VOLUME NO. 51 OPINION NO. 11

CONTRACTS - When alteration is permissible;
COUNTIES - Group health plans; payments to employees in lieu of participation;
COUNTY OFFICERS AND EMPLOYEES - Group health plans; payments to employees in lieu of participation; collective bargaining agreements;
EMPLOYEES, PUBLIC - Group Health Insurance; collective bargaining agreements;
INSURANCE - Group health insurance for public employees;
LABOR RELATIONS - Employment contracts; collective bargaining agreements;
STATUTORY CONSTRUCTION - Determining legislative intent;
MONTANA CODE ANNOTATED - Title 39, chapter 31; sections 1-2-101, -102, 2-18-701 to -711, -702, -703(2), 7-5-2101, -2107, 28-2-702, -904, -1601, -1602, 39-2-101, -904(1)(c), 39-31-306(3);
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 79 (1990).

HELD:

1. A board of county commissioners, in the exercise of its general authority to manage the business of the county and to set compensation for its employees, may offer payment to county employees in lieu of an employee's participation in a group health insurance plan.

2. Where an existing term of the collective bargaining agreement is a provision for payments in lieu of participation in a group health care insurance plan, that portion of the agreement may not be altered by the board of county commissioners without the written agreement of the collective bargaining unit.

3. For a non-union employee, the board may only terminate payments in lieu of participation if the termination is consistent with the employment agreement with the employee.

December 12, 2005

Mr. George H. Corn
Ravalli County Attorney
County Courthouse
205 Bedford Street, Suite C
Hamilton, Montana 59840

Dear Mr. Corn:

You have requested my opinion on a number of questions concerning the legality of payments offered to Ravalli County employees "in lieu of" participation by the employee in a group health insurance plan. Specifically you have asked the following:

1. May a board of county commissioners offer payments to county employees "in lieu of" group health insurance contributions?

2. If "in lieu of" payments are offered as part of a collective bargaining agreement, can those payments be discontinued by vote of the board of county commissioners?

3. If a non-union employee is promised "in lieu of" payments at the time of hire, when can those payments be discontinued?

The current policy of Ravalli County provides county employees with the option of accepting payments in lieu of participation in the group health insurance program provided through county employment. This policy is defined in the Ravalli County Personnel Policy Manual at Article IX, Section 11.0 Group Health Insurance. This section specifies the following:

> Alternative Use of County Contribution: Any employee eligible to receive the county insurance contribution, or any portion thereof, and who elects to sign the waiver of participation in the insurance program, may elect to receive $150.00 per month, or the applicable portion. This amount may be added to the monthly earnings (less taxes and deductions), or become a participant in one of the approved Deferred Compensation Plans and have the monies deposited into that program.
>
> The $150 payment in lieu of insurance program participation is not part of the monthly earnings and is not subject to increase by the annual certified COLA.

> Any employee who initially elects not to participate in the insurance program, and in a later year elects to participate in the insurance, must realize that the $150 will no longer be available to add to either earnings or the Deferred compensation Plan.

I understand that 55 county employees now accept payments in lieu of health insurance and that the present monthly payment is $250. This is either added to the employee's taxable income or contributed to a deferred compensation plan.

1. May a board of county commissioners offer payments to county employees "in lieu of" group health insurance contributions?

In any areas not expressly addressed by law, the board of county commissioners has been given broad statutory authority to represent the county and manage the business and the concerns of the county. Mont. Code Ann. § 7-5-2101 describes this authority:

> (1) The board of county commissioners has jurisdiction and power, under such limitations and restrictions as are prescribed by law, to represent the county and have the care of the county property and the management of the business and concerns of the county in all cases where no other provision is made by law.
>
> (2) The board has jurisdiction and power, under such limitations and restrictions as are prescribed by law, to perform all other acts and things required by law not enumerated in this title or which may be necessary to the full discharge of the duties of the chief executive authority of the county government.

Within the context of the extensive general authority of the board, Montana law makes specific provision for the employment of personnel by the board of county commissioners and the fixing of employee salaries. Mont. Code Ann. § 7-5-2107.

While most compensation issues are left wholly within the authority of the board, the legislature has imposed some restrictions and requirements in the area of group insurance for all public employees. These are found at Mont. Code Ann. §§ 2-18-701 to -711. Mont. Code Ann § 2-18-702 states that, with certain exceptions, "all counties, cities, towns, school districts and the board of regents shall upon approval by two-thirds vote of their respective officers and employees enter into group hospitalization, medical, health . . . contracts or plans for the benefit of their officers and employees and their dependents."

These sections specify several requirements that are imposed upon the group insurance plans of all public employees of the state. Others are imposed solely upon state employees and state-sponsored plans. One such restriction addresses payments in lieu of participation in a group health plan. For reasons that are not apparent from the text of the statute, the legislature prohibited payment to a state employee in lieu of participation in a group health plan: "An employee who elects not to be covered by a state-sponsored group benefit plan may not receive the state contribution." Mont. Code Ann. § 2-18-703(2). This limitation is imposed only upon those covered by a state-sponsored plan and not upon all public employees. The statute does not prohibit payments to other public employees in lieu of participation in the group plan. I have found no other statute, appellate case or other authority that would prevent a board of county commissioners from making such payments if it elected to do so.

Two fundamental principles of statutory interpretation assist in the analysis of the question presented. First, "In the construction of a statute, the intention of the legislature is to be pursued if possible." Mont. Code Ann. § 1-2-102. Our Supreme Court has held that "[i]f possible, legislative intent must be inferred from the plain meaning of the words contained in statutes; only if there exists ambiguity in such wording should the court resort to the rules of statutory construction." Sink v. School Dist. No. 6, 199 Mont. 352, 360, 649 P.2d 1263, 1267 (1982).

Second, "[i]n the construction of a statute, 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. § 1-2-101.

Applying these principles leads to the conclusion that the county's policy is permissible. The legislature has expressed its intention with regard to payments in lieu of participation with reference to state sponsored plans. Payments to employees in lieu of participation in a state sponsored plan are expressly prohibited. The legislature has expressed no intention on the subject insofar as other public employees are concerned. Since it is not the office of the interpreter of a statute to insert language, terms or conditions that have been omitted, no legislative intent to prevent payments to other public employees may be inferred.

2. If "in lieu of" payments are offered as part of a collective bargaining agreement, can those payments be discontinued by vote of the board of county commissioners?

I understand that Ravalli County has union employees represented by several bargaining units. Each unit is covered by a separate contract resulting from the collective bargaining

process. Each contract allows an employee to decline the health insurance provided by the county. In such case the contract specifies that the employee will be entitled to a payment in lieu of the county health insurance contribution. You have asked if the payment can be unilaterally discontinued by vote of the board of county commissioners.

Public employees have a right to bargain collectively that is recognized by statute. The general provisions of collective bargaining for public employees are set forth in statute at Mont. Code Ann. tit. 39, ch. 31. The right to bargain collectively necessarily includes the right to enter into binding contracts with public employers. When a written collective bargaining agreement between a public employer and a labor representative is adopted pursuant to statute, the agreement "must be valid and enforced under its terms . . . ." Mont. Code Ann. § 39-31-306(3).

Traditional contract law applies to the modification of a collective bargaining agreement and generally will forbid the unilateral modification of the agreement. Our code addresses when a written contract may be modified: "A contract in writing may be altered by a contract in writing or by an executed oral agreement, <u>and not otherwise</u>." Mont. Code Ann. § 28-2-1602. (Emphasis added.)

In 1990, Attorney General Racicot issued an opinion that is closely related to the issue you have raised. The question related to a school district where some employees were represented by a collective bargaining unit and others were not. Several employees asked the board to change health insurance carriers. The collective bargaining agreement precluded the change without the consent of the union. The school district asked if it could change carriers without the agreement of the union. The opinion concluded that it could not. "A governing body . . . cannot ordinarily change existing terms and conditions of employment for represented employees without consent of those employees' collective bargaining unit . . . ." 43 Op. Att'y Gen. No. 79 at 5 (1990).

Once the parties have executed a collective bargaining agreement, each is bound by the terms of the agreement and neither may alter the terms absent a new written agreement. Where an existing term of the collective bargaining agreement is a provision for payments in lieu of participation in the group health care insurance plan, that portion of the agreement may not be altered by the board of county commissioners without the written agreement of the collective bargaining unit.

3. If a non-union employee is promised "in lieu of" payments at the time of hire, when can those payments be discontinued?

The answer to this question depends upon the nature of the "promise," or terms of the employment agreement, as evaluated under standard principles of contract and employment law. If the employee has a written contract, then anything affecting the employee's benefits is governed by the terms of the written agreement unless it has been subsequently modified. Mont. Code Ann. §§ 28-2-904, 28-2-1602. The applicable principles are the same if the employment agreement is oral.

Employment is defined by statute. "The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person." Mont. Code Ann. § 39-2-101. As a contract, an employment agreement is subject to the law applicable to contracts generally. The parties may mutually agree to terms that are not prohibited by law or do not otherwise violate the public policy of the state. Mont. Code Ann. § 28-2-702. Once the parties form a binding contract, whether oral or in writing, the contract may ordinarily be modified only by agreement of the parties. Mont. Code Ann. §§ 28-2-1601, -1602.

The content of a contract is generally a question of fact, and resolution of factual issues is beyond the proper scope of an opinion of this office. However, a number of potentially relevant factors can be identified. Among them are the nature and duration of any promises made at the time of hiring. The existence of a personnel policy manual may also have an impact on the respective rights of the parties to an employment agreement.

The Ravalli County personnel policy manual asserts that "none of the provisions shall be deemed to create a contractual right in any employee nor to limit the power of the Board of County Commissioners . . . to repeal or modify these rules." Ravalli County Personnel Policy, Section 2.0, scope. In this regard it is similar to many other manuals. Yet our Wrongful Discharge from Employment statute expressly recognizes that a violation of an employer's written personnel policy may form the basis of a wrongful discharge claim. Mont. Code Ann. § 39-2-904(1)(c). See also Buck v. Billings Mont. Chevrolet, 248 Mont. 276, 811 P.2d 537 (1991). The Montana Supreme Court has also suggested that a policy manual may become a contract term if its terms were bargained for and a part of the "meeting of the minds" over the terms of employment. Gates v. Life of Montana Ins. Co., 196 Mont. 178, 183, 638 P.2d 1063, 1066 (1982).

Each employment agreement will present unique facts affecting the answer to this question. The county's unilateral right to terminate payments in lieu of participation for

non-union employees will depend upon the specific terms of each individual employment agreement. The county must honor those terms and may unilaterally terminate these payments only if termination is permitted under the terms of the employment agreement.

THEREFORE, IT IS MY OPINION:

1. A board of county commissioners, in the exercise of its general authority to manage the business of the county and to set compensation for its employees, may offer payment to county employees in lieu of an employee's participation in a group health insurance plan.

2. Where an existing term of the collective bargaining agreement is a provision for payments in lieu of participation in a group health care insurance plan, that portion of the agreement may not be altered by the board of county commissioners without the written agreement of the collective bargaining unit.

3. For a non-union employee, the board may only terminate payments in lieu of participation if the termination is consistent with the employment agreement with the employee.

Very truly yours,

MIKE McGRATH
Attorney General

mm/je/jym