

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 23

COUNTY COMMISSIONERS - Authority to establish number of
deputy positions in county offices;

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COUNTY OFFICERS AND EMPLOYEES - Authority of board of county commissioners to establish number of deputy positions in county offices;

REVENUE, DEPARTMENT OF - Authority of board of county commissioners to establish number of deputy positions in county offices;

MONTANA CODE ANNOTATED - Title 7, chapter 4, part 24; sections 7-4-2401, 7-4-2402, 15-8-101, 15-8-102;

REVISED CODES OF MONTANA, 1947 - Section 16-2409.

- HELD: 1. As between the state and county governments, the authority to establish a deputy position and the commensurate authority to eliminate a deputy position in the office of the county assessor reside with county government.
2. As between the county assessor and the board of county commissioners, the authority to add or eliminate a salaried deputy position resides with the board of county commissioners.

21 August 1987

Gerry M. Higgins
Golden Valley County Attorney
Golden Valley County Courthouse
Ryegate MT 59074

Dear Mr. Higgins:

You have requested my opinion on the following question:

If the board of county commissioners finds that a deputy assessor is not required, can they eliminate the position?

I understand that your question is at least in part prompted by action of the 1987 Montana Legislature which required that county governments assume 30 percent of the salary costs for the office of county assessor. (House Bill No. 2, 1987 Montana Legislature.) Prior to that action and since the adoption of the Montana Constitution in 1972, state government paid the entire salary costs for deputies in the office.

It is first necessary to point out that your request, and hence this opinion, deals with the authority to establish or eliminate a position, and that the authority to fill the position is not at issue here and may be entirely different. There are two major

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inquiries contained within the question you pose, the first of which is: As between the State (Department of Revenue) and local government, who has authority to establish the number of deputy positions in the county assessor's office?

The statutes are in apparent conflict on the question. Supporting state authority for control over the number of deputy assessor positions is section 15-8-101, MCA:

The department of revenue shall have full charge of assessing all property subject to taxation and equalizing values and shall secure such personnel as is necessary to properly perform its duties.

The next section of law (§ 15-8-102, MCA) provides that county assessors are "agents of the department of revenue."

Support for local control over the number of deputy positions for the county assessor is found in Title 7, chapter 4, part 24, MCA. Section 7-4-2402, MCA, provides in part that the board of county commissioners may "fix and determine the number of county deputy officers." Section 7-4-2401, MCA, also provides in part that every county officer "may appoint as many deputies or assistants as may be necessary for the faithful and prompt discharge of the duties of his office." The effect of this statute will be discussed more fully below.

The conflict between the statutes is apparent: One appears to give complete control over assessment personnel to the State; the others appear to place that control with local government.

It is my understanding that the common practice and usage in the last 15 years have been to establish at the local level the number of deputy assessor positions. Thus, even though the State, through the Department of Revenue, has paid the salaries, the number of deputies has been under the control of the local county government. It is my opinion that this established practice and usage should continue unless and until the Legislature directs otherwise. The Montana Supreme Court has said:

Under the case law, it is clear that, when faced with problems of statutory construction, the court must show deference and respect to the interpretations given the statute by the

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officers and agencies charged with administration.

State Dept. of Highways v. Midland Materials, 662 P.2d 1322, 1325 (Mont. 1983).

The second inquiry then is: Who on the local level, the county assessor or the board of county commissioners, establishes the number of deputies in the county assessor's office? The argument that the county assessor does is buttressed by section 7-4-2401(1), MCA, which reads in its entirety:

Every county and township officer, except justice of the peace, may appoint as many deputies or assistants as may be necessary for the faithful and prompt discharge of the duties of his office. All compensation or salary of any deputy or assistant shall be as provided in this code.

However, the authority that the board of county commissioners establishes the number of deputy positions is found in section 7-4-2402, MCA:

The board of county commissioners in each county is hereby authorized to fix and determine the number of county deputy officers and to allow the several county officers to appoint a greater number of deputies than the maximum number allowed by law when, in the judgment of the board, such greater number of deputies is needed for the faithful and prompt discharge of the duties of any county office.

These two statutes appear to be in direct conflict, the first granting unlimited discretion in the county officeholder to appoint deputies, the second providing that the board of county commissioners has the authority to create any deputy positions other than those provided by law.

In the recent decision of Spotorno v. Board of Commissioners of Lewis and Clark County, 687 P.2d 720 (Mont. 1984), the Montana Supreme Court referred to the two statutes cited above as being in "irreconcilable conflict." Spotorno, supra, at 722. The Court resolved a similar conflict between a county officeholder and the county commissioners by finding that the specific statute which applied to county auditors set a maximum number of deputies, but the authority of the board of county commissioners found in section 7-4-2402, MCA, was needed to actually fill the position. In this instance,

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there is no similar statute establishing the maximum number of deputies allowed a county assessor.

Careful attention to the wording of section 7-4-2401, MCA, and reference to several court cases which have interpreted it, show that it is not the broad grant of authority that it first appears. The wording of the statute in the Revised Codes of Montana, 1947, is perhaps clearer in conveying meaning:

Every county and township officer, except county commissioner and justice of the peace, may appoint as many deputies as may be necessary for the faithful and prompt discharge of the duties of his office, but no compensation or salary must be allowed any deputy except as provided in this code. [Emphasis added.]

§ 16-2409, R.C.M. 1947.

The underlined portion is that which was changed in recodification. However, the language in the Revised Codes of Montana is a stronger statement that while the officeholder may appoint deputies, those deputies are not to receive compensation except as allowed by the board of county commissioners. That is the way the statute has been interpreted by several court decisions.

In State v. Cockrell, 309 P.2d 316 (Mont. 1957), the Montana Supreme Court gave this interpretation to the statute:

Likewise without any order of the board of county commissioners, the county attorney may appoint as many deputies as necessary for the faithful and prompt discharge of the duties of his office, providing that no compensation or salary may be allowed therefor. R.C.M. 1947, § 16-2409.

Cockrell, supra, at 319.

In State v. Crouch, 227 P. 818 (Mont. 1924), the Supreme Court also approved the hiring of a deputy county attorney under the statute as long as he acted without pay.

The implication of both of the court decisions referred to above is that where the deputy is to receive a salary, the statute granting an officeholder unlimited discretion to appoint deputies does not apply. That is also a reasonable interpretation of section 7-4-2401,

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MCA, particularly when the previous language of section 16-2409, R.C.M. 1947, is considered. Since the number of deputy assessors is not otherwise established by statute, there is no legal duty for the board of county commissioners to fund the position of deputy assessor. Consequently, the number of deputies resides with the county commissioners. See Spotorno, supra, at 722.

THEREFORE, IT IS MY OPINION:

1. As between the state and county governments, the authority to establish a deputy position and the commensurate authority to eliminate a deputy position in the office of the county assessor reside with county government.
2. As between the county assessor and the board of county commissioners, the authority to add or eliminate a salaried deputy position resides with the board of county commissioners.

Very truly yours,

MIKE GREELY
Attorney General