VOLUME NO. 53 OPINION NO. 4

CONTRACTS - Collective bargaining over county employee holiday pay;
COUNTIES - Collective bargaining over county employee holiday pay;
COUNTY OFFICERS AND EMPLOYEES - Collective bargaining over county employee holiday pay;
EMPLOYEES, PUBLIC - Collective bargaining over county employee holiday pay;
HOLIDAYS - Collective bargaining over county employee holiday pay;
LABOR RELATIONS - Collective bargaining over county employee holiday pay;
SALARIES - Collective bargaining over county employee pay;
STATUTORY CONSTRUCTION - Adoption of construction of analogous federal statutes;
MONTANA CODE ANNOTATED - Title 39, chapter 31; sections 2-18-601(8), -603, (1)(a), -702(1), 39-4-107, (3), (4), 39-31-305(2);
MONTANA CONSTITUTION - Article XII, section 2(2);
OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 33 (1992), 43 Op. Att'y Gen. No. 14 (1989), 42 Op. Att'y Gen. No. 37 (1987), 38 Op. Att'y Gen. No. 116 (1980);
UNITED STATES CODE - 29 U.S.C. § 158(d).

HELD: A county may bargain collectively over a provision that public employees working ten-hour days, four days per week, are to be paid ten hours pay for holidays.

July 1, 2010

Mr. Ed Corrigan
Flathead County Attorney
P.O. Box 1516
920 South Main Street
Justice Center, Second Floor
Kalispell, MT 59903-1516

Dear Mr. Corrigan:

[P1] You have requested my opinion on a question I have phrased as follows:

> Whether a county may bargain collectively over a provision that public employees working ten-hour days, four days per week, are to be paid ten hours pay for holidays.

[P2] Your letter indicates that some departments in your county work four days per week, ten hours per day ("4/10"), while others do not. Such 4/10 schedules may be seasonal or year-round depending on the nature of the work. Further, your county determines holiday pay differently in different departments based on the contract language, policies, and procedures of the respective department. In this case, the employees in question are from the county road and bridge department.

[P3] "Holiday" is defined as "a scheduled day off with pay to observe a legal holiday . . . except Sundays." Mont. Code Ann. § 2-18-601(8). Montana Code Annotated § 2-18-603(1)(a) sets forth how holidays are to be accounted for in an employee's work schedule, but neither of these provisions specifies a number of hours that constitute a "holiday."

[P4] In 43 Op. Att'y Gen. No. 14 (1989), Attorney General Racicot addressed the issue of holiday time for county employees who regularly work a 4/10 schedule, concluding:

> County road and bridge department employees regularly working four 10-hour days per week are entitled to eight hours' pay under Section 2-18-603, M.C.A., for all nonworked holidays.

This opinion was based on the Montana Constitution and statutory authority. Article XII, section 2(2) of the Montana Constitution states that "A maximum period of 8 hours is a regular day's work in all industries and employment except agriculture and stock raising. The legislature may change this maximum period to promote the general welfare." Additionally, Mont. Code Ann. § 39-4-107 indicates "(a) period of 8 hours constitutes a day's work in all works and undertakings carried on or aided by any municipal or county government . . . ." The opinion specifically reserved the question presented here, stating: "Nothing in this opinion . . . should be construed as addressing the issue of whether a county employer is authorized to enter into a collective bargaining agreement which provides for a holiday pay amount in excess of eight hours."

[P5] It is clear that the County is permitted to enter a collective bargaining agreement providing a 4/10 workweek for its employees. Mont. Code Ann. § 39-4-107(3) (permitting 4/10 scheduling for county road and bridge workers); id., (4) (permitting city and county governments to bargain for 4/10 work schedules); see Kuhr v. City of Billings, 2007 MT 201, 338 Mont. 402, 168 P.3d 615 (legislature can allow change to

eight-hour day through collective bargaining). The question of accounting for holiday pay when a county employee works a 4/10 workweek pursuant to a collective bargaining agreement is not explicitly resolved by existing statutes or case law.

[P6] The Montana Collective Bargaining for Public Employees Act ("MCBPEA") is set forth in Title 39, chapter 31 of the Montana Code Annotated. Section 39-31-305(2) provides:

> For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or the public employer's designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising under an agreement and the execution of a written contract incorporating any agreement reached . . . .

(Emphasis added.)

[P7] This provision is nearly identical to the collective bargaining provision found at 29 U.S.C. § 158(d) of the National Labor Relations Act ("NLRA"). The Montana Supreme Court has held that the MCBPEA should be construed consistently with federal case law applying the NLRA. Bonner Sch. Dist. No. 14 v. Bonner Educ. Ass'n, 2008 MT 9, 341 Mont. 97, 176 P.3d 262; City of Great Falls v. Young, 211 Mont. 13, 17, 686 P.2d 185, 187 (1984).

[P8] In my opinion, holiday pay is specifically identified as a subject of collective bargaining, since it relates both to the amount of compensation, i.e. "wages," that the employee receives as well as to the "hours" worked under a 4/10 work schedule. Holiday pay is also covered by the MCBPEA as a "condition of employment."

[P9] In Bonner School District, the Court determined that the term "condition of employment" has traditionally been interpreted broadly in order to effectuate the NLRA's overriding goal of "fostering 'industrial peace'" in disputes between employers and employees. Bonner, 2008 MT 9, ¶ 19, 341 Mont. 97, 176 P.3d 262 (quoting Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 209-16 (1964)). The Court further noted several examples of what constituted "other conditions of employment" in federal caselaw, including the setting of food prices at company cafeterias (Ford Motor Co. v. NLRB, 441 U.S. 488 (1979)); free agency and reserve issues in professional baseball (Silverman v. Major League Baseball Player Relations Comm., 67 F.3d 1054 (2d Cir.

1995)); and rental rates of company houses (American Smelting & Refining Co. v. NLRB, 406 F.2d 552 (9th Cir. 1969)). The Court also looked to a decision by the National Labor Relations Board which determined that telephone access, break policies, and accounting of product shortfalls all constituted "other conditions of employment" for collective bargaining purposes. Bonner, ¶ 20 (citing Pepsi Cola Bottling Co. of Fayetteville, 330 N.L.R.B. 900 (2000)).

[P10] Ultimately, the Montana Supreme Court in Bonner determined that employee transfers and reassignments were "condition[s] of employment" and, thus, subject to collective bargaining because they were "plainly germane to the working environment." Bonner, ¶ 22 (quoting Ford Motor Co., 441 U.S. at 498). The same can be said for calculation of holiday pay. Other courts around the country, following similar analysis, have found the issue of "holiday pay" to fall under the category of "wages" or "conditions of employment" and thus appropriate for collective bargaining. See, e.g., Cadott Educ. Ass'n v. Wisconsin Employment Relations Comm'n, 540 N.W.2d 21 (Wis. Ct. App. 1995); Maine v. Maine Labor Relations Bd., 413 A.2d 510 (Me. 1980). I agree with their conclusion, and accordingly it is my opinion that holiday pay is a subject of collective bargaining under MCBPEA, and that public employers may abide by a collective bargaining agreement calling for ten hours of holiday pay for employees working a 4/10 schedule.

[P11] This conclusion is consistent with previous Attorney General Opinions. For instance, in 38 Op. Att'y Gen. No. 116 (1980), Attorney General Greely determined it was acceptable for a county to enter into a collective bargaining agreement providing employees an extra day of paid leave to attend the county fair. Recognizing that statutes set forth the terms of annual leave and state holidays, Attorney General Greely determined that providing an extra paid day off through the collective bargaining agreement was acceptable because the agreement did not purport to create a new state holiday, nor was there any indication that employees could accrue untaken "fair days" and use them as annual leave at another time. Thus, an extra day of paid leave constituted "wages, hours, fringe benefits, and other conditions of employment" and was an appropriate subject for collective bargaining.

[P12] On the other hand, where benefits are statutorily defined, they cannot be changed by collective bargaining. For example, in 42 Op. Att'y Gen. No. 37 (1987), Attorney General Greely determined that a county could not enter a collective bargaining agreement providing employees with a different health insurance plan than that adopted by other county employees under Mont. Code Ann. § 2-18-702(1). This conclusion was based on the language of § 2-18-702(1), which was "mandatory and clearly contemplates, inter alia, county-wide group health insurance plans upon the

necessary employee approval." See also 44 Op. Att'y Gen. No. 33 (1992) (state agency cannot comply with a collective bargaining agreement that provided for supplementation of an injured worker's compensation benefits with sick and annual leave where practice prohibited by statute.)

[P13] Here, however, a collective bargaining agreement providing for ten hours of holiday pay for employees who work a 4/10 schedule does not violate any statute. As noted above, the statutes are silent on the subject. Since the legislature has not addressed the issue, the parties are free to bargain collectively, and the public employer may abide by a resulting agreement that is otherwise lawful.

THEREFORE IT IS MY OPINION:

> A county may bargain collectively over a provision that public employees working ten-hour days, four days per week, are to be paid ten hours pay for holidays.

Sincerely,

STEVE BULLOCK
Attorney General

sb/zz/jym