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STATE OF ALABAMA  
OFFICE OF THE ATTORNEY GENERAL

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Honorable John Mark Tirey  
Sheriff of Walker County  
2001 2nd Avenue  
Jasper, Alabama 35501

Sheriffs – Compensation – Salaries –  
Statute of Limitations – Back Pay – Cost-  
of-Living Raises

Any cost-of-living adjustments applicable to the Sheriff of Walker County, effective during the sheriff's term, should not be added to his salary until the beginning of his next term of office.

The statute of limitations for back pay is two years.

The county commission should withhold the statutory six percent contribution from any back pay owed the sheriff and calculate the sheriff's supernumerary benefit based upon the correct salary.

Back pay to the sheriff should include fringe benefits associated therewith.

The county commission is not obligated to pay the sheriff interest on any back pay that may be due.

The county commission and sheriff should cooperate in determining payment terms on any back pay owed the sheriff.

Dear Sheriff Tirey:

This opinion of the Attorney General is issued in response to your request.

QUESTION 1

If the Walker County Commission has underpaid the sheriff, how should the back pay be calculated?

FACTS AND ANALYSIS

Pursuant to local act, the compensation paid to the Walker County Sheriff is tied to that of the circuit clerk so that “the sheriff receives the same salary as a circuit clerk would receive based on the same amount of service as calculated per annum pursuant to Act 98-301 [relating to circuit clerks]. . . .” 1999 Ala. Acts No. 99-309, 420. Act 99-309 became effective September 1, 1999. *Id.* According to your request, there have been several legislatively mandated cost-of-living salary adjustments for state employees resulting in corresponding increases to the compensation due the circuit clerk. You indicate, however, that the county commission has failed to apply these adjustments to your salary, resulting in the county commission owing you back pay. This opinion makes no specific determination as to whether the sheriff is due back pay.

In additional information provided, you indicate that you first took office in January 1995. Further, you have been reelected four times with your respective terms beginning January 1999, January 2003, January 2007, and January 2011.

Since the enactment of Act 99-309, there have been five legislative cost-of-living adjustments.

- Act 2000-611 (2 percent beginning October 1, 2000, and 2 percent beginning October 1, 2001). 2000 Ala. Acts 2000-611, 1224 (codified in sections 36-6-60 to 36-6-64 of the Code of Alabama);
- Act 2002-392 (3 percent beginning October 1, 2002). 2002 Ala. Acts 2002-611, 984 (codified in sections 36-6-80 through 36-6-83);
- Act 2005-316 (6 percent beginning October 1, 2005). 2005 Ala. Acts 2005-316, 766 (codified in sections 36-6-90 to 36-6-92);
- Act 2006-421 (5 percent beginning October 1, 2006). 2006 Ala. Acts 2006-421, 1046 (codified in sections 36-6-100 to 36-6-102);

- Act 2007-297 (3.5 percent beginning October 1, 2007, and 3.5 percent beginning October 1, 2008). 2007 Ala. Acts 297, 535 (codified in sections 36-6-110 to 36-6-113).

In calculating back pay, consideration should be given to two overriding principles. First, section 68, section 281, and Amendment 92 of the Constitution of Alabama “carry inhibitions against a salary increase of an officer during his term of office.” Opinion to Honorable John Robinson, House of Representatives, dated November 27, 2007, A.G. No 2008-016, *quoting Pruett v. Patton*, 288 Ala. 710, 712, 265 So. 2d 130, 131 (1972). If any cost-of-living adjustments became effective during a term of your office, those increases should not have been added to your salary until the beginning of the following term of office.

Secondly, this Office has previously determined that “[c]laims for salary or compensation are in the nature of a contract and would be subject to the six year statute of limitations found in § 6-2-34.” Opinion to Honorable Ashley Rich, Mobile County District Attorney, dated September 23, 2011, A.G. No. 2011-102, *quoting* opinion to James L. Martin, Barbour County Attorney, dated March 8, 1983, A.G. No. 83-00220. This Office has consistently applied this principle to various county officers. See, *e.g.*, the following opinions:

- Honorable Floyd Hambrick, Jr., Jackson County Judge of Probate, dated September 20, 2000, A.G. No. 2000-238 (probate judge);
- Honorable Tom Sowa, Attorney, Calhoun County Commission, dated October 7, 1994, A.G. No. 95-00005 (circuit clerk);
- Honorable James D. Hughston, Attorney at Law, dated October 9, 1990, A.G. No. 91-00017 (tax collector, circuit clerk, and district judge);
- Honorable Sam Collins, Judge of Probate, Fayette County Commission, dated December 9, 1980, A.G. No. 81-00114 (registrar);
- Honorable John H. Jackson, Jr., Attorney, Chilton County Commission, dated December 6, 1979, A.G. No. 80-00112 (commission chairman).

It should be noted, however, that in determining the applicability of the six-year statute of limitations to claims for back pay, this Office has relied on the case of *Kirkland v. Jefferson County*, 244 Ala. 69, 12 So. 2d 347 (Ala. 1943). *Kirkland* dealt with the claim of a deputy sheriff who alleged that the county owed him back pay.

In affirming the determination of the trial court that the claim was barred by the applicable six-year statute of limitations, the Court said, “[a]nd § 21 [of Title 7 of the Code of Alabama (1940)] provides: ‘The following must be commenced within six years: \* \* \* Actions upon any simple contract or specialty, not herein specifically enumerated.’” *Id.* at 348 (emphasis in original). Section 21 of Title 7 of the 1940 Code, upon which *Kirkland* relied, remains in the current Code of Alabama. ALA. CODE § 6-2-34(9) (2005). Additionally, *Kirkland* has not been specifically overturned.

More recent authority, however, has determined that “claims arising out of the employment relationship between a government entity and its employees are not contract claims.” *State Pers. Bd. v. Akers*, 797 So. 2d 422, 425 (Ala. 2000); *Whitlow v. City of Birmingham*, 689 So. 2d 107, 108 (Ala. Civ. App. 1996).

With respect to a claim of a deputy sheriff for wrongful termination, the Alabama Supreme Court has specifically determined that the six-year period of limitations was inapplicable because the claims alleged were “Ex delicto,” arising from a duty either growing out of the relationship of the parties or imposed by law, rather than “Ex contractu,” resulting from a breach of promise. *Jefferson County v. Reach*, 368 So. 2d 250, 252 (Ala. 1978). “Ex contractu” means “arising from a contract.” BLACK’S LAW DICTIONARY 884 (9th ed. 2009).

Further, section 6-2-38(m) of the Code states that “[a]ll actions for the recovery of wages, overtime, damages, fees, or penalties accruing under laws respecting the payment of wages, overtime, damages, fees, and penalties must be brought within two years.” ALA. CODE § 6-2-38(m) (2005). *See also, Jefferson County v. Birchfield*, 2090257, 2011 WL 2420886 (Ala. Civ. App. June 17, 2011) (holding that cost-of-living adjustments constitute wages for purposes of section 6-2-38(m) barring chief deputy tax assessor from recovery for periods more than two years prior to filing action).

Because Alabama’s appellate courts have apparently abandoned the contract theory embraced by *Kirkland* and the attendant six-year statute of limitations, this Office must also conclude that the statute of limitations for back pay due a public employee is now two years. The following opinions are hereby modified accordingly:

- Honorable Jay Ross, Mobile County Attorney, dated September 23, 2011, A.G. No. 2011-103;
- Honorable Ashley Rich, Mobile County District Attorney, dated September 23, 2011, A.G. No. 2011-102;

- Honorable Floyd Hambrick, Jr., Jackson County Judge of Probate, dated September 20, 2000, A.G. No. 2000-238;
- Honorable Tom Sowa, Attorney, Calhoun County Commission, dated October 7, 1994, A.G. No. 95-00005;
- Honorable James D. Hughston, Attorney at Law, dated October 9, 1990, A.G. No. 91-00017;
- James L. Martin, Barbour County Attorney, dated March 8, 1983, A.G. No. 83-00220;
- Honorable Sam Collins, Judge of Probate, Fayette County Commission, dated December 9, 1980, A.G. No. 81-00114;
- Honorable John H. Jackson, Jr., Attorney, Chilton County Commission, dated December 6, 1979, A.G. No. 80-00112.

This Office has been informed that salary schedules reflecting each cost-of-living adjustment for circuit clerks are available through the Administrative Office of Courts. To calculate the back pay, copies of these schedules should be obtained and the appropriate schedule applied to the appropriate term of office.

For instance, for your term of office that began in January 2007, the pay schedule applicable to circuit clerks in January 2007 would govern your salary throughout that term. The cost-of-living adjustments effective in October 2007 and October 2008 would not be applicable to your salary until the beginning of your next term, January 2011.

#### CONCLUSION

Any cost-of-living adjustments applicable to the Sheriff of Walker County that are effective during the sheriff's term should not be added to his salary until the beginning of his next term of office.

The statute of limitations for back pay is two years.

QUESTION 2

Would the Walker County Commission owe retirement, employee benefits, and interest on the back pay?

FACTS AND ANALYSIS

Retirement

According to information you have provided this Office, you participate in the supernumerary sheriffs' plan. *See* ALA. CODE §§ 36-22-60 to 36-22-65 (2001). The Code requires the county commission to withhold six percent from any salary payable to you. ALA. CODE § 36-22-61 (2001). Upon receipt of the back pay and the corresponding withholding of the statutory six percent, your future supernumerary benefit should be calculated based upon your correct salary applying the principles set forth above. Opinion to Honorable Wayne Gruenloh, Baldwin County Commission, dated January 5, 2007, A.G. No. 2007-029.

Benefits

Generally, an award of back pay includes fringe benefits associated therewith. *Whitlow*, 689 So. 2d at 109. This Office is unaware, however, of any fringe benefits that you have not already received. Of course, the county commission should withhold from any sums due you appropriate taxes and remit same, along with the county's share of employment taxes, i.e. FICA, to the appropriate taxing authority.

Interest

Section 8-8-8 of the Code of Alabama states as follows:

All contracts, express or implied, for the payment of money, or other thing, or for the performance of any act or duty bear interest from the day such money, or thing, estimating it at its money value, should have been paid, or such act, estimating the compensation therefor in money, performed.

ALA. CODE § 8-8-8 (2002).

In applying this statute, "[t]hree general rules have been laid out for determining the allowance of interest in Alabama: (1) the amount due must be

certain; (2) the time when it is due must be certain; (3) *the amount due and time of payment must be known to the debtor.*” *Wood v. Cent. Bank of the S.*, 435 So. 2d 1287, 1291 (Ala. Civ. App. 1982) (emphasis added). In this instance, it is undisputed that neither you, nor the county commission, were aware that statutory cost-of-living adjustments applicable to the circuit clerk’s salary had been adopted or that said enactments affected your compensation.

Additionally, as discussed above, claims arising from employment relationships between a governmental entity and its employees are not contract claims. *Akers*, 797 So. 2d at 425. Although not an employee, the sheriff’s relationship with the county commission, in this context, is created by law rather than contract. *See Reach*, 368 So. 2d at 252. Section 8-8-8 of the Code applies strictly to contracts and does not apply to awards of back pay. *Whitlow*, 689 So. 2d at 109. Accordingly, the county commission is not obligated to pay interest on any back pay that may be owed to you.

### CONCLUSION

The county commission should withhold the statutory six percent contribution from any back pay owed the sheriff and calculate the sheriff’s supernumerary benefit based upon his correct salary.

Back pay to the sheriff should include fringe benefits associated therewith.

The county commission is not obligated to pay the sheriff interest on any back pay that may be due.

### QUESTION 3

Should the back pay be paid in a lump sum or in installments?

### FACTS AND ANALYSIS

If the recalculation of the sheriff’s compensation results in a determination that back pay is owed, then the amount is immediately due and payable. This Office, however, recognizes that it may be advantageous to both parties to negotiate the payment terms. The county commission may have fiscal concerns about a lump-sum payment. The sheriff, on the other hand, may have significant tax ramifications associated with a lump-sum payment.

Accordingly, this Office encourages the sheriff and the county commission to cooperate with each other in determining the payment terms. *See, generally*, opinion to Honorable William E. Shinn, Jr., Morgan County Attorney, dated July 9, 2008, A.G. No. 2008-104 (county commission and sheriff should cooperate to resolve budgetary and personnel issues).

CONCLUSION

The county commission and sheriff should cooperate in determining payment terms on any back pay owed the sheriff.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Ben Baxley of my staff.

Sincerely,

LUTHER STRANGE  
Attorney General  
By:



BRENDA F. SMITH  
Chief, Opinions Division