

EMPLOYEES, PUBLIC - Hiring of local public defender employees into the new statewide public defender system;  
STATUTORY CONSTRUCTION - Construing the meaning of the word “may.”  
MONTANA CODE ANNOTATED - Sections 1-1-101, 1-2-102, -106, 2-3-221;  
MONTANA CONSTITUTION - Article II, section 9.

HELD: Section 69 of the Montana Public Defender Act (Senate Bill 146 of the 2005 Legislature) allows but does not require the Public Defender Commission and the Office of the Public Defender to hire all current city and county public defender employees. The bill allows the Commission and the Office the discretion to decide whom to retain for the new public defender system.

December 6, 2005

Mr. James Park Taylor, Chairman  
Public Defender Commission  
P.O. Box 278  
Pablo, MT. 59855-0278

Dear Mr. Taylor:

You have requested my opinion on the following question:

Does Section 69 of the Montana Public Defender Act (Senate Bill 146 of the 2005 Legislature) require the Public Defender Commission and the Office of the Public Defender to hire all current city and county public defender employees on July 1, 2006 or does it allow the Commission and the Office of the Public Defender discretion to decide whom to hire for the new public defender system?

The answer to your question requires an analysis of Section 69 using the well-established rules that the Montana Legislature and Supreme Court have developed to resolve questions of statutory interpretation.

Section 69 provides, in pertinent part:

Section 69. Transition - transfer of county and city employees to state employment - rights. (1) Employees of county or city public defender offices who are employed by a county or city on June 30, 2006, may be transferred to state employment in the office of state public defender provided for in [section 7]. Transferred employees become state employees on July 1, 2006.

(2) All transferred employees become subject to the state classification plan on July 1, 2006, except those specifically exempted under [section 7(2) and (3)(a)].

(3) The salary of transferred county or city employees on July 1, 2006, must be the same as it was on July 1, 2005, plus any salary increases provided for by the county or city not exceeding 4%.

....

Your question arises from subsection (1) which states: “Employees of county or city public defender offices who are employed by a county or city on June 30, 2006, may be transferred to state employment in the office of state public defender provided for in [Section 7]. Transferred employees become state employees on July 1, 2006.” (Emphasis added.)

Our rules of statutory construction flow from the simple premise articulated by the legislature in our code. “In the construction of a statute, the intention of the legislature is to be pursued if possible.” Mont. Code Ann. § 1-2-102. When a statute requires interpretation, “the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” Mont. Code Ann. § 1-1-101. “Words and phrases used in the statutes of Montana are construed according to the context and the approved usage of the language . . . .” Mont. Code Ann. § 1-2-106.

The word that must be construed to answer your question is the word “may.” By using this word to address the transition and transfer of county or city employees to state employment, did the legislature intend that some of these employees would be offered state employment and some would not, or did the legislature intend that all such employees must be offered employment by the state?

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“May” is commonly used to express possibility. Random House Unabridged Dictionary (2nd ed., 1993). For example, our Supreme Court has interpreted “may” as found in Mont. Code Ann. § 2-3-221 in Gaustad v. City of Columbus, 265 Mont. 379, 877 P.2d 470 (1994). The code section at issue provided that attorney fees “may be awarded” to the prevailing party in an action to enforce rights under article II, section 9 of the Montana Constitution. In the referenced case the prevailing party appealed when the district court declined to award attorney fees. The Supreme Court refused to require the award of attorney fees under the statute. The Court reasoned that “[i]n construing the meaning of a statute, we presume that the terms and words used were intended to be understood in their ordinary sense. The word ‘may’ is commonly understood to be permissive or discretionary. In contrast, ‘shall’ is understood to be compelling or mandatory.” 265 Mont. at 381-82 (citations omitted). The Court concluded that the award of attorney fees was discretionary with the district court and was not mandated by the statute.

Under the above analysis, the answer to your question appears to be clear: Section 69 of the Act allows the Commission and the Office of the Public Defender discretion to determine which current county and city public defender employees to retain for the new public defender system. But other means of statutory construction are useful in validating this conclusion.

The language of the bill itself strongly suggests that the legislature understood the possibility that some current employees of local public defender offices would not become state employees. Subsection (1) of Section 69 states that “Transferred employees become state employees on July 1, 2006.” The adjective “transferred” is surplusage if all employees are to be transferred to state employment. The continuing reference throughout Section 69 to “transferred” employees is likewise surplusage unless the legislature intended to grant the Commission and the Public Defender office the power to transfer some, but not all of the current employees to the state system. And when the legislature desired to mandate the transfer of certain employees to the state system, it clearly expressed its intent to do so through the use of mandatory language. In Section 70(2) of the Act the legislature provided that the “Commission staff in the office of appellate defender . . . must be officially transferred to the office of state public defender.” (Emphasis added.) The use of the mandatory “must” in Section 70 negates the inference that the legislature intended “may” to be mandatory in Section 69.

The testimony at the legislative hearings on Senate Bill 146 also supports this conclusion. At the meeting of the Judiciary Committee of the House of Representatives on March 31, 2005, the sponsor of the bill, Senator Dan McGee stated in his opening that “We are not saying that every public defender must come into a system and become a state

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employee.” (Tape 1, Side A.) And Representative Gutsche commented that the bill “will not make all public defenders state employees. . . .” (Tape 2, Side B.)

While the term “may” can be interpreted as being mandatory where the statutory usage or legislative history indicates that this was the legislature’s intent, see, e.g., Bascom v. Carpenter, 126 Mont. 129, 136, 246 P.2d 223, 226-27 (1952), such a conclusion is inappropriate here. These other bases of statutory interpretation confirm the legislative intent. The legislature used the word “may” in its ordinary sense--conveying discretion--when it drafted and passed Senate Bill 146. See Gaustad, 265 Mont. at 382 (distinguishing Bascom on the basis of legislative history indicating intent that “may” implies existence of discretion).

THEREFORE, IT IS MY OPINION:

Section 69 of the Montana Public Defender Act (Senate Bill 146 of the 2005 Legislature) allows but does not require the Public Defender Commission and the Office of the Public Defender to hire all current city and county public defender employees. The bill allows the Commission and the Office the discretion to decide whom to retain for the new public defender system.

Very truly yours,

MIKE McGRATH  
Attorney General

mm/je/jym