

46 Op. Att'y Gen. No. 20

COUNTY ATTORNEY - Absence of power to create positions of county employment without approval of county commissioners;

COUNTY ATTORNEY - Requirement that county provide administrative support;

COUNTY COMMISSIONERS - Obligation to provide administrative support for county attorney;

COUNTY COMMISSIONERS - Power to create new positions of employment;

COUNTY COMMISSIONERS - Requirement that commissioners approve reasonable claims for support services necessary to allow county attorney to perform official duties;

OPINIONS OF THE ATTORNEY GENERAL - 46 Op. Att'y Gen. No. 10 (1995), 43 Op. Att'y Gen. No. 77 (1990), 42 Op. Att'y Gen. No. 23 (1987), 10 Op. Att'y Gen. 167.

HELD:

1. The county is obligated to provide administrative support services which are reasonably necessary to allow the county attorney to perform the duties of the elective office.

2. The county attorney cannot compel the commissioners to authorize the hiring as a county employee of a legal secretary for the county attorney absent a showing that any other employment arrangement would prevent the county attorney from performing the minimum statutory duties of the job.

June 28, 1996

Mr. John Huntley
Fallon County Attorney
P.O. Box 760
Baker, MT 59313

Dear Mr. Huntley:

You have requested my opinion on two related questions, which I state as follows:

1. Is the county obligated to fund secretarial services for the elected part-time county attorney which are reasonably required for the performance of the duties of the office?
2. Can the county attorney employ a secretary as a county employee without the prior consent of the county commissioners, and thereby obligate the county to pay that employee's salary and benefits as a county employee?

The answer to your first question is clear from case law and prior opinions of this office. The county is obligated to provide office space and support services which are reasonably necessary to allow an elected official to perform the duties of the elective office. Expenses incurred by the officer for such matters are a proper charge against the county, and the commissioners are under a clear legal duty to pay them to the extent the commissioners, in the proper exercise of their discretion, determine that the charges are reasonable. 46 Op. Att'y Gen. No. 10 at 5-7 (1995). The commissioners' discretion in determining what charges are reasonable is broad, but not without limitation, and the commissioners may be sued in mandamus to compel performance of their duty to provide the necessary support if their exercise of discretion exceeds legal limits. State ex. rel. Taylor v. County Comm'rs, 128 Mont. 102, 270 P.2d 994 (1954); see Reep v. County Comm'rs, 191 Mont. 162, 171, 622 P.2d 685, 690 (1981) (commissioners obligated to provide sufficient staff to allow auditor to perform minimum duties required). The commissioners are also subject to suit if their denial of a claim against the county exceeds the discretion they are allowed by law. In re Hyde, 73 Mont. 363, 236 P. 248 (1925).

Your second question raises the issue of how positions of county employment are to be created. The commissioners exercise control over the county payroll, and case law and prior opinions of this office have clearly indicated that the decision as to whether to create an additional position of employment under the county is left to the commissioners, even when the position is a deputy position which the officer is

authorized by statute to appoint. For example, in 43 Op. Att'y Gen. No. 77 (1990), Attorney General Racicot held that the clerk of the district court lacked the power to appoint a deputy clerk without approval by the commissioners of the funding for the position, despite the presence of a statute authorizing the clerk to appoint a deputy. In 42 Op. Att'y Gen. No. 23 (1987), Attorney General Greely held that county officers may appoint deputies as allowed by law, but the deputies are entitled to no compensation unless allowed by the commissioners.

Two decisions of the Montana Supreme Court also bear on this question. In Spotorno v. Board of County Commissioners, 212 Mont. 253, 687 P.2d 720 (1984), the Court held that the county auditor could not sue in mandamus to compel the commissioners to fund the appointment of a deputy auditor that she was authorized to appoint by statute. The Court distinguished the earlier decision in Reep, 191 Mont. at 171, in which the Court had reversed a grant of mandamus and remanded the case for factual findings as to whether an additional deputy position was necessary to allow the auditor to perform the duties of the office. In Spotorno, the plaintiff county auditor did not advance the argument that the deputy position was required to allow her to fulfill her statutory duties.

I read these cases and prior opinions to hold that the commissioners have the final word through the budget process as to the creation of positions of employment with the county, and the concomitant discretion to determine whether to create county employee positions to provide assistance to a part-time county attorney or to require claims by the part-time county attorney for reasonable expenses incurred in procuring that assistance for him- or herself. The answer to your question therefore depends on whether in all cases the county attorney requires the assistance of a legal secretary who is an employee of the county in order to perform the minimum duties required by law.

In 46 Op. Att'y Gen. No. 10 (1995), I observed the importance of administrative support for county attorneys. I wrote:

In today's law office environment, the assistance of secretarial personnel, at a minimum, to handle correspondence, answer telephones, and perform other general office management tasks is a necessity, particularly for a government office that must remain open to the public. I hold that reasonable charges therefore must be paid by the county.

In addition to the more pedestrian tasks I listed in that opinion, county attorneys also require the assistance of a legal secretary to prepare legal documents.

I cited 10 Op. Att'y Gen. 167 at 168 for the proposition that the commissioners must exercise sound discretion in determining whether, as a matter of fact, any particular claim is reasonable in amount. However, clearly the commissioners are obligated to make some allowance for necessary secretarial services for the county attorney. I cannot express an opinion as to the specific issue of whether a position of employment with the county must be created under the circumstances you present because to do so would require that I make findings of fact on a matter left in the first instance to the discretion of the commissioners. However, it is my opinion that the commissioners are responsible for providing, in some fashion, for the administrative support needs of the county attorney.

THEREFORE, IT IS MY OPINION:

1. The county is obligated to provide administrative support services which are reasonably necessary to allow the county attorney to perform the duties of the elective office.
2. The county attorney cannot compel the commissioners to authorize the hiring as a county employee of a legal secretary for the county attorney absent a showing that any other employment arrangement would prevent the county attorney from performing the minimum statutory duties of the job.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/cdt/brf