

47 Op. Att'y Gen. No. 18

CONSOLIDATION - Reduction of county auditor's position to half-time;
COUNTY COMMISSIONERS - Power to reduce county auditor's position to half-time;
COUNTY GOVERNMENT - Reduction of county auditor's position to half-time;
COUNTY OFFICERS AND EMPLOYEES - Reduction of county auditor's position to half-time;
LOCAL GOVERNMENT - Reduction of county auditor's position to half-time;
PUBLIC OFFICERS - Reduction of county auditor's position to half-time;
MONTANA CODE ANNOTATED - Sections 7-1-101, 7-3-401 to -442, 7-3-431, 7-4-2203, -2301, -2303, -2305, -2311, 7-4-2706, 7-6-2401, -2407 to -2412, 20-3-201(4), -213; MONTANA CONSTITUTION - Article XI, sections 3(2), 4(1)(b), 4(2), 6;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 20 (1987), 40 Op. Att'y Gen. No. 51 (1984), 40 Op. Att'y Gen. No. 17 (1983).

HELD:

County commissions with general powers have no authority, express or implied, to reduce the office of county auditor to a half-time position.

September 10, 1998

Mr. Dennis Paxinos
Yellowstone County Attorney
P.O. Box 35025 Billings, MT 59107-5025

Dear Mr. Paxinos:

You have asked my opinion on two related questions which I have rephrased as follows:

1. Does the Yellowstone County Board of Commissioners have the authority to reduce the office of county auditor to a half-time position beginning after the next general election?
2. If the Yellowstone County Board of Commissioners has such authority, may it also reduce the county auditor's salary by half?

Yellowstone County has adopted the commission form of government described in Mont. Code Ann. §§ 7-3-401 to -442. *Schuman v. Study Comm'n of Yellowstone County*, 176 Mont. 313, 315, 578 P.2d 291, 292 (1978). According to Mont. Code Ann. § 7-3-402, local governments operating under the commission form of government are limited to the exercise of general government powers, as opposed to self-governing powers. A county's general powers consist of "legislative, administrative and other powers provided or implied by law." Mont. Const. art. XI, § 4(1)(b). These powers are in contrast to those of a self-governing county which may exercise any power not specifically prohibited by the constitution, law or charter. Mont. Const. art. XI, § 6; Mont. Code Ann. § 7-1-101; *State ex rel. Swart v. Molitor*, 190 Mont. 515, 517-18, 621 P.2d 1100, 1102 (1981).

The "general powers" language found in article XI, section 4 was proposed during the 1972 constitutional convention to "liberalize" a local government's authority, and is in response to decisions of the Montana Supreme Court which denied legislative and "ordinance-making" powers to counties. II 1972 Mont. Const. Conv. Local Government Comm. Proposal No. XI 792-93 (1979). This provision enables the legislature to grant to counties with general powers any legislative power which the legislature determines appropriate. Local Government Comm. Proposal No. XI, *supra* at 794.

The Local Government Committee is well aware of contentions that counties should not exercise any legislative power because the traditional county structure does not allow for clear separation of the legislative and executive functions and thus does not provide for clear separation of powers. However, the committee believes the legislature can build safeguards into any grant of legislative powers to counties to guard against such alleged abuse of the separation of powers concept. The language of section 4,

subsection 2 clearly hinges the grant of legislative powers to counties on grants from the legislature; no broad grant of power is given directly to counties by this section.

Local Government Comm. Proposal No. XI, *supra* (emphasis supplied).

Similar views were voiced when the local government committee brought section 4 of article 9 before the convention body for approval. "Under this section, then, counties will now have legislative powers, provided that the Legislature gives them such powers." II 1972 Mont. Const. Conv. at 2522. Thus, those counties which exercise only general powers are limited to whatever powers the legislature expressly or implicitly grants. 40 Op. Att'y Gen. No. 17 at 66 (1983).

Express powers are powers specifically granted by law. Implied powers are those "necessary for the execution of the powers expressly granted." *Billings Firefighters Local 521 v. City of Billings*, 214 Mont. 481, 483, 694 P.2d 1335, 1336 (1985). Even though express and implied powers are to be construed liberally, Mont. Const. art. XI, § 4(2), there must be some constitutional or statutory basis for their existence. Otherwise, "[r]ecognition of 'inherent' powers of general power county governments would effectively obliterate the distinction between general powers and self-government powers, a result which is obviously inconsistent with article XI of the Montana Constitution." 42 Op. Att'y Gen. No. 20 at 74-75 (1987), quoting 40 Op. Att'y Gen. No. 17 at 66 (1983), and citing 40 Op. Att'y Gen. No. 51 at 206, 210-11 (1984).

I have found no express or implied powers authorizing the Yellowstone County Commission to reduce the position of county auditor to half-time. The statutes contemplate a full-time auditor with a full-time salary in every county whose population exceeds 15,000. Mont. Code Ann. §§ 7-6-2401 and 7-4-2203. No existing statute contemplates a reduction of the office of auditor to part-time. The absence of such a statute is in direct contrast to Mont. Code Ann. § 7-4-2706, which permits county commissions of counties with populations under 30,000 to establish the county attorney as a part-time position by resolution and with consent of the county attorney; and Mont. Code Ann. §§ 20-3-201(4) and -213, which permit county commissions to establish the county school superintendent office as half-time, again by resolution and after a public hearing. Had the legislature intended to expressly authorize county commissions to reduce the office of county auditor to half-time, it would have adopted legislation similar to that for county attorneys and county superintendents.

County commissions do have the authority to consolidate two or more county offices, including the auditor's office. Mont. Const. art. XI, § 3(2); Mont. Code Ann. § 7-3-431. In the event a commission determines to consolidate offices, two options exist: (1) consolidation with another intra-county office; or (2) consolidation with a county office in another county. Mont. Code Ann. §§ 7-4-2301, -2303, -2305. Either option requires a resolution and hearing prior to issuance of a consolidation order. See Mont. Code Ann. §§ 7-4-2305 to -2311. Neither option contemplates or involves simply reducing an existing position to part-time.

Implied powers arising from the right of consolidation must be limited to those necessary for implementing the consolidation process itself. *Billings Firefighters*, 214 Mont. at 483, 694 P.2d at 1336. Reducing a position to half-time is an alternative to consolidation, not a mechanism by which to achieve consolidation.

A county auditor's principal duties include the auditing and investigating of claims against the county (§ 7-6-2407); the examination of county books and accounts (§ 7-6-2409); the maintenance of county records in the auditor's possession (§ 7-6-2410); and the recording of claims against the county (§ 7-6-2411). County commissions may also require the auditor to perform other duties, provided a reasonable amount of time remains available in which to perform the statutorily mandated duties. Mont. Code Ann. § 7-6-2412.

You question whether Mont. Code Ann. § 7-6-2412 can be read to imply that since a commission can determine an auditor has sufficient time to perform additional duties, the commission should also have the alternate option of reducing the number of hours worked by the county auditor. However, the subject of Mont. Code Ann. § 7-6-2412 is the imposition of additional duties, not the reduction of hours worked. The only powers which can be implied from that provision are those required to execute the imposition of

additional duties. *Billings Firefighters*, 214 Mont. at 483, 694 P.2d at 1336. A reduction of hours worked by the auditor is counter to that end, not supportive of it, and requires more explicit direction from the legislature than exists.

Counties with general powers have no authority, either express or implied, to reduce the office of county auditor to half-time. To hold otherwise would grant a county with general powers more power than intended by the legislature, and would obliterate the distinction between counties with general powers and those which are self-governing. As I have determined that the Yellowstone Board of County Commissioners has no authority, express or implied, to reduce the office of county auditor to half-time, there is no reason to address your second question regarding the salary due a half-time county auditor.

THEREFORE, IT IS MY OPINION:

County commissions with general powers have no authority, express or implied, to reduce the office of county auditor to a half-time position.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/mas/dm