisions are made for the performance or discontinuance of the duties or the discontinuance of the offices or positions."

The exact meaning of section 7-3-158(2), MCA, is not clear. The minutes of the House and Senate Local Government Committees, which considered the language in 1979 during hearings on House Bill 851 (enacted as 1979 Mont. Laws, ch. 675, § 23), are not helpful. The language of subsection (2) suggests the following. An elected or appointed officer or employee in the existing government who is not a member of the governing body itself loses his position if that position is abolished by the adoption of a new form of government. If this occurs, the position would end at the time the officers of the new governing body take office. §§ 7-3-156, 7-3-158(1), MCA. Of course the two exceptions provided for in section 7-3-158(3), MCA, could operate to permit an elected officer to continue to work for the local government, either in his elected position or in a different capacity, without a reduction in salary.

If, however, the position is not abolished by the adoption of a new form of government, then the elected or appointed officer or employee in the existing government continues to fulfill the duties of his position unless his term of office expires or some provision is made for the discontinuance of his duties. The latter situation could occur in one of several ways, depending upon whether the officer or employee serves by election or appointment. If the individual is an elected official whose position has not been eliminated by the new form of government, a charter or petition may provide that he serve in a different capacity with no

reduction in salary, pursuant to section 7-3-158(3), MCA. If the individual is an appointed official whose position has not been abolished by the new form of government, the appointing power may act to discontinue the duties of that position. Every office of which the duration is not fixed by law is held at the pleasure of the appointing power. § 2-16-213(1), MCA. See Conboy v. State, 42 St. Rptr. 120, 123, 693 P.2d 547, 550 (1985).

THEREFORE, IT IS MY OPINION:

"Holdover" officers of an existing governing body are not permitted to remain in office once a new form of local government has been adopted and the new governing body has been elected and qualified, unless the exclusive exceptions found in section 7-3-158(3), MCA, are implemented. Other elected or appointed officers and employees whose positions are not abolished by the new form of government continue to perform their duties unless special provisions are made for the discontinuance of those duties.

Very truly yours,

MIKE GREELY
Attorney General