

## 48 Op. Att'y Gen. No. 20

CITIES AND TOWNS - Determination of salary for deputies and undersheriff in a department of public safety;  
CITIES AND TOWNS - Power to demote or terminate undersheriff without a hearing in a department of public safety;  
COUNTY GOVERNMENT - Determination of salary for deputies and undersheriff in a department of public safety;  
COUNTY GOVERNMENT - Power to demote or terminate undersheriff without a hearing in a department of public safety;  
PEACE OFFICERS - Determination of salary for deputies and undersheriff in a department of public safety;  
PEACE OFFICERS - Power to demote or terminate undersheriff without a hearing in a department of public safety;  
POLICE - Determination of salary for deputies and undersheriff in a department of public safety;  
POLICE - Power to demote or terminate undersheriff without a hearing in a department of public safety;  
POLICE DEPARTMENTS - Determination of salary for deputies and undersheriff in a department of public safety;  
POLICE DEPARTMENTS - Power to demote or terminate undersheriff without a hearing in a department of public safety;  
SALARIES - Determination of salary for deputies and undersheriff in a department of public safety;  
SHERIFFS - Determination of salary for deputies and undersheriff in a department of public safety;  
SHERIFFS - Power to demote or terminate undersheriff without a hearing in a department of public safety;  
MONTANA CODE ANNOTATED - Title 7, chapter 32, part 1; sections 7-4-2503 to -2510, -2503(1), 7-32-104, -106 to -110, -2102;  
MONTANA LAWS OF 1985 - Chapter 256.

HELD:

1. The public safety commission in a department of public safety created pursuant to Mont. Code Ann. title 7, chapter 32, part 1, may set the salary of a deputy sheriff employed in the department at any level at or above the amount that would be paid to the deputy under Mont. Code Ann. § 7-4-2508.2. The due process provisions of Mont. Code Ann. §§ 7-32-107 to -110 do not apply upon termination of an undersheriff appointed to serve in a department of public safety.
2. The due process provisions of Mont. Code Ann. §§ 7-32-107 to -110 do not apply upon termination of an undersheriff appointed to serve in a department of public safety.

December 12, 2000

Mr. Dale Hubber  
Prairie County Attorney  
P.O. Box 215  
Terry, MT 59349-0215

Dear Mr. Hubber:

You have requested a letter of advice on two questions arising from the demotion of the undersheriff in the Prairie County Department of Public Safety. Since I have determined that the questions you raise may be of interest to other county and municipal governments in Montana, and because the answer to your questions is not clear from existing statutes, I have decided to treat your letter as a request for a formal opinion raising the following questions:

1. Do the provisions of Mont. Code Ann. §§ 7-4-2507 to -2510 limit the ability of the commissioners of a department of public safety created pursuant to Mont. Code Ann. title 7, chapter 32, part 1, to establish the salary of deputy sheriffs and undersheriffs who work in the department?

2. Do the provisions of Mont. Code Ann. §§ 7-32-106 to -110, describing the due process rights of "subordinate employees" of a department of public safety upon termination, apply to an appointed undersheriff working in a department of public safety?

Your letter informs me that in 1994, Prairie County and the Town of Terry entered an interlocal agreement to form a department of public safety pursuant to Mont. Code Ann. title 7, chapter 32, part 1. The agreement created a three-member public safety commission that would exercise "general supervisory authority over the entire operation of the department of public safety as set forth in Title 7, Chapter 32, part I [sic], of the Montana Code Annotated." Law Enforcement Consolidation Agreement, ¶ 4. It further provided that the sheriff would exercise the authority of the director of the department of public safety and stated that the "director shall have the powers and perform the duties conferred on and required of Sheriff's [sic] and police officers." Id., ¶ 5.

Your letter further informs me that at the time the issue addressed in your letter arose, the staff of the department of public safety consisted of the sheriff, an undersheriff, and one deputy sheriff. Earlier this year, the sheriff demoted the undersheriff to the position of deputy sheriff and promoted the then-serving deputy sheriff to the position of undersheriff. The public safety commission disagreed with the demotion, and acted officially to set the salary of the deputy sheriff at 95 percent of that of the sheriff, an amount equal to the salary of the undersheriff.

The sheriff has taken issue with the commission's action, arguing that under Mont. Code Ann. § 7-4-2508, the salary of the deputy can be set at no more than 90 percent of that of the sheriff, and that the undersheriff's salary must exceed that of the deputy by at least 5 percent of the salary of the sheriff, because under that statute the undersheriff must be paid 95 percent of the salary of the sheriff, while a deputy may receive no more than 90 percent of the sheriff's salary. The sheriff has established the salary of the deputy accordingly, reducing it to an amount that is 90 percent of the sheriff's salary.

I.

A department of public safety is a consolidated city-county law enforcement agency created pursuant to Mont. Code Ann. title 7, chapter 32, part 1. The statutes governing salaries under a department of public safety differ from those that apply to sheriffs, undersheriffs, and deputies generally. Mont. Code Ann. § 7-4-2503(1) establishes the formula for calculation of the salary of a sheriff who is not a director of a department of public safety. Mont. Code Ann. § 7-4-2508 requires such a sheriff to fix the compensation of the undersheriff at 95 percent of the sheriff's salary. It then provides a sliding scale formula for calculation of the salary of a deputy. For a county with a population under 15,000, such as Prairie County, the deputy's salary must be fixed at a figure between 85 percent and 90 percent of the salary of the sheriff. Mont. Code Ann. § 7-4-2510 then provides longevity increments that may be added to the salaries determined by § 7-4-2508.

In contrast, the statute governing salaries in a department of public safety provides as follows:

**7-32-104. Salaries.** The provisions of 7-4-2503 [setting formula for calculation of sheriff's salary] notwithstanding, the salaries of the director and employees of the department of public safety shall be established by the public safety commission and shall be paid by the city or town with the board of county commissioners. The salary of the director may not be less than that specified for the sheriff in 7-4-2503. The salaries of employees may not be less than the salaries specified in 7-4-2508 and 7-4-2510; however, employees are not required to be paid any fixed percentage of the director's or sheriff's salary.

Under this statute, the legislature provided that salaries of personnel serving in a department of public safety be set by a different process than that set forth in Mont. Code Ann. §§ 7-4-2503 to -2510. For one thing, the salary of the director of the department of public safety is set by the public safety commission, not by the county commission, while the public safety commission, rather than the sheriff, is given the authority to set salaries for the employees. For another, Mont. Code Ann. § 7-4-2508 requires the sheriff to set the deputy's salary within a range of at least 85 percent but not more than 90 percent of the sheriff's salary. In contrast, Mont. Code Ann. § 7-32-104 provides that the salary for the deputy, set by the commission, "may not be less than the salaries specified in 7-4-2508 and 7-4-2510."

To add to the confusion, Mont. Code Ann. § 7-4-2507 provides:

If there is a conflict between 7-4-2508 through 7-4-2510 and any other law, 7-4-2508 through 7-4-2510 govern with respect to undersheriffs and deputy sheriffs.

Mont. Code Ann. § 7-32-104 was already on the books when this provision was enacted in 1981. However, the language in the last sentence of § 7-32-104 was enacted by an amendment adopted in 1985. 1985 Mont. Laws ch. 256, § 1. It is presumed that the legislature enacted this amendment with knowledge of the provisions of existing law. Huether v. Sixteenth Judicial Dist. Court, 2000 MT 158, ¶ 20 (June 20, 2000).

In construing statutes, a court is obligated to adopt a reading of the law that gives effect to all provisions if possible. Id. In this case, it is not possible to do so because Mont. Code Ann. §§ 7-4-2508 and 7-32-104 directly conflict. It is not possible to follow the provisions of § 7-4-2508 setting the undersheriff's salary at 95 percent of that of the sheriff and setting the deputy's salary in the range of 85-90 percent of the sheriff's salary, and also to follow the provision of the last sentence of § 7-32-104, providing that the commission need not set the salaries of employees of a department of public safety at a set percentage of that of the director/sheriff.

In this case, I hold that the provisions of Mont. Code Ann. § 7-32-104 control, because they are the more specific, see, e.g., Montana Dep't of Rev. v. Kaiser Cement Corp., 245 Mont. 502, 507, 803 P.2d 1061, 1064 (1990). The 1985 legislature specifically addressed the question of the setting of the salaries of employees working in a department of public safety and provided that the public safety commission would set their salaries at or above the floor amount they would be paid under Mont. Code Ann. § 7-4-2508. The legislative history of this enactment suggests that the changes were proposed in part to overrule the effects of a district court decision in a Toole County case that had held that the public safety commission must pay the deputies in a department of public safety the percentage salaries set by § 7-4-2508. Mins., Hr'g of House Comm. on Local Gov't, Feb. 12, 1985, Ex. 1.

The 1985 legislature did not specifically address Mont. Code Ann. § 7-4-2507, which on its face would suggest that any such conflicts be resolved in favor of the application of the percentages set forth in Mont. Code Ann. § 7-4-2508. However, I find it appropriate to consider the legislative history, since the conflicting language of the statutes raises an ambiguity in their construction. In this case the clear intention of the legislature, as expressed in the 1985 amendments to Mont. Code Ann. § 7-32-104, was that the percentages set forth in the more general statute apply only as a floor for the salaries of employees of a department of public safety. Section 7-32-104 therefore operates as an implicit exception to the provisions of § 7-4-2507.

Applied to the facts of your case, it is my opinion that the public safety commission had the authority to set the deputy sheriff's salary at 95 percent of that of the sheriff, because that figure exceeds the floor amount set in Mont. Code Ann. § 7-32-104. I also hold that the sheriff lacked the authority to reset the salary of the deputy at a lesser amount after the commission had acted, since under § 7-32-104, the power to set salaries of employees in a department of public safety lies with the public safety commission, not with the sheriff.

## II.

You also inquire whether the undersheriff serving in a department of public safety serves at the pleasure of the sheriff, or whether the undersheriff is entitled to the hearing procedure for discharge of employees provided in Mont. Code Ann. § 7-32-109. Your request assumes that the demotion of the undersheriff constitutes a "discharge or termination of employment" under Mont. Code Ann. §§ 7-32-106 to -110. I accept your assumption for purposes of this opinion, but I express no opinion as to whether the due process provisions of §§ 7-32-106 to -110 apply to a demotion that does not end the employment of a subordinate employee to whom those provisions apply.

The statutes dealing with sheriff's departments generally differentiate between the undersheriff, who is appointed by and serves at the pleasure of the sheriff, Mont. Code Ann. § 7-32-2102, and deputies, who

have some due process rights in the event of termination, Mont. Code Ann. §§ 7-32-2107 to -2110; Holly v. Preuss, 172 Mont. 422, 426-27, 564 P.2d 1303, 1306 (1977). The statutes dealing with departments of public safety do not specifically mention the office of undersheriff. They provide that upon consolidation, the "officers and patrol officers" of the municipality and the "deputies of the county sheriff's office" become subordinates of the director of the department of public safety, without mention of an undersheriff. However, the Prairie County/Terry interlocal agreement specifically contemplates that the Prairie County Department of Public Safety will include "a Sheriff, Undersheriff, and as many deputies as are needed." Law Enforcement Consolidation Agreement, ¶ 3.

The statutes dealing with departments of public safety provide due process rights for terminated "subordinate employees" of the director of the department of public safety. Mont. Code Ann. §§ 7-32-107 to -110. "Subordinate employee" is defined as follows:

"Employee" or "subordinate employee" means but is not limited to any officer or patrol officer of the city or town police department, any deputy of the county sheriff's office, or any person employed as a clerk, dispatcher, or secretary by the department of public safety or so employed by the city or town police department or the county sheriff's office prior to the establishment of the department of safety [sic].

Mont. Code Ann. § 7-32-106. The undersheriff does not fit within any of the specific categories of employees (officers or patrol officers, deputies, clerks, dispatchers, or secretaries) mentioned in the statute. See Holly, 172 Mont. at 424-26 (noting similarities between the office of deputy and that of undersheriff, but concluding that the terms are not interchangeable). However, the inclusion in the statute of the language "means *but is not limited to*" suggests that the lack of a specific reference is not necessarily controlling.

In this case, resorting to the usual aids to statutory interpretation is not helpful. The legislative history of the various statutes contributes nothing, since it makes no reference to the office of undersheriff in a department of public safety. The statute creating the office of undersheriff was enacted prior to statehood, but it was amended twice in 1985, after the enactment of the statutes creating the department of public safety, without addressing this particular issue. Similarly, the legislature has revisited title 7, chapter 32, part 1 on several occasions without addressing this issue. Neither set of statutes can be said to be the more specific. One is specific as to "deputies" within a department of public safety, but makes no mention of an undersheriff. The other is specific as to the office of undersheriff, but makes no mention of a department of public safety.

In my opinion, a court faced with this issue would turn to the public policy behind the statutes that provide that the undersheriff serves at the pleasure of the sheriff. See, e.g., Willoughby v. Loomis, 264 Mont. 44, 52, 869 P.2d 271, 276 (1993) ("Statutes may not be interpreted to defeat their intent or purpose; the object sought to be achieved by the legislature is our prime consideration in interpreting them."). As the Montana Supreme Court observed in Holly:

Representative government requires an elected official be able to implement new or different policies and a fully tenured carryover staff might resist such changes. Having the undersheriff, who is the sheriff's second in command, not-tenured serves to make the sheriff's administration of his office more efficient and effective. Further the undersheriff would be more loyal to the sheriff's policies than would necessarily be true if the undersheriff was a tenured carryover from a prior defeated administration.

172 Mont. at 427. While these observations may not all be pertinent to the factual situation that brought forth your letter, they do suggest that a court faced with this issue, on which no clear answer may be found in the statutes, would probably opt to advance the public policy found persuasive by the Court in Holly. Therefore, in my opinion, the undersheriff in a department of public safety, like an undersheriff serving in a regular sheriff's department, serves at the pleasure of the sheriff and does not have the right to a hearing upon termination granted to other employees of the department of public safety under Mont. Code Ann. §§ 7-32-106 to -110.

THEREFORE, IT IS MY OPINION:

1. The public safety commission in a department of public safety created pursuant to Mont. Code Ann. title 7, chapter 32, part 1, may set the salary of a deputy sheriff employed in the department at any level at or above the amount that would be paid to the deputy under Mont. Code Ann. § 7-4-2508.

2. The due process provisions of Mont. Code Ann. §§ 7-32-107 to -110 do not apply upon termination of an undersheriff appointed to serve in a department of public safety.

Sincerely,

JOSEPH P. MAZUREK  
Attorney General

jpm/cdt/dm