VOLUME NO. 45 OPINION NO. 16

COUNTY OFFICERS AND EMPLOYEES - Employment status of county welfare department personnel;
EMPLOYEES, PUBLIC - Employment status of county welfare department personnel;
PUBLIC ASSISTANCE - Employment status of county welfare department personnel;
SOCIAL AND REHABILITATION SERVICES, DEPARTMENT OF - Employment status of county welfare department personnel;
ADMINISTRATIVE RULES OF MONTANA - Rules 2.21.801 to 2.21.822;
MONTANA CODE ANNOTATED - Sections 2-9-305, 2-18-101(13), 2-18-201, 2-18-204, 2-18-206, 2-18-213, 2-18-302, 2-18-304, 2-18-618(8), 53-2-201(1), 53-2-203, 53-2-301, 53-2-302, 53-2-304 to 53-2-306, 53-2-811;
MONTANA LAWS OF 1993 - Chapters 477, 567;
OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 29 (1992), 42 Op. Att'y Gen. No. 52 (1988), 42 Op. Att'y Gen. No. 23 (1987), 36 Op. Att'y Gen. No. 68 (1976), 36 Op. Att'y Gen. No. 52 (1975), 36 Op. Att'y Gen. No. 32 (1975);
UNITED STATES CODE - 29 U.S.C. §§ 201 to 219.

HELD: County welfare department personnel are state employees for purposes of the Fair Labor Standards Act, entitlement to employee benefits, and participation in employee-related programs. If county welfare department personnel are involuntarily terminated from employment and wish to pursue a grievance, they must follow the grievance procedure established by the Department of Social and Rehabilitation Services unless the Department and the county have mutually agreed upon an alternative process.

October 29, 1993

Peter S. Blouke, Ph.D
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and Rehabilitation Services
P.O. Box 4210
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Dear Dr. Blouke:

You have requested my opinion regarding the status of employees working in county welfare offices which are under the supervision of the Department of Social and Rehabilitation Services (Department). You ask whether these workers are county or state employees for purposes of the following benefits and programs: the retirement incentive program described in 1993 Mont. Laws, ch. 567; reduction in force benefits under 1993 Mont. Laws, ch. 477; sick leave grants under Mont. Code Ann. § 2-18-618(8) and Mont. Admin. R. 2.21.801 to 2.21.822; seniority and longevity increases provided in Mont. Code Ann. § 2-18-304; and coverage under the Federal Family and Medical Leave Act. You also question the employment status of these workers for purposes of determining whether a worker is exempt from the provisions of the Fair Labor Standards Act, and whether, upon termination from employment, the worker should follow a grievance procedure established by the state or the county.

While the employment status of county welfare department personnel has not yet been addressed in an Attorney General's Opinion, the question has arisen with respect to workers in county assessors' offices. In 36 Op. Att'y Gen. No. 68 at 453 (1976), former Attorney General Woodahl was asked whether staff members of the various county assessors' offices are employees of the county or the state for purposes of determining their salaries. In resolving this question, Attorney General Woodahl considered the respective degrees of authority granted to the state taxing authority, the Department of Revenue, and the county assessor to determine which entity was responsible for setting employee salaries. Specifically, he noted that the Department of Revenue (DOR) was constitutionally vested with the responsibility of overseeing property valuation and taxation; that in carrying out this responsibility, DOR had assumed the burden of paying the salaries of officers and employees within the county assessor's office; that those employees received the same "fringe benefits" as were given state employees; that DOR was statutorily authorized to "secure such personnel as is necessary to properly perform [its] duties;" and that the relevant statutes referred to the county assessors as "agents" of DOR. Id. at 454-55. Attorney General Woodahl concluded that, taken together, these provisions "clearly show that the legislature has seen fit to place the burden of maintaining the county assessor's office on the department of revenue." Id. at 455.

A similar analysis was employed by former Attorney General Greely in 42 Op. Att'y Gen. No. 52 at 202 (1988), in which he considered whether the county assessor or DOR was responsible for setting the

policies and internal operating procedures of the office of a county assessor. Noting that employees in the county assessor's office were paid by the state, and that the county assessor was statutorily an "agent" of DOR, Attorney General Greely concluded that the state was responsible for the internal operation of a county assessor's office, including employment practices, except with regard to county assessors and their deputies whose employment is controlled by statute.

These opinions establish that, absent an express legislative declaration regarding employment status, it is necessary to compare the supervisory authority of the county and state to determine the employment status of county welfare department personnel. See also 44 Op. Att'y Gen. No. 29 (1992) (comparing the attorney general's authority to that of the county commissioners to determine the employment status of a county attorney for purposes of Mont. Code Ann. § 2-9-305 under the Montana Comprehensive State Insurance Plan and Tort Claims Act); 36 Op. Att'y Gen. No. 32 (1975) (comparing the administrative authority of the county and the state over county attorneys); Cantwell v. Geiger, 228 Mont. 330, 742 P.2d 468 (1987) (comparing the supervisory authority of the county commissioners and the department of revenue over county assessors). When comparing the authority of the Department to the county welfare department offices, it is apparent that the Montana Legislature has provided for cooperative state-county administration of public assistance. See State ex rel. Dean v. Branjord, 108 Mont. 447, 92 P.2d 273 (1939); State ex rel. Broadwater County v. Potter, 107 Mont. 284, 84 P.2d 796 (1938); State ex rel. Wilson v. Weir, 106 Mont. 526, 79 P.2d 305 (1938). While the Department has overall responsibility for the administration of public assistance programs, each county which has not transferred its public assistance and protective services to the Department is responsible for local administration of all public assistance operations in the county. Mont. Code Ann. §§ 53-2-201(1) and -306. This opinion is concerned only with those counties which have not exercised their option under Mont. Code Ann. § 53-2-811 to transfer these responsibilities to the state.

Local public assistance activities are administered by a county department of public welfare, which consists of a county board, composed of the board of county commissioners, and such staff personnel as are necessary for the department's efficient performance. Mont. Code Ann. §§ 53-2-301 and -302. The county board is authorized to select its staff personnel, but it must do so from a list of qualified persons furnished by the Department. Mont. Code Ann. § 53-2-304(1). The staff personnel are directly responsible to the county board, but the Department may supervise such county employees with regard to the efficient and proper

performance of their duties. Mont. Code Ann. §§ 53-2-304(1) and -203. The county board may not dismiss any member of the staff without the approval of the Department, but the Department may request the county to dismiss any member of the staff for inefficiency, incompetence, or similar cause. However, the final authority for dismissal is in the county board. Mont. Code Ann. § 53-2-304(1). This provision apparently conflicts with Mont. Code Ann. § 53-2-203(1)(d), which grants the Department the authority to "supervise the appointment, dismissal, and entire status of the public assistance personnel attached to county boards."

The Department is also authorized to maintain a merit system pertaining to qualifications for appointment, terms of office, annual merit rating, releases, promotions, and salary schedules for all public assistance personnel. Mont. Code Ann. § 53-2-203(1)(a). The salaries and travel expenses of staff personnel attached to the county board are paid from state public assistance funds, but the county board is required to reimburse the Department for the full amount of salaries and expenses which are not reimbursed to the Department by the federal government. Mont. Code Ann. § 53-2-304(2).

These statutes suggest that much of the responsibility for selection and supervision of employees is shared by the state and the county. Some provisions, such as those granting final authority for dismissal, are ambiguous. This ambiguity renders it particularly difficult to determine legislative intent with respect to employment status of county welfare department personnel, since the authority to hire and fire typically defines the employment relationship. See Karell v. American Cancer Soc'y, 239 Mont. 168, 175, 779 P.2d 506, 510 (1989) (defining the right to hire and fire as an "exclusive right" of the employer); see also Cecil v. Cardinal Drilling Co., 244 Mont. 405, 797 P.2d 232 (1990).

Unlike the statutes in the opinions cited above, the provisions at issue here do not mandate or even suggest a particular conclusion as to which agency is the "employer" of county welfare workers. In this respect, the statutes are comparable to those at issue in 42 Op. Att'y Gen. No. 23 at 91 (1987). In that opinion, former Attorney General Greely was asked whether the authority to establish or eliminate a deputy assessor position lies with county or state government. Attorney General Greely noted that the relevant statutes were in apparent conflict, since one granted DOR the authority to "secure such personnel as is necessary to properly perform its duties," and another granted the board of county commissioners the authority to "fix and determine the number of county deputy officers." Id. at 93.

Because the statutes offered no definitive answer to the question presented, Greely looked instead to agency practice and usage, citing State Dep't of Highways v. Midland Materials, 622 P.2d 1322, 1325 (Mont. 1983), for the proposition that "when faced with problems of statutory construction, the court must show deference and respect to the interpretations given the statute by the officers and agencies charged with administration." See also Link v. City of Lewistown, 253 Mont. 451, 833 P.2d 1070 (1992); Helena Aerie No. 16 F.O.E. v. Department of Revenue, 251 Mont. 77, 822 P.2d 1057 (1991); Norfolk Holdings v. Department of Revenue, 249 Mont. 40, 813 P.2d 460 (1991). Because it had been customary for the past 15 years to establish at the local level the number of deputy assessor positions, Attorney General Greely concluded that, as between state and county governments, the authority to eliminate those positions rested with the county.

The agency practice with respect to county welfare department personnel has been to treat them as state employees for purposes of salary, benefits, and other employment-related issues. All public assistance personnel, including employees in county welfare offices, receive compensation and benefits in accordance with the state pay and classification program. The statewide pay schedules are set forth in Mont. Code Ann. § 2-18-213. In setting the number of state employee positions in the biennial state budget, the legislature typically includes the positions for county welfare employees as authorized state employee positions. A permanent state position is a position that is designated as such by a state agency, in this case the Department, and approved by the legislature in the biennium budget. Mont. Code Ann. §§ 2-18-101(13), -204 and -206. The employees in county welfare offices, including the directors, are classified by the Department of Administration as state employees whose salaries, benefits, rights and responsibilities are determined in accordance with the relevant state statutes, rules, and policies. See Mont. Code Ann. § 2-18-201; see generally Mont. Code Ann. tit. 2, ch. 18; Mont. Admin. R. tit. 2, ch. 21. The Department of Administration must authorize all changes in personnel or salary status. Changes may not be authorized which would cause the Department to exceed its appropriation. Mont. Code Ann. § 2-18-302. Finally, any collective bargaining with labor unions is conducted by the Department. The collective bargaining agreements list the State of Montana as the employer of workers in county welfare offices.

The agency practice of treating county welfare employees as state employees for purposes of salary, benefits, and other employment-related issues is a direct result of the Department's statutory authority to maintain a merit system pertaining to qualifications for appointment, terms of office, annual merit rating, releases,

promotions, and, most significantly, salary schedules for all public administration personnel. Mont. Code Ann. § 53-2-203(1)(a). The practice is not the result of an arbitrary exercise of authority by the Department. Under these circumstances, it is my opinion that this established practice should continue unless and until the legislature directs otherwise. I conclude that county welfare department personnel are state employees for purposes of determining their entitlement to and participation in the programs and benefits which you describe.

I am not persuaded that a county is the employer merely because county boards of public welfare are required to reimburse the Department from county poor funds the full amount of salaries and travel expenses not reimbursed to the Department by the federal government. Mont. Code Ann. § 53-2-304(2). The fact that a county may ultimately be responsible for paying a portion of the salary and travel expenses of its welfare department personnel does not transform these workers into county employees. The source of an employee's salary is not necessarily determinative when there are other aspects of the employment relationship which strongly suggest the worker is an employee of either the county or the state. See 42 Op. Att'y Gen. No. 52 (1988) (holding that although the legislature required county governments to assume 30 percent of the salary costs for county assessors' offices, the responsibility for the internal operations of a county assessor's office belonged to the state).

I am also not persuaded by the legislature's reference to county welfare department personnel as "county employees" in Mont. Code Ann. § 53-2-304(1). This is the only such reference in all of the relevant statutes discussed herein. A literal reliance upon this term would directly conflict with the Department's clear grant of authority to "supervise the appointment, dismissal, and entire status of the public assistance personnel attached to county boards." Mont. Code Ann. § 53-2-203(1)(d) (emphasis added). A literal interpretation of the words of an act should not prevail if it creates a result which is contrary to the apparent intention of the legislature. 2A Sutherland Statutory Construction § 46.07 (4th ed. 1992); Carchman v. Nash, 473 U.S. 716, 727-28 (1985). Every effort must be made to produce a harmonious whole, Wynia v. City of Great Falls, 183 Mont. 458, 465, 600 P.2d 802, 806-07 (1979), and absurd results should be avoided if possible, Johnson v. Marias River Elec. Coop., 211 Mont. 518, 524, 687 P.2d 668, 671 (1984). The legislature's single reference to "county employees" does not, therefore, govern the outcome of this opinion. It simply creates an ambiguity which must be resolved by considering the overall legislative intent as evidenced by the other provisions of the act.

My conclusion also extends to your inquiry regarding employment status for purposes of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 to 219. The FLSA governs minimum wage and overtime hours of state and local government employees who are not exempt from its provisions. An exempt employee is not entitled to overtime pay but may claim compensatory time in accordance with state policy. It should be the state's responsibility to make determinations regarding exemption status under the FLSA. As noted above, the state has assumed a significant degree of responsibility for employment-related concerns arising out of its duty to maintain a merit system. In addition, the Department is statutorily authorized to supervise the "entire status" of public assistance personnel attached to county boards in accordance with the merit system, which includes salary schedules. Mont. Code Ann. § 53-2-203(1)(a), (d). A determination of whether an employee is exempt from the FLSA is a "status" determination which is clearly the prerogative of the Department.

Finally, you ask whether county welfare personnel, upon involuntary termination, are required to follow the grievance procedure established by the county or the state. Given the fact that the county and state share final dismissal authority, Mont. Code Ann. §§ 53-2-203 and -304, it would make sense for the county and state to devise a mutually agreeable grievance process for those employees who are not required to follow a procedure outlined in a collective bargaining agreement. However, in the absence of a mutually agreeable grievance process, I conclude that an employee should follow a grievance procedure established by the Department for the reasons underlying my conclusions above. The Department has exercised authority in many other aspects of employment, and it is consistent with that practice to require that employees follow the grievance procedure established by the state, regardless of whether final authority for dismissal is exercised by the county or the state. In addition, Mont. Code Ann. § 53-2-305 provides that county welfare departments are under the general supervision of the Department. Requiring workers in county welfare offices who are terminated from employment to follow the Department's established grievance procedure is a valid exercise of the State's general supervisory authority.

THEREFORE, IT IS MY OPINION:

> County welfare department personnel are state employees for purposes of the Fair Labor Standards Act, entitlement to employee benefits, and participation in employee-related programs. If county welfare department personnel are involuntarily terminated from employment and wish to pursue a grievance, they must follow the grievance procedure

established by the Department of Social and Rehabilitation Services unless the Department and the county have mutually agreed upon an alternative process.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/ja/mlr