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Legal Opinion 2016-002

TO: John Engen, Mayor; City Council; Dale Bickell, Steve Johnson, Jason Diehl, Chad Nicholson, Human Resources Department, Mike Brady, Scott Hoffman

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE: February 1, 2016

RE: Unsuccessful city firefighter collective bargaining goes to binding arbitration and the decisions from binding arbitration are not subject to city council approval

FACTS:

Monday, January 11, 2016, during the City Council meeting, a new city council member withdrew from the consent agenda the proposed collective bargaining agreement between the city firefighters and the City of Missoula. The council member wanted to discuss the agenda item during city council committee reports. The council member stated he had campaigned on the issue of property taxes and would not vote for a pay raise for any city employee unless the city administration provided a balanced budget without any property tax increases. The council member voted against approving the collective bargaining agreement.

City council members must be aware that pursuant to Montana state law if a city collective bargaining agreement is not successfully negotiated with either the city firefighters or the city police all unresolved collective bargaining issues go to binding arbitration and an arbitrator determines the issues. The arbitrator's decision is not subject to city council approval. Thus, there is a very real potential that the city council could lose the ability to control the outcome of city firefighter or city police collective bargaining negotiation outcomes if there is impasse and collective bargaining negotiations go to an arbitrator for final and binding determination of the unresolved collective bargaining issues.

The city council, not the mayor adopts the city budgets. Historically, all city budget adoptions by the city council, that I am aware of, were balanced budgets.

ISSUE:

Pursuant to Montana state law, if collective bargaining negotiations between city firefighters and the city are not successful as to all issues, how is such an impasse resolved?

CONCLUSION:

Pursuant to Montana state laws set forth in Title 39, Chapter 34, *Arbitration for Firefighters*, MCA, collective bargaining impasses between a public employer and a firefighters' organization go to final and binding arbitration and the arbitrator's final decision is not subject to city council approval. It should also be noted that similar Montana state laws exist requiring binding arbitration for police officers, pursuant to Title 39, Chapter 31, Part 5, *Police Officers-Strikes Prohibited-Binding Arbitration*, MCA.

LEGAL DISCUSSION:

Montana state law generally prohibits municipal firefighters and police officers from engaging in a labor strike.

Title 39, Chapter 34, MCA is entitled *Arbitration for Firefighters*. Mont. Code Ann. §39-34-105 pertaining to firefighters provides:

39-34-105. Strikes limited. Strikes are prohibited during the term of any contract and the negotiations or arbitration of that contract.

Also, Mont. Code Ann. §§ 39-31-501 and 7-32-4114 prohibit Montana municipal police officers from engaging in a labor strike. These sections provide:

39-31-501. Strikes by police officers prohibited. (1) It is unlawful for a police officer to strike or recognize a picket line of a labor organization while in the performance of official duties.

(2) (a) As used in this section, "strike" means an action listed in subsection (2)(b), in concerted action with others, for the purpose of inducing, influencing, or coercing a change in the conditions of employment, compensation, rights, privileges, or obligations of employment of a police officer.

(b) A police officer may not engage in the following actions in concert with others:

- (i) refusal to report for duty;
- (ii) willful absence from the police officer's position;
- (iii) stoppage of work; or
- (iv) departure from the full, faithful, or proper performance of duties of employment.

7-32-4114. Restrictions on activities of police officers. (1) Except as provided in subsection (2), a member of the police force may not hold any other office or be employed in any other department of the city or town government. A member of the police force may not strike, as provided in [39-31-501](#).

(2) A member of the police force of a third-class city or of a town may be employed in another department of the city or town government. However, the member may not hold political office in the city or town government.

(3) The fact that a person is an officer or member of the police department

does not deprive the person's spouse or any member of the person's family of the right to participate in political activity or to hold public or political office.

(4) An officer or member of the police department may participate in political activity if the officer does not do so while on duty or in uniform or if the activity does not otherwise interfere with the performance of duties.

The Montana State Legislature in 1979 adopted laws that require that collective bargaining impasses between Montana municipal firefighters and Montana cities be resolved by binding arbitration and that the arbitrator's decision is not subject to city council approval. Mont. Code Ann. § 39-34-103 provides:

39-34-103. Powers and duties of arbitrator for firefighters and public employers. (1) The arbitrator shall establish dates and a place for hearings and may subpoena witnesses and require the submission of evidence necessary to resolve the impasse.

(2) Prior to making a determination on any issue relating to the impasse, the arbitrator may refer the issues back to the parties for further negotiation.

(3) At the conclusion of the hearings, the arbitrator shall require the parties to submit their respective final position on matters in dispute.

(4) The arbitrator shall make a just and reasonable determination of which final position on matters in dispute will be adopted within 30 days of the commencement of the arbitration proceedings. The arbitrator shall notify the board of personnel appeals and the parties, in writing, of the determination.

(5) In arriving at a determination, the arbitrator shall consider any relevant circumstances, including:

(a) comparison of hours, wages, and conditions of employment of the employees involved with employees performing similar services and with other services generally;

(b) the interests and welfare of the public and the financial ability of the public employer to pay;

(c) appropriate cost-of-living indices;

(d) any other factors traditionally considered in the determination of hours, wages, and conditions of employment.

(6) **The determination of the arbitrator is final and binding and is not subject to the approval of any governing body.** (Emphasis added.)

In 2005 the Montana State Legislature adopted a binding arbitration law for resolving collective bargaining impasses between Montana municipal police officers and Montana municipalities. Mont. Code Ann. §§ 39-31-503 and 39-31-504 MCA provide:

39-31-503. Binding arbitration -- policy. (1) It is the policy of the state that because the right of police officers to strike is prohibited by 39-31-501, it is necessary to the high morale of police officers and to the efficient operation of police departments to provide an alternative, expeditious, and effective procedure for the resolution of labor disputes through binding arbitration.

(2) Binding arbitration must be scheduled by mutual agreement no earlier than

30 days following the submission of the petition seeking binding arbitration under 39-31-502(2)(d).

39-31-504. Selection of arbitrator -- procedure -- cost sharing. (1) (a) After receipt of the petition to arbitrate under 39-31-502(2)(d), the board of personnel appeals shall submit a list of five qualified, disinterested, and unbiased individuals to the parties. Each party shall alternately strike two names from the list. The order of striking names must be determined by a coin toss. The remaining individual is the arbitrator.

(b) If the parties have not designated the arbitrator and notified the board of personnel appeals of their choice within 5 days of receipt of the list, the board of personnel appeals shall appoint the arbitrator from the names on the list. However, if one of the parties strikes names from the list, as provided in subsection (1)(a), the board of personnel appeals shall appoint the arbitrator from the names remaining on the list.

(2) The arbitrator shall establish the dates, times, and places of hearings. The arbitrator may issue subpoenas. Within 14 calendar days prior to the date of a hearing, each party shall submit to the other party a written last best offer package on all unresolved mandatory subjects. The last best offer package may not be changed. The arbitrator may administer oaths and shall afford the parties the opportunity to examine and cross-examine all witnesses and to present evidence relevant to the dispute.

(3) The arbitrator shall decide the unresolved mandatory subjects contained in the last best offer package. The arbitrator shall base findings and opinions on the criteria listed in subsections (3)(a) through (3)(h). Primary consideration must be given to the criteria in subsection (3)(a). The criteria are:

(a) the interest and welfare of the public;

(b) the reasonable financial ability of the unit of government to meet the costs of the proposed contract, giving consideration and weight to the other services provided by the unit of government, as determined by the governing body of the unit of government;

(c) the ability of the unit of government to attract and retain qualified personnel at the wage and benefit levels provided;

(d) the overall compensation presently received by the police officers, including direct wage compensation, holiday pay, other paid excused time, insurance, and all other direct or indirect monetary benefits;

(e) comparison of the overall compensation of other police officers in comparable communities with similar populations in Montana and contiguous states;

(f) inflation as measured by the consumer price index, U.S. city average, commonly known as the cost of living;

(g) the stipulations of the parties; and

(h) other factors, consistent with subsections (3)(a) through (3)(g), that are traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment. However, the arbitrator may not use other factors if, in the judgment of the arbitrator, the factors listed in subsections

(3)(a) through (3)(g) provide a sufficient basis for an award.

(4) Within 30 days after the conclusion of the hearings or an additional period agreed upon by the parties, the arbitrator shall select only one of the last best offer packages submitted by the parties and shall make written findings along with an opinion and order. The opinion and order must be served on the parties and the board of personnel appeals. Service may be made by personal delivery or by certified mail. The findings, opinion, and order must be based upon the criteria listed in subsection (3).

(5) The cost of arbitration must be borne equally by the parties.

CONCLUSION:

Pursuant to Montana state laws set forth in Title 39, Chapter 34, *Arbitration for Firefighters*, MCA, collective bargaining impasses between a public employer and a firefighters' organization go to final and binding arbitration and the arbitrator's final decision is not subject to city council approval. It should also be noted that similar Montana state laws exist requiring binding arbitration for police officers, pursuant to Title 39, Chapter 31, Part 5, *Police Officers-Strikes Prohibited-Binding Arbitration*, MCA.

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/s/

Jim Nugent, City Attorney