

## 48 Op. Att'y Gen. No. 2

EXEMPTIONS - Exemption of Chief Water Judge from state leave policies;  
JUDGES - Status of Chief Water Judge as agency employee for purposes of state leave policies;  
MONTANA CODE ANNOTATED - Title 2, chapter 18, part 6; sections 2-18-103, -601, -604, 3-7-221;  
MONTANA CONSTITUTION - Article III, section 1; article VI, section 7; article VII, sections 2(2), 11.

HELD:

The Chief Water Judge is not subject to the state leave policies in Mont. Code Ann. title 2, chapter 18, part 6.

April 27, 1999

Mr. John Northey  
Legal Counsel  
Legislative Audit Division  
State Capitol  
P.O. Box 201705  
Helena, MT 59620-1705

Dear Mr. Northey:

You have requested my opinion regarding whether the Chief Water Judge is subject to the state leave policies in Mont. Code Ann. title 2, chapter 18, part 6. These provisions provide annual vacation, as well as other types of leave, for state employees and further direct the Department of Administration or other administrative officer to monitor the accumulation and taking of such leave.

The state leave policies apply to any person employed by an agency except elected state, county, and city officials." Mont. Code Ann. § 2-18-601(4). Also exempted from the state leave policies are schoolteachers, independent contractors, and persons hired under personal services contracts. Id. You propose that because the Chief Water Judge is not an "elected official," he or she is not exempt under this statute.

It is true that the Chief Water Judge is appointed rather than elected. See Mont. Code Ann. § 3-7-221(1) (authorizing appointment by the Chief Justice of the Montana Supreme Court). However, the Chief Water Judge is a judicial officer, see State ex rel. Wilcox v. District Court, 208 Mont. 351, 359, 678 P.2d 209, 212 (1984), and the fact that the position is appointed does not address the more fundamental question of whether the Chief Water Judge is a "person employed by an agency" under Mont. Code Ann. § 2-18-601(4) for purposes of the state leave policies.

The term "agency" is defined as "any legally constituted department, board, or commission of state, county, or city government or any political subdivision thereof." Mont. Code Ann. § 2-18-601(1). The terms "department, board, or commission" more aptly describe the executive branch of government, not the judiciary. See Mont. Const. art. VI, § 7 (allocating not more than 20 departments, which make up the executive branch of government). The judiciary is an independent branch of government, unattached to any department, board, or commission. See Mont. Const. art. VII.

It is noteworthy that the judiciary is specifically mentioned in other provisions of title 2, chapter 18. In Mont. Code Ann. § 2-18-103, the legislature has exempted judges and their employees from state employee classification, compensation, and benefits. The legislature could have similarly referenced the judiciary in Mont. Code Ann. § 2-18-601 had it intended to include judicial officers within its scope. The fact that it did not, using instead terms which generally describe the executive branch, suggests that the legislature did not consider the judiciary as an "agency" for purposes of the state leave policies.

Not only does the statutory language of Mont. Code Ann. § 2-18-601(4) favor this interpretation, but the Separation of Powers Clause demands such a result. The Separation of Powers Clause of the Montana Constitution provides:

The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Mont. Const. art. III, § 1.

If the state leave policies apply to judicial officers, the legislative branch has effectively dictated work hours of the judiciary and placed supervisory control of those hours in the hands of the executive branch. By statute, the department of administration or the administrative officer of any county, city or political subdivision is authorized to oversee administration of employee annual, sick and military leave. Mont. Code Ann. § 2-18-604. In addition, the department is authorized to "promulgate rules necessary to achieve the uniform administration of these provisions and to prevent the abuse thereof." Id. Pursuant to these statutes, an administrative officer could feasibly require a judge to report work hours on a form devised by the department in order to monitor compliance with the state leave policies. This is an executive infringement on the judicial branch of government.

Under article VII, section 2(2), supervisory authority over inferior courts lies exclusively within the control of the Supreme Court. Furthermore, disciplinary action against a judicial officer is under the exclusive jurisdiction of the Judicial Standards Commission. Mont. Const. art. VII, § 11. The legislature cannot delegate supervisory authority of the judiciary to the executive branch without running afoul of these provisions, as well as the Separation of Powers Clause.

The Supreme Court's decision in Coate v. Omholt, 203 Mont. 488, 662 P.2d 591 (1983), is illustrative. In that case, the Montana Supreme Court struck down a statute which imposed sanctions on judges if judicial decisions were not rendered within the procedural restraints and time limits set by statute. The Court observed:

"Courts are an integral part of the government, and entirely independent, deriving their powers directly from the Constitution, in so far as such powers are not inherent in the very nature of the judiciary. A court of general jurisdiction, whether named in the Constitution or established in pursuance of the provisions of the Constitution, cannot be directed, controlled, or impeded in its functions by any other departments of the government. The security of human rights and the safety of free institutions require the absolute integrity and freedom of action of courts."

Id., 203 Mont. at 494, 622 P.2d at 595, citing State ex rel. Kostas v. Johnson, 69 N.E.2d 592, 595 (Ind. 1946). The Court concluded that legislation imposing time limits for judicial action violated the separation of powers clause in article III, section 1. The same reasoning applies here. The legislature cannot require judges to abide by administrative rules governing their work hours. Montana Code Annotated § 2-18-601(4) must be construed to avoid this result.

This opinion does not address the broader question of whether employees within the judicial branch, other than judges, are subject to the state leave policies. However, it is clear that the legislature cannot dictate work hours for the Chief Water Judge or delegate supervision of the judge's work hours to the Department of Administration without violating the constitutional principles discussed above. Since I am obligated to construe statutes to avoid constitutional infirmities if reasonably possible, Department of State Lands v. Pettibone, 216 Mont. 361, 374, 702 P.2d 948, 956 (1985), I interpret the phrase "employed by an agency" in Mont. Code Ann. § 2-18-601(4) to exclude judicial officers, whether elected or appointed.

THEREFORE, IT IS MY OPINION:

The Chief Water Judge is not subject to the state leave policies in Mont. Code Ann. title 2, chapter 18, part 6.

Sincerely,

JOSEPH P. MAZUREK  
Attorney General

jpm/ja/dm