

49 Op. Att'y Gen. No. 12

FIRES - Cooperative law enforcement agreement with federal agency for fire response;
PUBLIC OFFICERS - Eligibility of public officer for compensation from federal government agency;
SALARIES - Services provided outside "official duties" of sheriff;
SHERIFFS - Compensation paid to county employee under terms of cooperative law enforcement agreement with federal agency;
MONTANA CODE ANNOTATED - Title 2, section 2; sections 2-2-102(8), -104, -104(3)(a), -121(1), 7-4-2511(2), 7-32-2121, 44-11-305;
MONTANA CONSTITUTION - Article VI, sections 1(1), 5;
OPINIONS OF THE ATTORNEY GENERAL - 45 Op. Att'y Gen. No. 10 (1993), 43 Op. Att'y Gen. No. 43 (1989), 43 Op. Att'y Gen. No. 32 (1989).

HELD:

A sheriff may receive compensation from a federal agency under the terms of a cooperative law enforcement agreement where the services rendered by the sheriff fall outside of his or her "official duties" without violating any of Montana's statutory or constitutional provisions.

October 31, 2001

Mr. George H. Corn
Ravalli County Attorney
Courthouse Box 5008
205 Bedford Street
Hamilton, MT 59840

Dear Mr. Corn:

You have presented the following question for my opinion:

May a sheriff accept compensation from a federal agency under a cooperative law enforcement agreement without violating any statutory or constitutional provisions?

I.

For the purposes of this opinion, I assume the following facts stated in your letter of inquiry. The Ravalli County Commissioners entered into a "Cooperative Law Enforcement Agreement No. 01-03-004" (Agreement) with the Forest Service on May 26, 2000. This Agreement was signed by Perry Johnson, the Ravalli County sheriff, and authorized and approved by the Commissioners of Ravalli County as allowed by Mont. Code Ann. § 44-11-305.

In general, this Agreement authorized the Forest Service to contract with county law enforcement personnel for services provided to the Forest Service, such as patrolling Forest Service campgrounds in exchange for payment. The rate of pay for personnel was equal to their county wage, including hourly wage, workers' compensation, transportation, and administrative costs.

The Agreement also included a "Financial Plan for Fire Emergencies" (Financial Plan). The Financial Plan allowed the Forest Service, during fire emergencies, to engage local law enforcement personnel for work outside their normal duties and hours. The work was to be done on an as-needed basis as determined by the Forest Service. Specifically, the Financial Plan provided that "[w]hen the Forest Service requests regular or reserve deputies to work in positions beyond the normal responsibilities of the Sheriff's Department due to a fire emergency," the Forest Service would pay for such work at the rates provided for in the Financial Plan. The Financial Plan specified the Forest Service employees who were capable of requesting such services. In particular, "[o]nly the Forest Service Fire Dispatcher and the Forest Law Enforcement Officer may request services under the fire agreement."

Reimbursable services under the Financial Plan included: "fire camp security, maintain[ing] roadblocks for fire equipment or fire camp security, equipment security, [and] traffic control requested by Forest Service." Regular deputies were paid at their overtime rate and reserve deputies were paid \$13.60 per hour for the first eight hours worked and \$20.40 for overtime thereafter. Nonreimbursable services included "mass evacuation, normal Sheriff's Department activities, [and] normal traffic control." Additionally, the Financial Plan provided that the Forest Service would pay the county "32.5 cents per mile for officers responding to their assignments, \$44.00 per day flat rate for patrol cars left at the scene and a 22 percent administrative fee to offset administrative costs."

During the fire season of 2000, the Forest Service exercised the Financial Plan, and pursuant to its provisions, local law enforcement personnel, including the Ravalli County sheriff, reported for work at places designated by the Forest Service. In general, the mechanics of payment worked in the following manner: law enforcement personnel reported for work at the designated site; after working, the personnel would turn a time card in to the sheriff's office; the hours worked would then be turned over to county finance personnel, who tabulated the hours and sent a request for payment to the Forest Service; finally, the county paid the personnel and the Forest Service reimbursed the county.

The Financial Plan called for both sworn deputies and reservists to be hired. County figures show that a total of 24 sheriff's department personnel, including the sheriff, worked 7649.96 hours and were paid \$178,830. The sheriff's department was open for business during its normal business hours and personnel continued their work schedule for the county.

II.

You have requested my opinion regarding whether a sheriff can accept compensation from a federal agency under the terms of a cooperative law enforcement agreement without violating any provisions of the Montana Code Annotated or the Montana Constitution.

Mont. Code Ann. § 7-4-2511(2) generally governs compensation of county officials. It states:

No salaried county officer may receive for his own use any fees, penalties, or emoluments of any kind, except the salary as provided by law, for any official service rendered by him. Unless otherwise provided, all fees, penalties, and emoluments of every kind collected by a salaried county officer are for the sole use of the county and must be accounted for and paid to the county treasurer as provided by subsection (1) and credited to the general fund of the county.

In Platz v. Hamilton, 201 Mont. 184, 653 P.2d 144 (1982), the Montana Supreme Court addressed whether a clerk of district court was required to remit to the county treasurer the fees collected by the clerk in the issuance and execution of passports. Citing Mont. Code Ann. § 7-4-2511(2), the Court found to be dispositive the fact that there was no statute imposing an official duty upon the clerk to execute passport applications or to pay over execution fees collected to the county treasurer. Id. The Court held that because the execution of passport applications was not an official duty imposed upon a clerk of district court by state statute, and because the legislature had not enacted a statute with regard to the disposition of execution fees, the clerks had no duty to remit the fees to the general fund. Id. at 190, 653 P.2d at 147.

Thus, in order to respond to your question, I must determine whether assisting the Forest Service in its efforts to respond to fire emergencies during the fire season of 2000 was an official duty of the sheriff of Ravalli County.

The duties of a sheriff are set forth in Mont. Code Ann. § 7-32-2121. Among other duties, the sheriff must preserve the peace, arrest persons committing public offenses, prevent and suppress breaches of the peace, serve process, run a detention center, supervise search and rescue units when they are called, and serve as humane officer. Section 7-32-2121 imposes no official duty on a county sheriff to aid a federal agency in the performance of the sheriff's official duties. Furthermore, a federal agency cannot unilaterally mandate such aid from a county agency absent enabling state legislation. See generally Printz v. United

States, 521 U.S. 898 (1997) (holding that the federal government may not compel the states to implement, by legislation or executive action, federal regulatory programs).

The services rendered by Sheriff Johnson to the Forest Service are analogous to the services performed in Platz in that they are not part of a sheriff's statutorily defined duties. This was recognized by the Financial Plan, which provided payment solely for services beyond the ordinary responsibilities of the sheriff's department. Thus, under the applicable law, it is my opinion that the duties performed by Sheriff Johnson at the behest of the Forest Service were not official services rendered by him for which compensation is prohibited.

Having addressed the substantive law concerning whether the compensation was received for services outside of his official duties, the question as to whether Sheriff Johnson can accept such payment without violating the statutorily imposed standards of conduct found in title 2, chapter 2 must be addressed. Sheriff Johnson is classified as a public officer and subject to the standards of conduct because he is an elected officer of local government. See Mont. Code Ann. § 2-2-102(8). Mont. Code Ann. § 2-2-104(3)(a) provides, "[A] public officer, legislator, or public employee may not receive salaries for two separate public employment positions that overlap for the hours being compensated."

The general reason for salary limitations for public officers is to preserve separation of powers and to prevent public officials from advancing their own interests at the expense of public welfare. 45 Op. Att'y Gen. No. 10 (Mont. 1993) held that a Public Service Commissioner who reactivated his prior employment in order to be eligible to receive a severance payment did not violate the code of ethics for state public officials because the payment received did not appear to constitute a gift within the meaning of the word as used by the standards of conduct. See Mont. Code Ann. § 2-2-104.

Similarly, in this case Sheriff Johnson was paid for rendering a service, which he was not statutorily required to perform, in exchange for pay. The federal agency had control over whether Johnson would be asked to render services. Accordingly, receipt of compensation from the Forest Service does not violate the public policy behind salary restrictions nor does it violate the rules of conduct for public officers embodied in Montana law.

It is also my opinion that the work performed by the sheriff according to the terms of the Financial Plan would not violate the prohibition found at section 2-2-121(1), which prohibits a public officer from using "public time, facilities, equipment, supplies, personnel or funds for the officer's or employee's private business purposes." While Sheriff Johnson did receive a private financial benefit for performing under the Financial Plan, it does not appear that public time, facilities, equipment, supplies, personnel, or funds were used for which the county was not reimbursed by the Forest Service. The county was compensated for any associated vehicle costs and paid a 22 percent administrative fee to cover other resources used to carry out the terms of the Financial Plan. Under the circumstances involved in this particular situation, it is my opinion that section 2-2-121(1) would not be violated.

Lastly, you raise the issue of whether a constitutional impediment exists that would prohibit Sheriff Johnson from accepting compensation from the Forest Service. Article VI, section 5 of the Montana Constitution provides that officers of the executive branch shall receive salaries as provided by law. Section 5(2) further provides, in relevant part: "During his term, no elected officer of the executive branch may hold another public office or receive compensation for services from any other governmental agency." Section 1(1) sets forth the officers within the executive branch. It provides: "The executive branch includes a governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, and auditor."

Although the sheriff of Ravalli County is an elected public official, he is not a member of the executive branch as defined by article VI, section 1(1), and he therefore would not be subject to the compensation limitations outlined in article VI, section 5.

Additionally, even if the constitutional restrictions on salary applied to a county sheriff, in this case they would not prevent Sheriff Johnson from accepting compensation from a federal agency under these circumstances. 43 Op. Att'y Gen. No. 32 (Mont. 1989) held that an elected officer of the executive branch may not receive additional compensation for simultaneous service in the Montana National Guard.

However, this holding was later clarified to prohibit only compensation received from the state. 43 Op. Att'y Gen. No. 43 (Mont. 1989). Then-Attorney General Racicot concluded that a public officer who is engaged in rendering services to a federal agency and who is paid by that federal agency may accept such compensation without violating Montana's constitutional provisions governing salary restrictions. Id.

Accordingly, Sheriff Johnson did not violate any statutory or constitutional provisions in accepting compensation from a federal agency under these circumstances. He received compensation for duties performed, which were not official services, while continuing to perform all manner of public service required by his elected position.

Based on the above analysis, it is my opinion that a sheriff may receive compensation from a federal agency under the terms of a cooperative law enforcement agreement where the services rendered by the sheriff fall outside of his or her "official duties" without violating any Montana statutory or constitutional provision.

THEREFORE, IT IS MY OPINION:

A sheriff may receive compensation from a federal agency under the terms of a cooperative law enforcement agreement where the services rendered by the sheriff fall outside of his or her "official duties" without violating any of Montana's statutory or constitutional provisions.

Very truly yours,

MIKE McGRATH
Attorney General

mm/as/dm