

VOLUME NO. 43

OPINION NO. 77

CLERKS - Authority in clerk of court to employ deputy or raise deputy's salary without approval of county commissioners;
CLERKS - Deputy clerk of court acting on behalf of clerk;
COUNTIES - Authority in clerk of court to employ deputy or raise deputy's salary without approval of county commissioners;
COUNTY COMMISSIONERS - Authority in clerk of court to employ deputy or raise deputy's salary without approval of county commissioners;
COUNTY GOVERNMENT - Authority in clerk of court to employ deputy or raise deputy's salary without approval of county commissioners;
COURTS, DISTRICT - Authority in clerk of court to employ deputy or raise deputy's salary without approval of county commissioners;
SALARIES - Authority in clerk of court to employ deputy or raise deputy's salary without approval of county commissioners;
SALARIES - Authority of county commissioners to set salaries for part-time and full-time service in same position;
MONTANA CODE ANNOTATED - Sections 3-5-404, 7-4-2401 to 7-4-2403, 7-4-2505, 7-6-2315, 7-6-2318, 7-6-2320, 7-6-2324, 7-6-2325, 7-6-2413, 7-31-2101;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 23 (1987), 40 Op. Att'y Gen. No. 61 (1984), 39 Op. Att'y Gen. No. 78 (1982), 38 Op. Att'y Gen. No. 35 (1979).

- HELD: 1. A deputy clerk of the district court may act on behalf of the clerk of the district court in performing the clerk's duties and obligations.
2. The clerk of the district court may not employ a chief deputy or deputy without authorization of the board of county commissioners.
3. The clerk of the district court may not raise the salary of a deputy without authorization in the county budget and without specific approval of the county commissioners.
4. The board of county commissioners may calculate the years of service of a county employee based upon the number of hours worked rather than the number of calendar years in part-time service.

November 29, 1990

Robert Slomski
Sanders County Attorney
P.O. Box 519
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Dear Mr. Slomski:

You have requested my opinion on the following questions relating to the employment of a part-time deputy clerk of court:

1. Is a deputy clerk of the district court authorized to perform all of the duties and functions of the clerk of the district court in the clerk's absence, or is only a "chief deputy" authorized to perform those duties and functions?
2. Is the clerk of the district court entitled as a matter of law to employ a chief deputy, or any deputies, without authorization of the board of county commissioners and without funds approved by the board of county commissioners in the final county budget?
3. Is the clerk of the district court authorized to promote her part-time deputy clerk to chief deputy clerk at the higher pay scale without authorization in the county budget as approved by the county commissioners and without consent of the board of county commissioners?
4. In determining length of service, is the board of county commissioners required to calculate years of service according to the actual number of years that an employee has been employed, or may length of service be calculated for part-time employees by calculating 2,080 work hours as one year of service?

You state that the clerk of the district court of Sanders County has employed a deputy clerk who works approximately one-third time. The budget for fiscal year 1989-1990, as approved by the board of county commissioners of Sanders County, authorizes this position of deputy clerk for 700 hours per year at a salary of \$6.41 per hour. While the deputy clerk has six years of part-time experience in her job, the total number of hours that she has actually worked represents more than one year of full-time service (2,080 hours) but less than two years of full-time service.

You further state that the clerk of court had to leave on short notice because of a family emergency and that before leaving she appointed her deputy as "chief deputy." Under the county personnel plan a chief deputy full-time position earns \$8.15 per hour. The personnel plan does not provide for a part-time chief deputy position. Further, the budget approved by the county commissioners does not authorize a chief deputy position.

These facts have given rise to several questions. You ask first whether a deputy clerk may perform all of the functions and duties of the clerk of court

or whether only the "chief deputy" may perform these duties in the clerk's absence. This question is readily answered by application of section 7-4-2403, MCA, which provides:

Whenever the official name of any principal officer is used in any law conferring power or imposing duties or liabilities, it includes his deputies.

Under the plain meaning of this section, any deputy clerk of the district court may perform any of the duties of the clerk. The Montana Supreme Court has also held that "[a] deputy is one who is 'appointed as the substitute of another, and empowered to act for him, in his name, or on his behalf.'" State v. Board of County Commissioners, 121 Mont. 162, 191 P.2d 670 (1948). Any deputy, by definition, may act on behalf of the clerk of court in performing any of the clerk's duties.

Your second question is analogous to the question addressed by the Montana Supreme Court in Spotorno v. Board of County Commissioners of Lewis and Clark County, 212 Mont. 253, 687 P.2d 720 (1984). In Spotorno, the county auditor sought to compel the board of commissioners to fund a deputy auditor position. The Court held that the board of county commissioners, not the auditor, had the authority to determine the number of deputy auditors. In making that determination, the Court interpreted sections 7-4-2401, 7-4-2402, and 7-6-2413, MCA. Section 7-4-2401, MCA, describes the general authority of a county officer to appoint deputies and provides:

(1) 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.

(2) The appointment of deputies, clerks, and subordinate officers of counties, districts, and townships must be made in writing and filed in the office of the county clerk.

Under this section, it would seem that the authority to appoint deputies rests solely within the discretion of the county officer. Section 7-4-2402, MCA, however, vests the board of county commissioners with the authority to "fix and determine the number of county deputy officers," providing:

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.

§ 7-4-2402, MCA.

In Spotorno, the Supreme Court compared these two statutes and stated:

The question becomes one of whether the auditor can appoint one deputy and therefore compel the county commissioner to fund that position. We conclude, based on section 7-4-2402, *supra*, that the auditor has no authority to appoint a deputy; rather, the authority to determine the number of deputies resides with the county commissioners. [Emphasis added.]

687 P.2d at 722. Similarly, in Reep v. Board of County Commissioners, 191 Mont. 162, 622 P.2d 685 (1981), the county auditor sought a writ of mandate to compel the county commissioners to provide for a larger staff in the county's final budget. The Supreme Court in Reep reversed the lower court's issuance of the writ, holding that although the commissioners were required to fund the office of the county auditor so that she could adequately perform her duties at the minimum level imposed by the Legislature, there was no factual basis for concluding that those duties were not being adequately performed. The Court reviewed the minimum duties of the auditor and remanded the matter for a finding on the question of whether the commissioners had sufficiently funded the position in accordance with those minimum duties. Also, in Butler v. Local 2033 American Federation of State Employees, 186 Mont. 28, 606 P.2d 141 (1980), the Supreme Court held that the sheriff could not promote his officers to a higher position without the approval of the board of county commissioners. These cases all recognize that the county commissioners have the authority through their control of the county budget to restrict the number of deputies hired by elected officials.

A former Attorney General's Opinion reached a similar conclusion. In 42 Op. Att'y Gen. No. 23 at 91 (1987), the question was whether the county assessor or the board of county commissioners could establish the number of deputies in the county assessor's office. The inherent conflict of sections 7-4-2401(1) and 7-4-2402, MCA, was recognized. The opinion, however, relied upon Spotorno and a careful reading of section 7-4-2401, MCA. The opinion analyzed section 16-2409, R.C.M. 1947, the predecessor of section 7-4-2401, MCA, which provided:

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 highlights two words that were deleted in recodification. In construing this section, the opinion stated:

[T]he 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.

42 Op. Att'y Gen. No. 23 at 95. The opinion then cites and analyzes State v. Cockrell, 131 Mont. 254, 309 P.2d 316 (1957), and State v. Crouch, 70 Mont. 551, 227 P. 818 (1924), both of which recognize that a county attorney may appoint as many deputies as necessary providing that no compensation or salary is allowed therefor.

In analyzing these cases and sections 7-4-2401 and 7-4-2402, MCA, the opinion concluded:

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, 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. [Emphasis added.]

42 Op. Att'y Gen. No. 23 at 95-96. Given these prior interpretations of the role of the county commissioners in establishing the county budget and thereby establishing the number of deputy positions available to an elected official, I must conclude that the clerk of the district court may not employ a chief deputy or any other deputies without authorization of the board of county commissioners.

Your third question is whether the clerk of court may promote a deputy clerk to chief deputy at a higher pay scale without authorization from the board of county commissioners. The authority to establish a final budget for county officers rests solely with the board of county commissioners. §§ 7-6-2315, 7-6-2318, 7-6-2320, MCA. In setting the budget, the county clerk and recorder must set out with specificity each salary for each position. Section 7-6-2314(2)(a), MCA, provides:

Within the general class of salaries and wages, each salary shall be set forth separately, together with the title or position of the recipient.

Once the final budget is established, it is considered the final appropriation of expenditures of the county and, except as provided in sections 3-5-404 (provision of minimum facilities for district court), 7-6-2325 (allowable transfers within expenditure classes), and 7-31-2101 (authorization to transfer funds when governor has declared a state of emergency), MCA, each county official "shall be limited in the making of expenditures or incurring of liabilities to the amount of such detailed appropriations and classifications, respectively." § 7-6-2324, MCA. It is notable that in section 7-6-2325, MCA, which allows transfers of appropriations within particular classifications, the Legislature has imposed the restriction that "no salary shall be increased above the amount appropriated therefor." Thus, once the final budget is adopted, salaries for particular positions are fixed and are not subject to change by individual county officials during the budget period.

Moreover, the board of county commissioners has the specific and exclusive authority to establish the compensation allowed to a deputy clerk of the district court. Section 7-4-2505(1), MCA, provides in pertinent part:

Subject to subsection (2), the boards of county commissioners in the several counties in the state shall have the power to fix the compensation allowed any deputy or assistant of the following officers:

....

(b) clerk of the district court[.]

Subsection (2) of this section places the only restriction upon the commissioners' authority to set salaries and provides only that the salary of a deputy may not be more than 90 percent of the salary of the officer under whom the deputy is serving. Based on these sections, it is fundamental to the structure of county government that the board of county commissioners has discretion to fix the salaries of deputies and assistants in the county offices within the statutory limits.

In State ex rel. Thompson v. Gallatin County, 120 Mont. 263, 184 P.2d 998 (1947), a deputy clerk of court was hired at \$150 per month with the approval of the county commissioners. The clerk later recommended to the commissioners that his deputy receive a raise to \$160 per month, but the commissioners did not follow the recommendation and kept the salary at \$150 per month. The commissioners had previously budgeted the position at \$2,040 for the fiscal year (or \$170 per month). The district court concluded that because the commissioners had budgeted for the higher salary, they could not preclude the raise. The Supreme Court reversed, however, holding that "the board of county commissioners has discretion to fix the salary of deputies

and assistants in the county offices within the bounds set by the legislature." 184 P.2d at 1001. The Court reasoned that the particular action of the commissioners to keep the salary at \$150 per month, recorded solely in an entry in the commission journal, was sufficient to limit the general action of the commissioners in setting the county budget with its higher salary. Thus, the authority of the county commissioners to set salaries is so extensive that a particular decision of the board may, in effect, limit the higher budgeted amount.

This authority of the board to limit salaries generally provided for in the budget was recognized in 38 Op. Att'y Gen No. 35 at 121 (1979), in which it was held:

In budgeting, the board of county commissioners may fix and determine specific wages and salaries pursuant to their authority to adjust and revise line item amounts in the proposed budget. Where the board has previously adopted a resolution limiting yearly salary and wage increases to five percent and they adopt a general budget for salaries and wages without individual salary detail, salary and wage increases of county employees cannot exceed the five percent amount established. A county official has no authority to increase his or her employees['] individual salaries in excess of the five percent limitation even if greater increases could be accommodated within the total salary budget established for that office.

Even if the county budget allows for an increase in salaries, only the county commissioners may authorize such an increase through the budgetary process. The clerk of court is, therefore, not authorized to promote a deputy clerk to a chief deputy position at a higher pay scale without authorization in the county budget and approval of the board of county commissioners.

Your last question concerns the manner in which the board of county commissioners may calculate rate of pay based upon years of service. In particular, you ask whether the board may use 2,080 work hours as one year of service rather than the number of calendar years in service. You state that your question arises from application of longevity requirements in the county personnel plan. The use of 2,080 hours for determining years of service and longevity status is well established. In 39 Op. Att'y Gen. No. 78 at 299 (1982), the term "year of service" was construed to mean 2,080 hours of employment for purposes of computing longevity payments for deputy sheriffs. Similarly, the phrase "years of employee's employment" was determined to mean 2,080 hours of service for state employees in 40 Op. Att'y Gen. No. 61 at 245 (1984). The rationale in these opinions is equally applicable here. As such, the board may compute length of service for part-time employees by using 2,080 hours as equal to one year of service and need not compute length of service on a calendar year basis.

THEREFORE, IT IS MY OPINION:

1. A deputy clerk of the district court may act on behalf of the clerk of the district court in performing the clerk's duties and obligations.
2. The clerk of the district court may not employ a chief deputy or deputy without authorization of the board of county commissioners.
3. The clerk of the district court may not raise the salary of a deputy without authorization in the county budget and without specific approval of the county commissioners.
4. The board of county commissioners may calculate the years of service of a county employee based upon the number of hours worked rather than the number of calendar years in part-time service.

Sincerely,

MARC RACICOT
Attorney General