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1988 Mont. AG LEXIS 18

Office of the Attorney General of the State of Montana

February 19, 1988

42 Op. Atty Gen. Mont. No. 68

Reporter: 1988 Mont. AG LEXIS 18; 42 Op. Atty Gen. Mont. No. 68

OPINION No. 68

February 19, 1988

Core Terms

volunteer, nominal fee, nominal, public agency, reimburse, federal regulation, tied, compensation for services, law enforcement agency, hours of service, sheriff's deputy, reserve officer, public funds, total amount, time spent, full-time

Syllabus

[*1]

COUNTIES - Use of public funds to compensate reserve deputy sheriffs for time spent and expenses incurred;

PEACE OFFICERS - Use of public funds to compensate reserve deputy sheriffs for time spent and expenses incurred;

POLICE - Use of public funds to compensate reserve deputy sheriffs for time spent and expenses incurred;

POLICE DEPARTMENTS - Use of public funds to compensate reserve deputy sheriffs for time spent and expenses incurred;

PUBLIC FUNDS - Use of public funds to compensate reserve deputy sheriffs for time spent and expenses incurred;

SHERIFFS - Use of public funds to compensate reserve deputy sheriffs for time spent and expenses incurred;

CODE OF FEDERAL REGULATIONS - [29 C.F.R. §§ 553.100](#) to [553.106](#);

[MONTANA CODE ANNOTATED - Sections 7-32-201\(5\), 7-32-212, 46-1-201\(8\), 46-6-401.](#)

HELD: County public funds may be used to reimburse a reserve deputy sheriff's expenses, provide reasonable benefits, and pay nominal compensation, but the total

amount of these provisions may not be given as a form of compensation tied to productivity.

Request By: James Yellowtail
Big Horn County Attorney
Drawer L
Hardin MT 59034

Opinion By: MIKE GREELY, Attorney General

Opinion

You have requested [*2] my opinion on the following question:

May county public funds be used to compensate time spent and expenses incurred by reserve deputy sheriffs, in view of their status as volunteers under [section 7-32-201\(5\), MCA](#)?

A response to your question hinges on the definition of the term "volunteer" in [section 7-32-201\(5\), MCA](#), which states:

"Reserveofficer" means a sworn, part-time, volunteer member of a law enforcement agency who is a peace officer as defined in 46-1-201(8) and has arrest authority as described in 46-6-401 only when authorized to perform these functions as a representative of the law enforcement agency.

While Montana has no statutory or case law defining "volunteer," a rather extensive definition is set out in the federal regulations accompanying the Fair Labor Standards Act, [29 C.F.R. §§ 553.100](#) to .106 (1987). The definition and explanations contained in these regulations are directly applicable to Montana's state and local governments under the 1985 United States Supreme Court decision, *Garcia v. San Antonio Metropolitan Transit Authority*, 105 U.S. 1005 (1985).

The federal regulations define a volunteer as:

(a) An individual who performs hours of service [*3] for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered

. . . .

(c) Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.

[29 C.F.R. § 553.101\(a\)](#), (c).

The federal regulations further explain that individuals, such as reserve police officers, who volunteer services to public agencies are considered volunteers and

not employees of the public agencies "if their hours of service are provided with no promise[,] expectation, or receipt of compensation for the services rendered, except for reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof" [29 C.F.R. § 553.104\(a\)](#).

It is noteworthy that these regulations provide that volunteers may be paid expenses, reasonable benefits, a "nominal fee," or a combination of these, without losing their status as volunteers:

Individuals do not lose their status as volunteers because they are reimbursed for tuition, transportation and meal costs involved in their attending classes intended to teach [*4] them to perform efficiently the services they provide or will provide as volunteers.

[29 C.F.R. § 553.106\(c\)](#). The regulations further explain that volunteer status is not lost if reasonable benefits are provided. The examples given of reasonable benefits include coverage of volunteers by group insurance plans, such as the workers' compensation provisions. [29 C.F.R. § 553.106\(d\)](#).

The regulations clearly distinguish payment of a nominal fee from payment of compensation for services, and the effect of these on a volunteer's status:

Individuals do not lose their volunteer status if they receive a nominal fee from a public agency. A nominal fee is not a substitute for compensation and must not be tied to productivity. However, this does not preclude the payment of a nominal amount on a "per call" or similar basis to volunteer firefighters. The following factors will be among those examined in determining whether a given amount is nominal: The distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed [*5] or throughout the year. An individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status.

[29 C.F.R. § 553.106\(e\)](#).

As noted earlier, a combination of expenses, benefits and fees does not, by itself, preclude volunteer status. However, volunteer status can be jeopardized if the total amount of payments made (expenses, benefits, fees) is excessive in the context of the economic realities of the particular situation. [29 C.F.R. § 553.106\(f\)](#).

It is apparent from these regulations that a reserve deputy sheriff may receive some nominal compensation for time spent and may be reimbursed for expenses without losing volunteer status, but these payments must not be a substitute for

salaried compensation, nor may they be tied to productivity. These regulations, taken in conjunction with Montana's statute prohibiting a reduction in the number of full-time officers, [§ 7-32-212, MCA](#), also suggest that the above-listed forms of "encouragement" to volunteers cannot be abused to the extent that volunteer reserve officers are used in place of authorized full-time law enforcement officers.

[*6]

THEREFORE, IT IS MY OPINION:

County public funds may be used to reimburse a reserve deputy sheriff's expenses, provide reasonable benefits, and pay nominal compensation, but the total amount of these provisions may not be given as a form of compensation tied to productivity.

1988 Mont. AG LEXIS 48

Office of the Attorney General of the State of Montana

42 Op. Atty Gen. Mont. No. 97

Reporter

1988 Mont. AG LEXIS 48; 42 Op. Atty Gen. Mont. No. 97

OPINION No. 97

July 14, 1988

Core Terms

search and rescue, auxiliary, workers' compensation, train, law enforcement agency, supervision, coverage, reserve officer, new statute, volunteer, law enforcement service, actual service, county sheriff, qualification, part-time, sheriff's, unsworn

Syllabus

[*1]

COUNTY OFFICERS AND EMPLOYEES - Members of recognized search and rescue units as auxiliary officers of county sheriff; SHERIFFS - Members of recognized search and rescue units as auxiliary officers of county sheriff; WORKERS' COMPENSATION - Coverage of members of recognized search and rescue units; MONTANA CODE ANNOTATED - Sections 7-32-201 to 7-32-235, 7-32-212(11); OPINIONS OF THE ATTORNEY GENERAL - 36 Op. Att'y Gen. No. 6 (1975).

HELD: Members of a recognized search and rescue unit are auxiliary officers and must be provided full workers' compensation coverage when engaged in a search, training, or testing operation called and supervised by the sheriff.

Request By: John W. Robinson

Ravalli County Attorney

Ravalli County Courthouse

Hamilton MT 59840

Opinion By: MIKE GREELY, Attorney General

Opinion

You have requested my opinion on the following questions:

1. Are members of recognized search and rescue units "auxiliary officers" and thereby covered under workers' compensation laws?

2. If members of recognized search and rescue units are not auxiliary officers, can they be covered by workers' compensation for liability purposes when such units are called out by the sheriff for a search or for mandated [*2] training or testing?

In 1985 the Legislature amended section 7-32-235, MCA, by adding subsections (1) and (3), MCA, which authorize a county to "establish or recognize one or more search and rescue units within the county" and to support the units financially by means of a property tax. Your questions concern the county's responsibility for providing workers' compensation coverage for members of a search and rescue unit which the county has recognized under section 7-32-235(1), MCA. If the members of such a unit are "auxiliary officers," then section 7-32-203(2), MCA, requires the law enforcement agency that utilizes them to provide full workers' compensation coverage while the auxiliary officers are providing actual service for the law enforcement agency.

Prior to 1977 there was little statutory guidance on questions concerning voluntary law enforcement groups such as search and rescue associations. See, e.g., 36 Op. Att'y Gen. No. 6 at 300 (1975). Following a statewide survey by the Montana Board of Crime Control which revealed wide variations in the performance, training, authority, and supervision of such groups, the 1977 Legislature enacted Senate Bill 152 (1977 [*3] Mont. Laws, ch. 85), now codified at sections 7-32-201 to 234, MCA, which addressed the regulation of all volunteer members of law enforcement agencies. Senate Bill 152 distinguished between "auxiliary officers" and "reserve officers," established qualification and training standards for reserve officers, and defined the role and authority of auxiliary officers.

In 1981 the Legislature added section 7-32-235, MCA, to the statutory provisions on reserve and auxiliary officers. The new statute provided that search and rescue units are under the operational control and supervision of the county sheriff having jurisdiction. When the 1985 amendments discussed above were enacted, this provision became subsection (2) of section 7-32-235, MCA.

The 1981 legislation which expressly gave the county sheriff supervisory control over search and rescue operations (1981 Mont. Laws, ch. 42) contained an instruction stating that the new statute was intended to be codified as an integral part of title 7, chapter 32, part 2, MCA, and that the provisions of Title 7, chapter 32, part 2, MCA, apply to the new statute. To conform the statutory list of duties of the sheriff, the legislation also [*4] amended section 7-32-2121, MCA, by adding subsection (11), which requires the sheriff to "take charge of and supervise search and rescue units and their officers whenever search and rescue units are called into service."

Section 7-32-201(1), MCA, defines "auxiliary officer" as "an unsworn, part-time, volunteer member of a law enforcement agency who may perform but is not limited to the performance of such functions as civil defense, search and rescue, office duties, crowd and traffic control, and crime prevention activities." (Emphasis added.) Subsection (3) defines "law enforcement agency" as "a law enforcement service provided directly by a local government."

In view of the legislative history and express language of the involved statutes, I conclude that members of a county-recognized search and rescue unit are "auxiliary officers" and thereby subject to the applicable provisions of Title 7, chapter 32, part 2, MCA. Cf. *State v. Lemmon*, 41 St. Rptr. 2359, 692 P.2d 455 (1984) (member of sheriff's posse is an auxiliary officer). Search and rescue unit members are unsworn part-time volunteers who provide a law enforcement service when called out on a search by the sheriff. [*5] While such auxiliary officers are exempt from the qualification and training requirements which apply to reserve officers (see § 7-32-234, MCA, I further conclude that the full workers' compensation coverage required by section 7-32-203(2), MCA, should also extend to any training or testing exercised which are conducted on the orders and at the direction of the sheriff. See § 7-32-231, MCA. While engaged in training or testing operations under the sheriff's supervision, the auxiliary officers are providing "actual service for law enforcement agency" and should be insured by the agency under its workers' compensation coverage. See § 7-32-203(2), MCA.

These conclusions make it unnecessary to address your second question.

THEREFORE, IT IS MY OPINION:

Members of a recognized search and rescue unit are auxiliary officers and must be provided full workers' compensation coverage when engaged in a search, training, or testing operation called and supervised by the sheriff.

Load Date: 2014-10-29

2000 Mont. AG LEXIS 18

Office of the Attorney General of the State of Montana
48 Op. Atty Gen. Mont. No. 22

Reporter

2000 Mont. AG LEXIS 18; 48 Op. Atty Gen. Mont. No. 22

OPINION No. 22

December 18, 2000

Core Terms

peace officer, appointment, crime control, train

Syllabus

[*1]

PEACE OFFICERS - Peace officer employment, education and certification standards;
STATUTORY CONSTRUCTION - Construction of statute's provisions in manner which gives meaning and effect to each;

STATUTORY CONSTRUCTION - Construing plain meaning of words of statute;

MONTANA CODE ANNOTATED - Sections 1-2-101, 7-32-303, -303(5)(a), (5)(b), (5)(c), -303(6).

HELD: Mont. Code Ann. § 7-32-303(6) authorizes only one extension, not to exceed 180 days, to the requirement that every peace officer must attend and successfully complete, within one year of his or her initial appointment, an appropriate peace officer basic training course certified by the Board of Crime Control.

Request By: Mr. Jim Oppedahl

Executive Director

Montana Board of Crime Control

P.O. Box 201408

Helena, MT 59620-1408

Opinion By: JOSEPH P. MAZUREK, Attorney General

Opinion

You have requested my opinion on the following question, which I have rephrased as follows:

May the Board of Crime Control grant more than one 180-day extension under Mont. Code Ann. § 7-32-303(6) for a peace officer to complete basic training?

In my opinion, the Board may not.

Mont. Code Ann. § 7-32-303 governs peace officer employment, education and certification standards. [*2] Relevant to your question is subsection (5)(a), which provides:

(5)(a) Except as provided in subsections (5)(b) and (5)(c), it is the duty of an appointing authority to cause each peace officer appointed under its authority to attend and successfully complete, within 1 year of the initial appointment, an appropriate peace officer basic course certified by the board of crime control. Any peace officer appointed after September 30, 1983, who fails to meet the minimum requirements as set forth in subsection (2) or who fails to complete the basic course as required by this subsection (a) forfeits the position, authority, and arrest powers accorded a peace officer in this state.

Thus, the general requirement is that a peace officer must attend and successfully complete an appropriate peace officer basic training course within one year of his or her initial appointment.

Subsections (5)(b) and (5)(c) provide exceptions to that general rule; however, they only apply to peace officers who, at some time prior in their careers as peace officers, have received a basic certificate from the Board of Crime Control (Board) or the equivalent certification from another state. Subsection (5)(c) [*3] reiterates the one-year rule in requiring former officers to pass a basic equivalency test and to complete a legal training course conducted by the Montana Law Enforcement Academy.

You asked for my construction of subsection (6), which grants the Board authority to extend the one-year time requirement of subsections (5)(a) and (5)(c). Specifically, you asked whether more than one 180-day extension to the one-year time requirement may be granted. Subsection (6) states:

(6) The board of crime control may extend the 1-year time requirements of subsections (5)(a) and (5)(c) upon the written application of the peace officer and the appointing authority of the officer. The application must explain the circumstances that make the extension necessary. Factors that the board may consider in granting or denying the extension include but are not limited to illness of the peace officer or a member of the peace officer's immediate family, absence of reasonable access to the basic course or the legal training course, and an unreasonable shortage of

personnel within the department. The board may not grant an extension to exceed 180 days.

In light of the rules of statutory construction, [*4] I conclude that the Board's interpretation that subsection (6) authorizes the Board to grant only one 180-day extension is correct. Statutes must be construed or interpreted in accordance with the intent of the legislature. *State v. Christensen*, 265 Mont. 374, 376, 877 P.2d 468, 469 (1994). In construing a statute, I must look first to the plain meaning of the words of the statute; if the language is clear and unambiguous, no further interpretation is necessary. Id.

The statutory language of Mont. Code Ann. § 7-32-303(6) is clear and unambiguous. In relevant part it states, "The board may not grant an extension to exceed 180 days." My opinion is that this language expresses a clear intent by the legislature to give the Board authority to grant one extension, but placed upon the Board the constraint that an extension could not exceed 180 days.

Mont. Code Ann. § 1-2-101 expresses a preference that, where possible, a statute be interpreted in a manner which gives meaning to each particular provision of the statute. Additionally, the Montana Supreme Court has stated that any statutory interpretation that renders any sections of the [*5] statute superfluous and does not give effect to all of the words used must be avoided. *State v. Berger*, 259 Mont. 364, 367, 856 P.2d 552, 554 (1993).

The legislative intent in § 7-32-303(6) is expressed unambiguously through the straight-forward process attendant to extension requests. The statute requires the Board to act upon "the written application of the peace officer" which, in turn, "must explain the circumstances that make the extension necessary." It then identifies certain circumstances that may be considered by the Board "in granting or denying the extension." The statute concludes by prohibiting the Board from granting an extension exceeding 180 days. Subsection (6) thus contemplates a one-time process initiated by the submission of an extension request and a determination that, if favorable, cannot extend the normal deadline more than 180 days. The provision, given literal effect, is not susceptible to a construction under which a peace officer may tender multiple applications whose intended or practical effect is to secure extensions exceeding the 180-day limit. Any other conclusion, moreover, would produce inconsistency [*6] with § 7-32-303(5)(a), since interpreting subsection (6) to allow multiple extensions over 180 days to an officer who has not received his or her basic certification would undermine subsection (5)(a)'s requirement that peace officers complete the educational requirements imposed upon them within one year of their appointment except where an extension is granted under the following subsection. Put otherwise, it makes little sense to impose a

one-year deadline, with the possibility of an extension for a specified maximum length, if through the simple use of multiple extensions that length may be exceeded.

In sum, it is clear that § 7-32-303(6) recognizes that there are certain legitimate reasons an officer may need an extension beyond the one-year requirement set forth in § 7-32-303(5)(a). Nonetheless, the overriding intent of the statute is to require that all peace officers receive the proper education within one year of their appointment, except where compelling circumstances exist to justify an extension not to exceed 180 days. The public and officer safety reasons underlying this requirement are obvious.

THEREFORE, IT IS MY OPINION:

Mont. Code Ann. § 7-32-303(6) authorizes [*7] only one extension, not to exceed 180 days, to the requirement that every peace officer must attend and successfully complete, within one year of his or her initial appointment, an appropriate peace officer basic training course certified by the Board of Crime Control.

Load Date: 2014-10-29

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

2012 Mont. AG LEXIS 6

Office of the Attorney General of the State of Montana

54 Op. Atty Gen. Mont. No. 8

Reporter

2012 Mont. AG LEXIS 6; 54 Op. Atty Gen. Mont. No. 8

Opinion No. 8

August 10, 2012

Core Terms

peace officer, appoint, basic training, break in, train, deadline, initial appointment, one year, successful completion, time period, scenario, forfeit

Syllabus

[*1]

PEACE OFFICERS - Effect of a break in service on the peace officer training requirements;

MONTANA CODE ANNOTATED - Sections 1-2-101, 7-32-303(1)(a), (2), (5)(a), (b), (c), (6), (7), 44-4-404;

OPINIONS OF THE ATTORNEY GENERAL - 48 Op. Atty. Gen. No. 22 (2000).

HELD: A peace officer who has a break in service during the one year time period provided in 7-32-303(5)(a) has the remainder of the one-year period, plus any additional time as granted by the public officer standards and training council, in which to attend and successfully complete a basic training course. If the break in service extends beyond one year from his or her initial appointment and the officer has not completed a basic training course within one year of the initial appointment as required by 7-32-303(5)(a), the officer forfeits his or her position as peace officer and cannot serve in that capacity until he or she attends and successfully completes a basic training course.

Request By: Ms. Winnie Ore, Chairperson

Montana Public Safety Officer Standards & Training Council

2260 Sierra Road East

Helena, MT [*2] 59602

Opinion By: STEVE BULLOCK, Attorney General

Opinion

[P1] You have requested my opinion on the following question, which I have rephrased as follows:

How long does a peace officer have to complete a basic training course if the officer has a break in service during the one-year time period provided in Mont. Code Ann. § 7-32-303(5)(a)?

[P2] The general requirement is that a peace officer must attend and successfully complete an appropriate peace officer basic training course within one year of his or her initial appointment:

Except as provided in subsections (5)(b) and (5)(c), it is the duty of an appointing authority to cause each peace officer appointed under its authority to attend and successfully complete, within 1 year of the initial appointment, an appropriate peace officer basic course certified by the Montana public safety officer standards and training council. Any peace officer appointed after September 30, 1983, who fails to meet the minimum requirements as set forth in subsection (2) or who fails to complete the basic course as required by this subsection (5)(a) forfeits the position, authority, and arrest powers accorded a [*3] peace officer in this state.

Mont. Code Ann. § 7-32-303(5)(a). This requirement applies to all state, county, and city law enforcement officers described in Mont. Code Ann. § 7-32-303(1)(a).

[P3] The one-year deadline may be extended by the public safety officer standards and training council (POST council) for a period of up to 180 days as provided in subsection (6):

The Montana public safety officer standards and training council may extend the 1-time requirements of subsections (5)(a) and (5)(c) upon the written application of the peace officer and the appointing authority of the officer. The application must explain the circumstances that make the extension necessary. Factors that the council may consider in granting or denying the extension include but are not limited to illnesses of the peace officer or a member of the peace officer's immediate family, absence of reasonable access to the basic equivalency course, and an unreasonable shortage of personnel within the department. The council may not grant an extension to exceed 180 days.

Mont. Code Ann. § 7-32-303(6) [*4] . As determined in a prior opinion of this office, the 180-day deadline may be extended only once. 48 Op. Atty. Gen. No. 22 (2000).

[P4] The Montana Department of Justice offers a 12-week law enforcement officer basic course which has been approved by the POST council and is available three times a year

through the Montana Law Enforcement Academy. Topics covered include education and training in the fundamentals of policing, including law, human behavior, police function, patrol operations, investigation, traffic enforcement, and police proficiencies. See <https://doj.mt.gov/mlea/basic-programs-3/>. Successful completion of the training requirement and other qualifications, including a one-year probationary period, allows the officer to apply to the POST council for a basic certificate certifying that the officer has met all the basic qualifying peace officer standards of this state. Mont. Code Ann. § 7-32-303(7).

[P5] Your question involves a peace officer who is appointed by a law enforcement agency but has a break in service prior to completing the basic course described in Mont. Code Ann. § 7-32-303(5)(a) [*5]. I will analyze your question in two parts: (1) the first scenario assumes that the officer leaves and returns to service within the one-year time period provided in Mont. Code Ann. § 7-32-303(5)(a); and (2) the second scenario assumes that the officer leaves but does not return to service within the one-year time period provided in Mont. Code Ann. § 7-32-303(5)(a).

[P6] I will assume for purposes of this opinion that the peace officer has never been issued a basic certificate (so that the provisions of Mont. Code Ann. § 7-32-303(5)(b) do not apply); that the officer has not previously completed a basic peace officer's course taught by a federal, state, or United States military law enforcement agency (so that the provisions of Mont. Code Ann. § 7-32-303(5)(c) do not apply); and that the officer is appointed after September 30, 1983 (so that the provisions of Mont. Code Ann. § 7-32-303(5)(a) are applicable).

I.

[P7] In the first scenario, a peace officer appointed by [*6] an agency has a break in service during the one-year time period described in Mont. Code Ann. § 7-32-303(5)(a). The following dates are representative:

January 1, 2012:	The officer is appointed by the agency.
May 1, 2012:	The officer leaves employment.
October 1, 2012:	The officer returns to employment.

Because the break in service occurs before the one-year period expires in January 2013, the officer does not forfeit his/her position, authority, or arrest powers by virtue of the fact that he or she did not complete basic training within one year of his/her initial appointment. Mont. Code Ann. § 7-32-303(5)(a). The officer may thus return to service under the terms of his or her initial appointment (assuming he or she still meets the qualifications of Mont. Code Ann. § 7-32-303(2)), and has the remainder of the one-year period (or until January 1, 2013) in which to complete basic training, plus any additional time extended by the POST council pursuant to Mont. Code Ann. § 7-32-303(6).

[P8] You question whether **[*7]** the one-year deadline could be extended by the length of the break in service or, stated another way, whether the one-year deadline should be tolled during the officer's absence. Using the above example, the officer would have until May 1, 2013, or an additional five months, to complete basic training.

[P9] I find no statutory support for the proposition that the one-year deadline can be extended based solely on the employment circumstances of an individual officer. The rules of statutory construction require me 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. § 1-2-101; (AG Opinion cite). The deadlines in Mont. Code Ann. § 7-32-303 are clear and unambiguous. 48 Op. Atty. Gen. No. 22 (2000). There is no mention of "tolling" or any extensions beyond 180 days as provided in Mont. Code Ann. § 7-32-303(6). There is no indication that the Legislature intended an individual officer or appointing agency to avoid the deadlines in Mont. Code Ann. § 7-32-303(5)(a) **[*8]** simply by terminating and reinstating his or her appointment at will.

[P10] By the same reasoning, an individual or appointing agency may not avoid the statutory deadlines by maintaining a break in service for less than one year, returning to a different agency, maintaining another break in service for less than one year, and potentially repeating this process without ever completing basic training. For example:

January 1, 2010:	The officer is appointed to the agency (Agency A).
June 15, 2010:	The officer leaves employment at Agency A.
January 1, 2011:	The officer is appointed to another agency (Agency B).
June 15, 2011:	The officer leaves employment at Agency B.
January 1, 2012:	The officer is appointed to another agency (Agency C).
June 15, 2012:	The officer leaves employment at Agency C.

The clear intent of § 7-32-303(5)(a) is to mandate basic training within one year of the "initial" appointment. This objective is defeated if an officer or appointing agency can effectively toll the deadlines through multiple appointments.

[P11] I realize that the one-year deadline may present a hardship, particularly for an officer whose return date is so late he or she may **[*9]** not have sufficient time remaining to successfully complete basic training. In that circumstance, however, the POST council may extend the one-year period for up to six months, presumably allowing sufficient time for completion of the course. Mont. Code Ann. § 7-32-303(6). I note that the circumstances listed in the statute are not exclusive, so that the POST council has substantial discretion when considering an extension request by the officer and the appointing agency.

II.

[P12] In the second scenario, a peace officer has a break in service that extends beyond the one-year time period described in Mont. Code Ann. § 7-32-303(5)(a). The following dates are representative:

January 1, 2012:	The officer is appointed by the agency.
May 1, 2012:	The officer leaves employment.
January 1, 2013:	The one-year period expires and the officer has not returned to service.

This scenario is distinct from the first because the officer, having failed to complete the education requirements within one year of initial appointment, forfeits his or her position, authority and arrest powers pursuant to the **[*10]** last sentence of Mont. Code Ann. § 7-32-303(5)(a). As a result, the officer may not resume employment under the terms of his or her initial appointment. Rather, the appointing agency is statutorily required to terminate the officer's employment "for failure to meet the minimum standards established by the council." Montana Code Annotated 44-4-404.

[P13] To avoid this result, some agencies propose to start the one-year time period anew by rehiring or reappointing the person as a peace officer. This proposition runs afoul of legislative intent and the plain language of 7-32-303(5)(a), which requires completion of basic training within one year of the "initial" appointment, after which time the officer forfeits his or her position. By virtue of this requirement, the legislature has provided a single, one-year grace period during which time the officer may serve as a peace officer without the necessary training. Once the grace period expires, the officer is no longer privileged to serve in a law enforcement capacity. There is nothing that would allow an appointing agency to extend multiple grace periods, **[*11]** or allow the officer to continually serve as a peace officer without training.

[P14] As the administrator of the Montana Law Enforcement Academy (MLEA), I have publicly declared the need for qualified and highly trained law enforcement personnel. (<https://doj.mt.gov/mlea/basic-programs-3/>). Section 7-32-303(5)(a) promotes that goal, while at the same time granting some flexibility to appointing agencies and the officers in the hiring and training process. While I recognize there are legitimate reasons why a peace officer may require a break in service extending beyond the one-year deadline due to circumstances beyond his or her control, e.g., military service or health issues, I cannot condone an interpretation of the statute that compromises public or officer safety. I conclude that agencies are not entitled to "rehire" or "reappoint" peace officers if they have not successfully completed basic training within the time periods provided by law.

[P15] Despite my conclusion, there is nothing preventing the agency from employing the individual in some other capacity until he or she completes basic training. I understand that MLEA will accept individuals for training even **[*12]** if they are not in

a current appointed position as a peace officer. After training is successfully completed and the individual is certified by the POST council, he or she may resume the duties of a peace officer. In this respect, the one-year grace period is honored, the public safety objectives are fulfilled, and the individual's ability to work as a peace officer is inconvenienced but not totally compromised as a result of the break in service.

THEREFORE IT IS MY OPINION:

A peace officer who has a break in service during the one year time period provided in 7-32-303(5)(a) has the remainder of the one-year period, plus any additional time as granted by the public officer standards and training council, in which to attend and successfully complete a basic training course. If the break in service extends beyond one year from his or her initial appointment and the officer has not completed a basic training course within one year of the initial appointment as required by 7-32-303(5)(a), the officer forfeits his or her position as peace officer and cannot serve in that capacity until he or she attends and successfully completes a basic training course.

Load Date: 2014-10-29

ATTORNEY GENERAL
STATE OF MONTANA

Tim Fox
Attorney General



Department of Justice
215 North Sanders
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March 14, 2016

Sheriff Tony Harbaugh, Chair
Montana POST Council
2260 Sierra Road East
Helena, Montana 59602

Re: Attorney General Opinion Request: Waiver of Statutory Training Requirements

Dear Sheriff Harbaugh:

The Montana Public Safety Officer Standards & Training Council (POST) has requested an opinion regarding the following question:

Does the authority granted POST in Mont. Code Ann. § 44-4-403(2) to "waive or modify a qualification or training standard for good cause" give POST the power to waive a qualification or training standard imposed by statute?

The request was presented with a legal analysis. This letter is not a formal Attorney General Opinion, but rather is a "letter of advice." It is within the discretion of this office to issue such a letter if the questions posed can be answered by reference to an unambiguous statute or regulation. In this instance the question is answered by reference to statutes and regulations which specifically involve significant public safety interests.

As POST's legal counsel have advised, POST cannot modify or waive training requirements that are explicitly provided by statute. An agency, or in this case a board, is itself a creature of statute and has only the authority provided by statute. Absent explicit authority, then, a board does not unilaterally have the power to waive or otherwise alter a statutory requirement. See 47 Op. Att'y Gen. No. 22 (board must adopt rules regarding undue conflict, instead of determining on a case-by-case basis, where statute mandated adoption of standards for review).

Montana Code Annotated § 44-4-403 sets out the duties of POST. The Council shall "establish basic and advanced qualification and training standards for employment." 44-4-403(1)(a). Correspondingly, the Council "may waive or modify a qualification or

training standard for good cause.” 44-4-403(2). For purposes of statutory interpretation, a term used in a statutory provision should be assumed to have the same meaning throughout the provision unless explicitly stated otherwise. 49 Op. Att’y Gen. No. 15 (“identical words used in different parts of the same act are intended to have the same meaning”) (citing *Gustafson v. Alloyd*, 513 U.S. 561, 570 (1995)).

Here, then, POST’s ability to waive “a qualification or training standard” refers to the “qualification and training standards” established by POST as referenced in -403(1)(a). To read this provision as providing authority to waive training standards set by statute, not by POST, would require inserting what the Legislature has omitted, in violation of Mont. Code Ann. § 1-4-101.

This result is supported by Mont. Code Ann. § 1-3-204, which provides: “Any person may waive the advantage of a law intended solely for that person’s benefit. A law established for a public reason cannot be contravened by a private agreement.” This statute has been interpreted to mean that laws which are intended to *protect* the public in general cannot be waived privately by either implication or agreement. *Hoehne v. Sherrod, Inc.*, 205 Mont. 365, 369 (1983). See also *Shea v. North-Butte Mining Co.*, 55 Mont. 522, 179 P. 499 (1919), and *Lewis v. B&B Pawnbrokers, Inc.*, 1998 MT 302, 292 Mont. 82, 968 P.2d 1145.

Here, all statutorily prescribed training standards are established to promote public safety, and therefore “for a public reason.” Certifications are awarded by POST for the purpose of raising the level of professionalism and skill of public safety officers and to foster cooperation among the POST Council, agencies, organizations, and the public. Mont. Admin. R. 23.13.204(1). The certificates awarded are established for the purpose of promoting ethical behavior, professionalism, education and experience necessary to perform the duties of a public safety officer. *Id.* at (2). As such, POST’s own administrative rules require adherence to statutory training mandates. Mont. Admin. R. 23.13.201(1), under the heading “Minimum Standards”, states: “All public safety officers must be certified by POST and meet the applicable employment, education, and certification standards as prescribed by the Montana Code Annotated.”

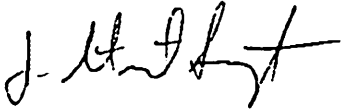
POST, therefore, may waive or modify qualification and training standards it has independently set under the authority provided by the Legislature, but may not waive or modify standards prescribed by statute. For example your letter discusses misdemeanor probation officers and misdemeanor pretrial services officers, both of which are required to “have the minimum training required in 46-23-1003.” Mont. Code Ann. §§ 46-9-505(5); 46-23-1005(2)(a). Section 46-23-1003(2) sets the qualification for probation and parole officers and requires “16 hours a year of training in subjects relating to the powers

Sheriff Tony Harbaugh, Chair
March 14, 2016
Page 3

and duties of probation officers, at least 1 hour of which must include training on serious mental illness and recovery from serious mental illness." POST cannot waive this requirement for misdemeanor officers. Section 46-23-1003(2) also requires "training in accordance with standards adopted by" POST. While the requirement to meet standards adopted by POST may not be waived, POST is provided discretion as to the specific standards to be adopted. POST could therefore adopt a curriculum for misdemeanor officers that, while meeting the hours of training requirements of § 46-23-1003(2), differs from the curriculum for felony probation and parole officers. This would have to be adopted by rule change though, not by individual waiver, to conform to the "adopted by" requirement.

Therefore, POST's analysis is correct. A statutory requirement cannot be waived by POST under Mont. Code Ann. § 44-4-403(2).

Very truly yours,

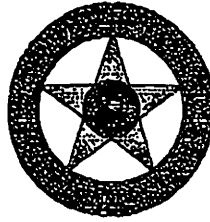


J. STUART SEGREST
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c: Tim Fox
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VOLUME NO. 56**OPINION NO. 2**

PUBLIC SAFETY OFFICERS - The definition of "agent" in Mont. Code Ann. § 44-2-111 does not restrict the persons that the Attorney General may appoint as agents to employees "within the department of justice";

STATUTORY CONSTRUCTION - Where statutory language is ambiguous, I must look outside of the plain language to determine the intent of the Legislature;

MONTANA CODE ANNOTATED - Title 44, chapter 1, part 1; sections 1-2-101, 1-2-102, 7-32-303, 44-2-111, 44-2-113, 44-2-115, 44-2-115(1), 44-2-115(2), 44-2-115(3), 44-2-115(5).

HELD: The definition of "agent" in Mont. Code Ann. § 44-2-111 does not restrict the persons that the Attorney General may appoint as agents to employees "within the department of justice."

July 1, 2016

Sheriff Tony Harbaugh, Chair
Montana POST Council
2260 Sierra Road East
Helena, MT 59602

Dear Sheriff Harbaugh:

[P1] The Montana Public Safety Officer Standards and Training Council (POST) has requested an Attorney General Opinion as to a question that I have rephrased as:

Does the definition of "agent" in Mont. Code Ann. § 44-2-111 restrict the persons that the Attorney General may appoint as agents to employees "within the department of justice"?¹

¹ Because I conclude that 44-2-111 does not restrict "agents" to employees within the Department of Justice (DOJ), I do not reach your second question regarding the authority of the Department to enter into a Memorandum of Authority (MOU) with the Department of Corrections (DOC) regarding DOC investigators.

Sheriff Tony Harbaugh
July 1, 2016
Page 2

[P2] Part 1 of Volume 44, Chapter 2, Montana Code Annotated, provides the Attorney General with the authority to appoint "agents." An agent appointed by the Attorney General "is a peace officer" and is provided the powers and duties (and limitations on those powers) in Mont. Code Ann. § 44-2-115.

[P3] At issue here is Mont. Code Ann. § 44-2-111 which defines "agent." This statute reads: "[a]s used in this part, 'agent' means a person appointed by the attorney general to conduct criminal investigations and perform related duties within the department of justice." Your letter questions whether the phrase "within the department of justice" qualifies "agent" and thereby limits an "agent" to DOJ employees only.

[P4] While 44-2-111 could be read to limit agents to DOJ employees, it is not the only way to read the sentence, grammatically speaking. "Within the department of justice" could be read to modify "related duties" but not "conduct criminal investigations." Under this reading an "agent" may be appointed from departments other than DOJ, but, if the agent is to "perform related duties" outside of conducting criminal investigations, these related duties must be within DOJ. An example of such a "related duty" is teaching at the Law Enforcement Academy. The instructors at the Academy are not actively conducting criminal investigations, but they are performing related duties within DOJ.

[P5] Because the statute is subject to more than one reasonable interpretation as to whether it limits an "agent" to employees of DOJ, it is ambiguous. I must therefore look outside the plain language of the definition to determine the meaning intended by the Legislature. See *State v. Johnston*, 2008 MT 318, ¶ 26, 346 Mont. 93, 193 P.3d 925 ("We resolve ambiguous terms, however, by looking to the structure, purpose and/or legislative history of a statute to determine the intent of the Legislature."). I also must consider statutory schemes "in their entirety and the legislative intent may not be gained from the wording of any particular section or sentence, but only from a consideration of the whole." *Friends of the Wild Swan v. Department of Natural Res. & Conservation*, 2005 MT 351, ¶ 16, 330 Mont. 186, 127 P.3d 394.

[P6] First, I note that 44-2-111 speaks to the "definition" of agent, not the "qualifications" of an agent. The Legislature listed the specific qualifications of agents in Mont. Code Ann. § 44-2-113: "a person qualified by experience, training, and high professional competence in criminal investigation. Each agent shall meet all the requirements of 7-32-303 (listing POST certification standards)." The Legislature could have expressly included "employed by the department of justice" or similar language as a qualification, but did not do so. This weighs against reading such a limitation into the definition. See Mont. Code Ann. § 1-2-101 (an interpretation of a statute should not "insert what has been omitted or . . . omit what has been inserted."). Additionally, as

Sheriff Tony Harbaugh
July 1, 2016
Page 3

44-2-113 is the more particular provision regarding qualifications, it should control. Mont. Code Ann. § 1-2-102.

[P7] Importantly, for ten years or more, beginning under former Attorney General McGrath, DOJ has maintained an MOU with DOC designating DOC employees as investigators so that these employees may conduct criminal investigations within DOC prison and treatment facilities. As such, three Attorneys General, myself included, have implicitly acknowledged that agents may be appointed by the Attorney General in departments other than DOJ. The DOC agents subject to the MOU are essential to conducting investigations within DOC facilities, because local law enforcement often does not have the time or resources to investigate all alleged crimes within these facilities. This long-standing, consistent interpretation is entitled to "respectful consideration." *Friends of the Wild Swan*, ¶ 11 (granting DNRC, "as a state agency . . . respectful consideration of its long and continued course of consistent interpretation of a statute") (citation and internal quotations omitted).

[P8] Additionally, I understand from DOC that a prior Legislature was informed of the MOU between DOJ and DOC, and then opted not to pass legislation designating DOC investigators as "peace officers," preferring instead the additional oversight provided by the MOU. Thus the Legislature, despite having knowledge of the use of this statute to appoint non-DOJ agents, has not taken steps to change the law but instead relied on the MOU. The Legislature's inaction in light of knowledge of the MOU weighs in favor of an interpretation that does not limit agents to DOJ employees. See *Swanson v. Hartford Ins.*, 2002 MT 81, ¶ 22, 309 Mont. 269, 46 P.2d 584 ("We presume that if the legislature disagreed with our interpretation . . . it would have amended the statute accordingly.") (internal citation and quotation marks omitted).

[P9] On the other hand the lists of powers and duties under Mont. Code Ann. § 44-2-115 seem tailored toward DOJ criminal investigators. For example, the agent "shall provide investigative assistance" to federal, state and local agencies "at their request in accordance with rules adopted by" DOJ. 44-2-115(1). The only "concurrent jurisdiction" expressly granted is the investigation of "offenses involving dangerous drugs [and] organized criminal activity," -115(2), and the section also speaks to investigating gambling and workers' compensation fraud. -115(3), (5).

[P10] The majority of agents appointed by the Attorney General will, of course, work within DOJ. It thus makes sense that the powers and duties section refers primarily to the type of work performed by DOJ agents. The listed duties do not apply to all agents within DOJ, however. Not all agents, for example, "investigate gambling activities" or workers' compensation fraud. -115(3), (5). Thus the listed duties cannot be read as

Sheriff Tony Harbaugh
July 1, 2016
Page 4

mandatory for all agents. Though primarily directed at DOJ agents, this list of powers and duties could be intended to place limits on the authority of non-DOJ agents as well. A non-DOJ agent, for example, would be able to provide "investigative assistance" to local law enforcement agencies, but only at the request of a local agency and "in accordance with rules adopted by" DOJ.

[P11] Looking at the statute and Part 1 as a whole, and considering the history of agency interpretation and inaction by the Legislature, my opinion is that the phrase "within the department of justice" in Mont. Code Ann. § 44-2-111 is not intended to limit the definition of "agent" to DOJ employees only. A person "qualified by experience, training, and high professional competence in criminal investigation," Mont. Code Ann. § 44-2-113, may be appointed as an "agent" by the Attorney General, even if he works for a state agency other than DOJ.²

THEREFORE, IT IS MY OPINION:

The definition of "agent" in Mont. Code Ann. § 44-2-111 does not restrict the persons that the Attorney General may appoint as agents to employees "within the department of justice."

Sincerely,



TIMOTHY C. FOX
Attorney General

tcf/jss/jym

² It is unnecessary in this opinion to address whether "agent" is limited to state employees. However, I note that Mont. Code Ann. § 44-2-114 requires all agents to "be covered by the public employees' retirement system."

ATTORNEY GENERAL
STATE OF MONTANA

Tim Fox
Attorney General



Department of Justice
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June 19, 2019

Tony Harbaugh
Montana POST Council
2260 Sierra Road East
Helena, MT 59602

RECEIVED

JUN 21 2019

MT POST Council

Re: Request for Opinion: Training Standards for Misdemeanor and Pretrial Services Officers

Dear Sheriff Harbaugh:

By letter dated June 4, 2019, you requested an Attorney General Opinion for the question:

Can the POST Council provide different training standards for misdemeanor probation officers [officers] and pretrial services officers than that required for felony probation officers?

A legal research memorandum was enclosed with that request. On June 13 we received an email from your office explaining the urgency of resolving this question. Fortunately, in this instance we can accommodate that urgency through prior correspondence between POST and this office.

The question quoted above is substantially similar to a previous POST question which resulted in a letter of advice dated March 14, 2016. The analysis that your office provided on June 4, 2019 is consistent with our 2016 analysis. We therefore refer you and the other interested agencies to the 2016 letter of advice (copy enclosed). Specifically, please review the highlighted paragraph at pp. 2-3 thereof.

Very truly yours,

PATRICK M. RISKEN
Assistant Attorney General

encl.

cc: Jon Bennion

TELEPHONE: (406) 444-2026 FAX: (406) 444-3549 E-MAIL: contactdoj@mt.gov WEB: mtdoj.gov

MONTANA DEPARTMENT OF JUSTICE

Legal Services Division ★ Division of Criminal Investigation ★ Highway Patrol Division ★ Forensic Science Division
Gambling Control Division ★ Motor Vehicle Division ★ Information Technology Services Division ★ Central Services Division

ATTORNEY GENERAL
STATE OF MONTANA

Tim Fox
Attorney General



Department of Justice
215 North Sanders
PO Box 201401
Helena, MT 59620-1401

March 14, 2016

Sheriff Tony Harbaugh, Chair
Montana POST Council
2260 Sierra Road East
Helena, Montana 59602

Re: Attorney General Opinion Request: Waiver of Statutory Training Requirements

Dear Sheriff Harbaugh:

The Montana Public Safety Officer Standards & Training Council (POST) has requested an opinion regarding the following question:

Does the authority granted POST in Mont. Code Ann. § 44-4-403(2) to "waive or modify a qualification or training standard for good cause" give POST the power to waive a qualification or training standard imposed by statute?

The request was presented with a legal analysis. This letter is not a formal Attorney General Opinion, but rather is a "letter of advice." It is within the discretion of this office to issue such a letter if the questions posed can be answered by reference to an unambiguous statute or regulation. In this instance the question is answered by reference to statutes and regulations which specifically involve significant public safety interests.

As POST's legal counsel have advised, POST cannot modify or waive training requirements that are explicitly provided by statute. An agency, or in this case a board, is itself a creature of statute and has only the authority provided by statute. Absent explicit authority, then, a board does not unilaterally have the power to waive or otherwise alter a statutory requirement. *See* 47 Op. Att'y Gen. No. 22 (board must adopt rules regarding undue conflict, instead of determining on a case-by-case basis, where statute mandated adoption of standards for review).

Montana Code Annotated § 44-4-403 sets out the duties of POST. The Council shall "establish basic and advanced qualification and training standards for employment." 44-4-403(1)(a). Correspondingly, the Council "may waive or modify a qualification or

training standard for good cause.” 44-4-403(2). For purposes of statutory interpretation, a term used in a statutory provision should be assumed to have the same meaning throughout the provision unless explicitly stated otherwise. 49 Op. Att’y Gen. No. 15 (“identical words used in different parts of the same act are intended to have the same meaning”) (citing *Gustafson v. Alloyd*, 513 U.S. 561, 570 (1995)).

Here, then, POST’s ability to waive “a qualification or training standard” refers to the “qualification and training standards” established by POST as referenced in -403(1)(a). To read this provision as providing authority to waive training standards set by statute, not by POST, would require inserting what the Legislature has omitted, in violation of Mont. Code. Ann. § 1-4-101.

This result is supported by Mont. Code Ann. § 1-3-204, which provides: “Any person may waive the advantage of a law intended solely for that person’s benefit. A law established for a public reason cannot be contravened by a private agreement.” This statute has been interpreted to mean that laws which are intended to *protect* the public in general cannot be waived privately by either implication or agreement. *Hoehne v. Sherrod, Inc.*, 205 Mont. 365, 369 (1983). See also *Shea v. North-Butte Mining Co.*, 55 Mont. 522, 179 P. 499 (1919), and *Lewis v. B&B Pawnbrokers, Inc.*, 1998 MT 302, 292 Mont. 82, 968 P.2d 1145.

Here, all statutorily prescribed training standards are established to promote public safety, and therefore “for a public reason.” Certifications are awarded by POST for the purpose of raising the level of professionalism and skill of public safety officers and to foster cooperation among the POST Council, agencies, organizations, and the public. Mont. Admin. R. 23.13.204(1). The certificates awarded are established for the purpose of promoting ethical behavior, professionalism, education and experience necessary to perform the duties of a public safety officer. *Id.* at (2). As such, POST’s own administrative rules require adherence to statutory training mandates. Mont. Admin. R. 23.13.201(1), under the heading “Minimum Standards”, states: “All public safety officers must be certified by POST and meet the applicable employment, education, and certification standards as prescribed by the Montana Code Annotated.”

POST, therefore, may waive or modify qualification and training standards it has independently set under the authority provided by the Legislature, but may not waive or modify standards prescribed by statute. For example your letter discusses misdemeanor probation officers and misdemeanor pretrial services officers, both of which are required to “have the minimum training required in 46-23-1003.” Mont. Code Ann. §§ 46-9-505(5); 46-23-1005(2)(a). Section 46-23-1003(2) sets the qualification for probation and parole officers and requires “16 hours a year of training in subjects relating to the powers

Sheriff Tony Harbaugh, Chair
March 14, 2016
Page 3

and duties of probation officers, at least 1 hour of which must include training on serious mental illness and recovery from serious mental illness." POST cannot waive this requirement for misdemeanor officers. Section 46-23-1003(2) also requires "training in accordance with standards adopted by" POST. While the requirement to meet standards adopted by POST may not be waived, POST is provided discretion as to the specific standards to be adopted. POST could therefore adopt a curriculum for misdemeanor officers that, while meeting the hours of training requirements of § 46-23-1003(2), differs from the curriculum for felony probation and parole officers. This would have to be adopted by rule change though, not by individual waiver, to conform to the "adopted by" requirement.

Therefore, POST's analysis is correct. A statutory requirement cannot be waived by POST under Mont. Code Ann. § 44-4-403(2).

Very truly yours,



J. STUART SEGREST
Assistant Attorney General

c: Tim Fox
Alan Joscelyn
Jon Bennion
Pat Risken

ATTORNEY GENERAL
STATE OF MONTANA

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DEC 12 2019

MT POST Council

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December 11, 2019

Tony Harbaugh
POST Council
2260 Sierra Road East
Helena, MT 59602

Re: Request for Opinion

Dear Mr. Harbaugh:

You have requested an Attorney General Opinion regarding certification by the Montana Public Safety Officers Standards and Training Council (POST) of tribal detention and corrections officers, namely:

Are tribal detention and corrections officers "public safety officers" requiring certification by POST?

Because the analysis involves references to unambiguous statutes, an Attorney General Opinion is not warranted under Mont. Code Ann. § 2 15-501(7). We have determined that your question can be answered with a letter of advice, which is not a formal Attorney General Opinion and should not be presented as such.

Under Mont. Code Ann. § 44-4-403(1)(c), POST must "provide for the certification or recertification of public safety officers and for the suspension or revocation of certification of public safety officers." A "public safety officer" is defined at Mont. Code Ann. § 44-4-401(2).

A tribal detention or corrections officer meets none of the statutory definitions and is not a "person required by law to meet the qualification or training standards established by the council."

Because a tribal detention or corrections officer is not a "public safety officer," POST is not required to provide certification under Mont. Code Ann. § 44-4-403(c).

Again, this letter is a letter of advice and not a formal Opinion of the Attorney General.

Sincerely,

Hannah Tokerud
Assistant Attorney General

Reviewed by

Perry Johnson 12-12-19
1 page

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December 11, 2019

Tony Harbaugh
POST Council
2260 Sierra Road East
Helena, MT 59602

Re: Request for Opinion

Dear Mr. Harbaugh:

You have requested an Attorney General Opinion regarding the Montana Public Safety Officers Standards and Training Council's (POST) advanced coroner course, namely:

- Does the POST Council have authority to set forth ARMs specifying the definition of the time allowed for coroners to conduct their 16-hour advanced coroner course?
- If POST does not have such authority, does the current statutory requirement that a coroner complete an advanced course every two years mean every two calendar years or every two years from when the previous course is completed?

Because the analysis involves references to unambiguous statutes, an Attorney General Opinion is not warranted under Mont. Code Ann. § 2-15-501(7). We have determined that your question can be answered with a letter of advice, which is not a formal Attorney General Opinion and should not be presented as such. Your two questions are addressed in turn.

1. Rulemaking authority.

Mont. Code Ann. § 7-4-2905(2)(b) states:

The council shall annually conduct a 16-hour advanced coroner course. Unless there are exigent circumstances, failure of any coroner or deputy coroner to satisfactorily complete the advanced coroner course, or an

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2 pages

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equivalent course approved by the council, at least once every 2 years results in forfeiture of office. The council may adopt rules providing a procedure to extend the 2-year period because of exigent circumstances.

Administrative rules may not conflict with statute and may not unnecessarily repeat statutory language. Mont. Code Ann. § 2-4-305(2) & (6). Mont. Code Ann. § 7-4-2905(2)(b) adequately sets forth the time requirements to complete the advanced coroner course (*i.e.*, two years). If POST were to adopt an administrative rule requiring training every two years, it would be duplicative. Alternatively, if POST were to adopt an administrative rule requiring training between periods of anything other than two years, it would conflict with the statute. There is no need or reason for an additional rule.

POST is, however, authorized to establish rules creating a procedure to extend the two-year period requirement under exigent circumstances. *See* Mont. Code Ann. § 7-4-2905(2)(b). While this does not authorize POST to establish the general rule of how often training must occur, it does allow it to define the exception to the rule for individuals experiencing these exigent circumstances.

2. Definition of two years.

Unless the context requires otherwise, a year in Montana statute is defined as “a calendar year.” Mont. Code Ann. § 1-1-301; *see also Bosch v. Town Pump, Inc.*, 2004 MT 330, ¶ 9, 324 Mont. 138, 14 102 P.3d 32, 34 (“a one-year period is calculated as starting on a given day and ending on the date one day prior to the start day in the next calendar year. For example, a one-year limitations period beginning with a start date of November 16, 1994, ends on November 15, 1995.”). The start of the period excludes the day of the triggering event. *Cf. Kessel v. Liberty Northwest Ins. Corp.*, 2007 MT 305, ¶ 14, 340 Mont. 92, 172 P.3d 599 (“a limitations period is calculated by excluding the day of the event which gives rise to the claim.”). In this instance, if a coroner completed a two advanced day coroner course on October 9–10, 2019, they would have to complete their next advanced corner course by October 10, 2021.

Again, this letter is a letter of advice and not a formal Opinion of the Attorney General.

Sincerely,


JEREMIAH LANGSTON
Assistant Attorney General