

VOLUME NO. 43

OPINION NO. 58

COUNTIES - Application of 7 percent increase in section 7-4-2504(3);
COUNTIES - Two-year statute of limitations on wage claims from public officers and claims for longevity from deputy sheriffs and undersheriffs;
COUNTY COMMISSIONERS - Application of 7 percent increase in section 7-4-2504(3);
COUNTY COMMISSIONERS - Discretionary authority to freeze salaries of elected county officials;
COUNTY OFFICERS AND EMPLOYEES - Application of 7 percent increase in section 7-4-2504(3);
COUNTY OFFICERS AND EMPLOYEES - Two-year statute of limitations on wage claims from public officers and claims for longevity from deputy sheriffs and undersheriffs;
EMPLOYEES, PUBLIC - Two-year statute of limitations on wage claims from public officers and claims for longevity from deputy sheriffs and undersheriffs;
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LIMITATIONS ON ACTION - Two-year statute of limitations on wage claims from public officers and claims for longevity from deputy sheriffs and undersheriffs;
PUBLIC OFFICERS - Two-year statute of limitations on wage claims from public officers and claims for longevity from deputy sheriffs and undersheriffs;
SALARIES - Application of 7 percent increase in section 7-4-2504(3);
SALARIES - Discretionary authority to freeze salaries of elected county officials;
SALARIES - Two-year statute of limitations on wage claims from public officers and claims for longevity from deputy sheriffs and undersheriffs;
SHERIFFS - Two-year statute of limitations on wage claims from public officers and claims for longevity from deputy sheriffs and undersheriffs;
MONTANA CODE ANNOTATED - Sections 7-4-2503, 7-4-2504, 27-2-202, 27-2-211;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 85 (1988), 39 Op. Att'y Gen. No. 32 (1981).

- HELD: 1. The 7 percent increase in section 7-4-2504(3), MCA, must be considered a cost-of-living increment (COLA) used to determine salaries for elected county officials in fiscal year 1982 and must be added to the base salary on July 1, 1982, before computing the COLA for fiscal year 1982-83.
2. The two-year statute of limitations in section 27-2-211(1)(c), MCA, applies to wage claims by public officers, including elected county officials and their deputies, and claims for longevity payments from deputy sheriffs and undersheriffs.

February 5, 1990

Christine A. Cooke
Big Horn County Attorney
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Dear Ms. Cooke:

You have requested my opinion on the following questions:

1. Was the 7 percent increase in section 7-4-2504(3), MCA, a cost-of-living increment (COLA) to be added to the base salary on July 1, 1982, before computing the COLA for fiscal year 1982-83?
2. If the board of county commissioners freezes salaries of elected officials based upon an erroneous foundation is the salary freeze valid and binding?
3. What statute of limitations applies to wage claims submitted by public officers, including elected county officials and their deputies, and claims for longevity payments submitted by deputy sheriffs and undersheriffs?

I.

Based on a review of the legislative history of section 7-4-2504(3), MCA, and as indicated in 42 Op. Att'y Gen. No. 85 (1988), I conclude that the 7 percent increase in section 7-4-2504(3), MCA, was a COLA to be added to the base salary on July 1, 1982, before computing the COLA for fiscal year 1982-83.

Section 7-4-2504(3), MCA, provides:

If the application of 7-4-2503 does not qualify a county official for a salary increase of at least 7% on July 1, 1981, his salary on that date shall be increased by an amount sufficient to provide him total salary equal to 7% more than during the previous year.

Section 7-4-2503, MCA, as adopted in 1981, created a new method for compensation of certain county officers. S.B. 50, 47th Leg., 1981 Mont. Laws, ch. 518, § 1. The base salary was calculated by adding an amount determined by the classification of the county plus a population increment. For example, the annual base salary for officials from counties of the first through third class was \$14,000 plus a population increment of \$10 for each

100 persons in the county's population. Section 7-4-2504, MCA, allowed the county governing body in 1982 to grant a cost-of-living increase to the official by

adding to the annual salary computed under 7-4-2503 an increment calculated by applying to the annual salary established by 7-4-2503(1) plus previous cost-of-living increments, 70% of the last previous calendar year's consumer price index[.]

For most counties, the adoption of the new method resulted in a pay raise for county officials that equaled or was greater than the cost-of-living increment for 1981. However, for four counties in which officials would have had to take a reduction in pay under the new system, the Legislature enacted a "grandfather clause," now section 7-4-2504(3), MCA.

A detailed look at the legislative history of Senate Bill 50 is enlightening as to the purpose of the grandfather clause. Senator McCallum, the sponsor of the bill, explained the amendments made by the subcommittee appointed to consider the bill:

Senator McCallum said the subcommittee decided on two different bases. One is for first through third class counties. They would receive a \$14,000 base and \$10 per 100 population increments. The other is for fourth through seventh class counties. They would receive a \$12,000 base and \$20 per 100 population increments. If this does not give them a raise they would get a 7% increase, whichever is more. [Emphasis added.]

Minutes, Disposition of Senate Bill 50, Senate Local Government Committee, February 18, 1981, at 1. The 7 percent increase was therefore a fixed, one-time, cost-of-living increment, intended to supplement the base salary and the population increment for those officials who did not get a raise as a result of the adoption of the new base salary and population increment.

There has been some confusion as to the operation of the grandfather clause because of language in a report submitted to the Legislature from the County Compensation Board. This Board had been created by the previous Legislature to study the problem of salaries of county officials. Sheriff Hammermeister, chairman of the Board, stated in his report:

On page 9, starting at line 5 of Senate Bill 50, is a grandfather clause for salaries. Since Senate Bill 50 does change the salary schedule and no longer uses a direct taxable formula, without this grandfather clause 2 counties would have taken a pay cut (due to presently a small population and large taxable valuation). The grandfather clause does affect 4 counties and it is in effect only for one fiscal year. [Emphasis added.]

County Compensation Board Report for Senate Bill 50, Senate Local Government Committee, January 17, 1981, at 6.

The phrase "in effect only for one fiscal year" did not mean that the salaries must be stripped of the 7 percent increase in determining the salaries for 1982-83. The phrase meant simply that the 7 percent increase was a statutorily-fixed COLA that would be allowed only in 1981. In the years thereafter, the COLA of those officials who received the 7 percent COLA in 1981 would be determined by using the formula in section 7-4-2504(1), MCA. Neither the formula in section 7-4-2504(1), MCA, nor the legislative history suggests that COLAs determined after 1981 must be based only on the base salary in section 7-4-2503, MCA, without considering the 1981 7 percent COLA. Section 7-4-2504(1), MCA, states that the COLA each year is determined "by adding to the annual salary computed under 7-4-2503 an increment calculated by applying to the annual salary established by 7-4-2503(1) plus previous cost-of-living increments, 70% of the [CPI]." The 1981 one-time 7 percent COLA in section 7-4-2504(3), MCA, is such a cost-of-living increment that must be added to the base salary in determining the COLA for 1982.

The minutes from the Senate Local Government Committee clearly support the above conclusion:

Senator McCallum said they felt everyone should get a raise and this is setting guidelines for the future. If the population didn't bring them up to 7%, we threw in the 7% figure. They will receive whichever is greater. [Emphasis added.]

Minutes, Disposition of Senate Bill 50, Senate Local Government Committee, February 18, 1981, at 1. The 1981 7 percent increase was therefore intended to be used in setting future salaries, a COLA to be added into the calculation of the next year's COLA.

In addressing a peripheral matter, a previous Attorney General's Opinion stated: "Section 7-4-2504(2), MCA [now § 7-4-2504(3)], thus created a new salary base on July 1, 1981, for those county officials whose salaries would not have increased by 7 percent on July 1, 1981, under the formulas provided in section 7-4-2503, MCA." (Emphasis added.) 42 Op. Att'y Gen. No. 85 (1988). While the use of the phrase "new salary base" should not be confused with the term "base salary" for purposes of calculating longevity payments (see 43 Op. Att'y Gen. No. 44 (1989), slip op. at 1), the conclusion in 42 Op. Att'y Gen. No. 85 is correct. The 1981 7 percent increase in section 7-4-2504(3), MCA, was not a type of "bonus" with no relation to future salary calculations. Rather, the 1981 7 percent increase must be considered a COLA to be used in calculating future COLAs in accordance with the formula in section 7-4-2504(1), MCA.

II.

With respect to freezing salaries of county officials, section 7-4-2504(1), MCA, provides:

The county governing body may, however, for all or the remainder of each fiscal year, in conjunction with setting salaries for the same action on the salaries of justices of the peace (if applicable), the county governing body, county attorney, and coroner, set the salary at the prior fiscal year level if that level is lower than the level required by this subsection.

As used in this section, the word "may" vests the county governing board with the discretion to freeze salaries. See discussion on the word "may" in 39 Op. Att'y Gen. No. 32 (1981) at 131-32. Once the Legislature vests a governmental body with discretionary authority, courts are reluctant to get involved in the procedure or method of exercising official discretion unless there has been manifest abuse. *Id.* at 132; Black v. General Electric Co., 89 Wis. 2d 195, 278 N.W.2d 224 (1979), following State ex rel. Knudsen v. Board of Education, 43 Wis. 2d 58, 168 N.W.2d 295, 299 (1969).

You have phrased your second question in terms of whether a freeze predicated upon an erroneous foundation is valid and binding. You have suggested that because the statute sets no criteria for exercising the discretion to freeze salaries, any or no reason could justify such action. Your assertion that the statute sets no limits on the commissioners' discretion is correct. However, the actions of public officers are subject to a common law abuse of discretion standard. That standard essentially holds that discretionary action is not enforceable if it involves an abuse of discretion or is exercised beyond the limits conferred by the Legislature. State ex rel. Knudsen, *supra* at 299. Admittedly, public officials should be given wide latitude in the methods they choose to exercise their authority. 39 Op. Att'y Gen. No. 32 at 133. To answer your question, however, I would have to determine whether the commissioners abused their discretion and make factual findings and liability determinations that are inappropriate for an Attorney General's Opinion. I regret, therefore, that I must decline to answer this question.

III.

Your last question concerns what statute of limitations applies to wage claims by public officers, including elected officials and their deputies, and to claims for longevity payments brought by deputy sheriffs and undersheriffs. As a general rule, employment disputes are controlled by the statute of limitations on simple contracts. § 27-2-202, MCA; Weston v. Montana State Highway Commission, 186 Mont. 46, 606 P.2d 150 (1980); Intermountain Deaconess Home v. Department of Labor and Industry, 191 Mont. 309, 623 P.2d 1384 (1981); Pope v. Keefer, 180 Mont. 454, 591 P.2d 206 (1979). As the Court

stated in Intermountain Deaconess, "[w]age disputes grow out of the contractual relationship of employee and employer." 623 P.2d at 1387.

Nevertheless, as the Montana Supreme Court has consistently recognized, "[t]he right of a public officer to compensation for the performance of duties imposed upon him by law does not rest upon contract, but is incident to the right to hold office." McGillic v. Corby, 37 Mont. 249, 254, 95 P. 1063 (1908). See also Peterson v. City of Butte, 44 Mont. 401, 120 P. 483 (1912). This rule was reiterated recently in Wage Appeal of Montana State Highway Patrol Officers v. Board of Personnel Appeals, 208 Mont. 33, 676 P.2d 194 (1984), in which the Court stated:

[W]hen the Legislature enacts a statute fixing certain terms and conditions of public employment, such as salaries and compensation, it is presumed that the statute does not create contractual rights, but is intended merely to declare a policy to be pursued until the Legislature declares otherwise. [Citations omitted.]

676 P.2d at 199. The wage claims here, then, cannot be considered actions grounded in contract, but claims based on liabilities created by statute. Other states have reached a similar conclusion. For example, in Campbell v. Graham-Armstrong, 107 Cal. Rptr. 777, 509 P.2d 689 (1973), the California Supreme Court held that back pay from a statutory salary schedule for kindergarten teachers who did not have written contracts was a liability created by statute. See also Wright v. City of Loraine, 70 Ohio App. 337, 46 N.E.2d 325 (1942); Niswonger v. City of Cincinnati, 17 Ohio App. 2d 200 (1968); Raymond v. Christian, 24 Cal. App. 2d 92, 74 P.2d 536 (1937).

In Montana, the phrase "liability created by statute" has a narrow meaning. One must look at the underlying cause of action to determine whether the statute creates a liability. State ex rel. Fallon v. District Court, 161 Mont. 79, 505 P. 120 (1972), quoting Beeler v. Butte & London Copper Development Co., 41 Mont. 465, 472, 110 P. 528, 530 (1910). Here, the underlying cause of action is not based upon a contractual relationship between the elected official and the county. Rather, the statutes define the extent and nature of the public officer's duties, and the amount of compensation. As such, claims for compensation must be considered liabilities created by statute and subject to the two-year statute of limitations in section 27-2-211 (1)(c), MCA.

This conclusion is especially true with respect to the claims for longevity. In Wage Appeal of Highway Patrol, *supra*, the Court expressly found that there was no contractual right to longevity payments for public officers absent language in the statute creating rights of a contractual nature. The Court stated:

If contractual rights are to be created by statute, the language of the statute and the circumstances must manifest a legislative intent to create private rights of a contractual nature enforceable against the State. [Citation omitted.]

676 P.2d at 199. Here, there is no indication that contractual rights have been created with respect to the longevity increments of the deputy sheriff and undersheriff.

THEREFORE, IT IS MY OPINION:

1. The 7 percent increase in section 7-4-2504(3), MCA, must be considered a cost-of-living increment (COLA) used to determine salaries for elected county officials in fiscal year 1982 and must be added to the base salary on July 1, 1982, before computing the COLA for fiscal year 1982-83.
2. The two-year statute of limitations in section 27-2-211(1)(c), MCA, applies to wage claims by public officers, including elected county officials and their deputies, and claims for longevity payments from deputy sheriffs and undersheriffs.

Sincerely,

MARC RACICOT
Attorney General