

48 Op. Att'y Gen. No. 18

COUNTY OFFICERS AND EMPLOYEES - County public welfare department staffing patterns;
EMPLOYEES, PUBLIC - County public welfare department staffing patterns;
PUBLIC ASSISTANCE - County public welfare department staffing patterns;
PUBLIC HEALTH AND HUMAN SERVICES, DEPARTMENT OF - County public welfare department staffing patterns;
LAWS OF MONTANA, 1987 - Chapter 146;
MONTANA CODE ANNOTATED - Sections 41-3-302, 53-2-201, -203, -206, -207, -301, -304, -305, -306, -322, -801 to -813;
OPINIONS OF THE ATTORNEY GENERAL - 45 Op. Att'y Gen. No. 16 (1993).

HELD:

Both the Department of Public Health and Human Services and the county welfare boards have an interest in staffing patterns for the county public assistance offices, and staffing patterns should be determined through a process of consultation and negotiation between the Department and the county boards. In the event agreement is not reached, the Department of Public Health and Human Services has the final authority for determining the staffing patterns of a non-assumed county department of public welfare.

July 13, 2000

Mr. Thomas P. Meissner
Fergus County Attorney
712 West Main
Lewistown, MT 59457

Dear Mr. Meissner:

You have requested my opinion on a question which I have rephrased as follows:

May the Department of Public Health and Human Services unilaterally determine staffing patterns of a non-assumed county department of public welfare, whether resulting in an increase or a decrease of staff, without consulting with and receiving approval from the county board of public welfare?

The 1983 Montana Legislature established a statutory scheme by which counties may elect to have their public assistance and protective services programs assumed by the State of Montana. See Mont. Code Ann. §§ 53-2-801 to -813. Prior to that time, protective services programs were the responsibility of the county welfare departments and the Department of Social and Rehabilitation Services (a predecessor to the Department of Public Health and Human Services). See Mont. Code Ann. § 41-3-302 (1981). Public assistance programs were located in county departments of public welfare, and were subject to the supervision of the Department of Social and Rehabilitation Services. See Mont. Code Ann. § 53-2-305 (1981).

Fergus County, and the 24 counties that have added their names to your opinion request, are among the counties that did not elect to have their programs assumed by the state. Counties that have not transferred their public assistance and protective services to the state must have a county department of public welfare consisting of a county board of public welfare and whatever staff personnel may be "necessary" for the "efficient performance of the public assistance activities of the county." If two or more counties agree, they may combine into one administrative unit and share necessary personnel. Mont. Code Ann. § 53-2-301.

Non-assumed counties select and appoint "necessary" personnel for their public welfare departments from lists of qualified persons provided to the county by the Department of Public Health and Human Services (hereinafter referred to as Department). Staff personnel for each county must include "at least one qualified staff worker or investigator and clerks and stenographers that may be necessary." A supervisor may also be appointed by the county board, if "conditions warrant." Mont. Code Ann. § 53-2-304(1).

Unfortunately, Mont. Code Ann. §§ 53-2-301 and -304 are both silent with respect to who determines what staff personnel are "necessary" and when "conditions warrant" the appointment of a supervisor.

The Department is charged with maintaining a merit system for the hiring of public assistance personnel, and with supervising "the appointment, dismissal, and entire status of the public assistance personnel attached to county boards in accordance with [that] merit system." Mont. Code Ann. § 53-2-203(1) and (4). I have previously construed Mont. Code Ann. § 53-2-203--and established practice under that statute--to mean that county welfare department personnel are state employees for employment-benefit purposes. Those purposes include determining entitlement to and participation in retirement incentive programs, reduction in force benefits, sick leave grants, seniority and longevity increases, state grievance procedures, and coverage under the federal Family Medical Leave and Fair Labor Standards Acts. See 45 Op. Att'y Gen. No. 16 (1993). That opinion is helpful in providing background information for the issue you present, but it does not control the conclusion.

County department of public welfare staff in non-assumed counties are hired by and directly responsible to the county board of public welfare, but their efficiency and job performance are supervised by the Department. See Mont. Code Ann. § 53-2-304(1). The two entities also share in the cost of staffing the county public welfare department, with the state being responsible for federal monies devoted to public assistance. See Mont. Code Ann. §§ 53-2-206, 53-2-207, 53-2-304(2) and (3), and 53-2-322. Thus, much of the responsibility for the selection, supervision, and payment of employees is shared by the state and the county.

Likewise, the decision to determine what staff is "necessary" for the successful operation of a county public welfare department should be shared by the Department and the county board of public welfare. The only possible way both entities can fulfill their duties and responsibilities while remaining fiscally responsible is to share in the determination of necessary staffing patterns for county departments of public welfare located in non-assumed counties. For obvious reasons, the counties and the Department should consult closely with each other in assessing the staffing needs of the local offices. However, when disagreements over staffing issues cannot be resolved by discussion and negotiation, the difficult question arises as to which entity has the final say.

I have previously noted that the statutes in this area are sometimes contradictory. For example, in 45 Op. Att'y Gen. No. 16 (1993), I observed that Mont. Code Ann. § 53-2-203(1)(d), authorizing the Department to "supervise the . . . dismissal . . . of the public assistance personnel attached to the county boards" conflicted with Mont. Code Ann. § 53-2-304(1), which provides that the county board is the final authority for dismissals. The statutes suggest that both the county board and the Department have input into the decision as to whether a particular staff position is "necessary," but they do not clearly provide for the final decision-making authority. This lack of clarity gave rise to the uncertainty underlying your opinion request. Further legislative attention to these statutes would help alleviate the uncertainty.

In 45 Op. Att'y Gen. No. 16, when presented with similarly uninformative statutes, I relied on agency practice to determine whether public assistance staff attached to the county boards were considered state employees or county employees for purposes of employment benefits. In this case past agency practice is somewhat murky. Your opinion request states that the Department has recently unilaterally reduced the staff in the Lewistown office, and letters from other counties contain similar complaints. There are, however, indications from some counties that staffing determinations were primarily driven by the counties, with only general concurrence by the Department.

I am persuaded that the best approach to this issue is to look at the respective statutory responsibilities of the Department and the county boards. It appears the legislature contemplated that overall supervision of the public assistance function of county boards would rest with the Department, while day-to-day control over board functions would be the responsibility of the boards. For example, the county boards are empowered to make the hiring decision for staff positions, but they must make their selection from a list of persons deemed qualified by the Department. Mont. Code Ann. § 53-2-304(1). The employees are directly responsible to the boards, but the Department has authority to supervise them in the efficient and proper performance of their duties. Id. The legislature clarified in 1987 that the county boards have final authority to dismiss employees, but statutes also suggest that Department approval is required. 1987 Mont. Laws, ch. 146 (codified in § 53-2-304(1)).

I am most persuaded by the recognition in Mont. Code Ann. § 53-2-203(4) that the Department has the authority to "supervise the appointment, dismissal, and *entire status* of the public assistance personnel attached to county boards." (Emphasis added.) As noted above, I have previously held that those personnel are state employees for salary and benefit purposes. They are identified as state full-time equivalents (FTE) in the budget adopted by the legislature. In my opinion, their "entire status" includes the location in which they are assigned to work.

This conclusion is supported by the overall demarcation of duties between the Department and the county boards described above. The county departments of public welfare are responsible for the day-to-day management of the county welfare department, within the framework of applicable federal and state laws and Departmental rules, see Mont. Code Ann. § 53-2-306, while responsibility for the overall supervision of the public assistance system rests with the Department. The Department could not manage the overall system to ensure efficient use of tax dollars if it did not have the authority to determine, after appropriate consultation with the county, that a particular FTE could best be utilized in another county, or even in the administration of the public assistance system in Helena.

Even in non-assumed counties, the Department remains charged with responsibility for providing organizational services to and supervising county departments and boards of public welfare in the administration of their public assistance functions. See Mont. Code Ann. §§ 53-2-201(1)(d) and -305 (1999). It also retains primary responsibility for providing protective services. See Mont. Code Ann. § 41-3-302 (1999). In order to fulfill these responsibilities, the Department must have final authority with respect to staffing patterns of county welfare departments in the event the Department and the county board of welfare are unable to reach agreement.

THEREFORE, IT IS MY OPINION:

Both the Department of Public Health and Human Services and the county welfare boards have an interest in staffing patterns for the county public assistance offices, and staffing patterns should be determined through a process of consultation and negotiation between the Department and the county boards. In the event agreement is not reached, the Department of Public Health and Human Services has the final authority for determining the staffing patterns of a non-assumed county department of public welfare.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/mas/dm