

ELECTIONS: 1. As used in Section 129.060, RSMo 1959, providing that
VOTING: no deduction shall be made from an employee's "usual
WAGES: salary or wages" when he absents himself from employment
for a maximum of three hours on election day, the quoted
words refer to an amount received on a typical working day, and cannot be construed to indicate the usual hourly rate of wages. 2. Under a union contract requiring additional compensation for hours in excess of 7 1/2 worked in one day, and where an employee has previously worked nine (9) hours a day for over a year, any employer who excuses the employee to vote on election day after he has worked 8 1/2 hours, is required to pay such employee his usual salary or wages of 7 1/2 hours straight time pay plus 1 1/2 hours of overtime pay in accordance with Section 129.060, RSMo 1959.

OPINION NO. 357

September 21, 1967

Honorable Thomas A. Walsh
State Representative, 52nd District
Local No. 1, IBEW
5850 Elizabeth Avenue
St. Louis, Missouri 63110



Dear Representative Walsh:

This is to acknowledge receipt of your request for an official opinion from this office which reads in part as follows:

"The question presented is this: Where an employee is regularly scheduled to work overtime and is granted one-half hour absence from work to vote for which one-half an hour he would have been paid at an overtime rate had he actually worked, is an employer required to pay the employee for the one-half hour at an overtime or a straight time rate?

* * * * *

Let me provide a specific example of how the issue arises. An employer has had a crew on a construction job regularly working 9 hours a day, for more than a year, at least 5 days a week. The union contract provides for a 7 1/2 hour regular work day and 37 1/2 hour regular work week. It provides that an overtime rate (doubletime) be paid for all work in excess of 7 1/2 hours per day or outside of the regular Monday through Friday work week. On election day the employee is scheduled for his usual 9 hour day. The polls are open from 7 A.M. to 7 P.M. He is scheduled to work from

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7 A.M. to 4:30 P.M. (with one-half hour off for an unpaid lunch period). He properly requests and is entitled to take off one-half hour early in the afternoon to vote and does vote, having left the job at 4 P.M. It is undisputed by anyone that the employee is entitled to his wages for the one-half hour that he took off from work. Had he worked as scheduled, he would have received 7 1/2 hours of straight time pay plus 1 1/2 hours of overtime pay.

Should the employer pay the employee for the one-half hour at straight time, which means that the employee would receive 8 hours of straight time pay and one hour of overtime pay; or should the employer pay the employee for the one-half hour at the overtime rate, which means the employee would receive 7 1/2 hours straight time pay plus 1 1/2 hours overtime pay?"

The precise issue with which we are concerned is the effect of overtime rates on Section 129.060, RSMo 1959, which reads in part as follows:

"1. Any person entitled to vote at any election held within this state, or any primary election held in preparation for such election, shall, on the day of such election be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of three hours between the time of opening and the time of closing the polls for the purpose of voting; and any absence for such purpose shall not be sufficient reason for the discharge of or the threat to discharge any such person from such services or employment; and such employee, if he votes, shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages;
* * * "

The essence of the above statute is to guarantee an employee the right to vote at any election without deductions being made from his "usual salary or wages." It has been stated that the purpose or intent of this provision is to "eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote." Day-Brite Lighting, Inc. vs. State of Missouri, 362 Mo. 299, 240 S.W. 2d 886.

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Relating these principles to the question and example presented, the "usual salary or wages" of an employee not voting and remaining at his employment for the accustomed nine (9) hours, would include 7 1/2 hours straight time pay plus 1 1/2 hours overtime pay. Therefore, any employee who works for eight and one-half (8 1/2) hours and takes off the one-half hour allowed him to vote in this instance by Section 129.060, supra, is also guaranteed by such section to receive his usual salary or wages; viz., to be paid the amount he would have received had he worked. This proposition is clearly spelled out in the Day-Brite Lighting case, cited supra, where the following statement is made at 240 S.W. 2d, page 886:

"The intendment of statute penalizing an employer who fails to allow an employee, entitled to vote, to absent himself on election day for a period of four hours between times of opening and closing of the polls is that employee shall be paid during his authorized absence as though he had worked."

Thus, if the employee had worked, he would receive as his usual salary or wage 7 1/2 hours of straight time pay plus 1 1/2 hours of overtime pay, since he had previously been working nine (9) hours a day for over a year.

It may be argued that the phrase "usual salary or wages" refers to an employee's usual hourly rate of wages; i.e., straight time as distinguished from overtime, for the hours taken off to vote. This question has been decided by the New York State Courts in the case of Williams vs. Aircooled Motors, 127 N.Y.S. 2d 135, 283 App. Div. 187, affirmed by the New York Court of Appeals, 121 N.E. 2d 251, 307 N.Y. 332. The following statement is taken from the decision rendered by the appellate division at page 137:

"[1-3] We think that 'the usual salary or wages' referred to in §226 is the amount received on a typical working day, and cannot be construed to indicate the usual hourly rate of wages. There seems to be no adequate reason for departing from the statutory language. The purpose of the statute is clearly to encourage voting, to make it financially immaterial to a voter whether he works or takes time off to vote. This requires that he be paid on election day precisely what he would have earned had he remained on the job for nine hours. Election day is the unusual day; the normal

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work day determines an employee's 'usual salary or wages,' from which a deduction is prohibited. * * * "

Thus, to interpret the statute any other way would discriminate against all workers employed at an hourly rate rather than by the day or week. Also, it would penalize an employee the difference between straight time and overtime, because he chose to exercise his elective franchise. We do not believe that the Legislature intended such a result. See *Lee vs. Ideal Roller & Manufacturing Co.*, 92 N.Y.S. 2d 726.

CONCLUSION

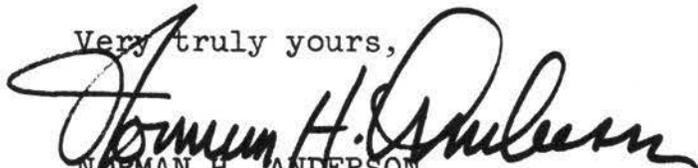
It is the opinion of this office that:

1. As used in Section 129.060, RSMo 1959, providing that no deduction shall be made from an employee's "usual salary or wages" when he absents himself from employment for a maximum of three hours on election day, the quoted words refer to an amount received on a typical working day, and cannot be construed to indicate the usual hourly rate of wages.

2. Where, under a union contract requiring additional compensation for hours in excess of 7 1/2 worked in one day, and where an employee has previously worked nine (9) hours a day for over a year, any employer who excuses the employee to vote on election day after he has worked 8 1/2 hours, is required to pay such employee his usual salary or wages of 7 1/2 hours straight time pay plus 1 1/2 hours of overtime pay in accordance with Section 129.060, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, B. J. Jones.

Very truly yours,


NORMAN H. ANDERSON
Attorney General