

OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2017-010

TO: City Council; Mayor John Engen; Dale Bickell; Mike Haynes; Laval Means;
Denise Alexander; Marty Rehbein; Kirsten Hands; Kelly Elam

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE April 11, 2017

RE: Municipal office becomes vacant when elected or appointed office holders cease to discharge their duty of office for a period of 3 consecutive months, except when prevented by illness or when absent with city council permission

FACTS:

Recently it has been noted by city staffs that a city council appointed alternate office holder to a city council commission had not attended a commission meeting for approximately 9 to 10 months.

ISSUE(S):

If a person appointed to a City of Missoula office, has apparently ceased or neglected to perform the duties and responsibilities of the office appointed to for more than three (3) consecutive months, is there a legal remedy available for addressing the factual circumstance?

CONCLUSION(S):

Yes. Both the City charter of Missoula as well as Montana state law provide that a municipal office becomes vacant if the person appointed to the office ceases to discharge their duties of their office for three (3) consecutive months, except when prevented by illness or when absent with permission of the city council.

LEGAL DISCUSSION:

Mayoral and City Council appointees to City of Missoula municipal commissions, boards, authorities, etc. are representatives, agents or office holders of the City of Missoula when serving in their appointed municipal office capacity. Both Article VIII(1) of the City of Missoula charter as well as section 7-4-4111 MCA of Montana municipal laws set forth in Montana state law, provide that a municipal office becomes vacant when a person elected or appointed to a municipal office ceases to discharge the duties of their office for three (3) consecutive months, except when prevented by illness or when absent with permission of city council.

Article VIII(1) of the City of Missoula charter states:

1. **DETERMINATION OF VACANCY IN CITY OFFICE.** An elected or appointed office becomes vacant on the happening of any of the following events before the expiration of the term of the incumbent:
 - (1) the death of the incumbent;
 - (2) determination pursuant to state law that he/she is mentally ill;
 - (3) his or her resignation;
 - (4) his or her removal from office;
 - (5) his or her absence from the City continuously for 10 days without the consent of the City Council;
 - (6) his or her open neglect or refusal to discharge his or her duties;
 - (7) his or her ceasing to be a resident of the City or, in the case of a City Council member, his or her ceasing to be a resident of his or her ward;
 - (8) his or her ceasing to discharge the duty of the office for a period of 3 consecutive months, except when prevented by illness or when absent from the City by permission of the City Council;
 - (9) his or her conviction of a felony or of any offense involving a violation of his or her official duties;
 - (10) his or her refusal or neglect to file his or her official bond, if required, within the time prescribed;
 - (11) the decision of a competent tribunal declaring void his or her election or appointment. (*Emphasis added*)

Montana municipal government law states the same pursuant to section 7-4-4111 MCA, which states:

7-4-4111. Determination of vacancy in municipal office. An office becomes vacant on the happening of any of the following events before the expiration of the term of the incumbent:

- (1) the death of the incumbent;
- (2) a determination pursuant to Title 53, chapter 21, part 1, that the incumbent is mentally ill;
- (3) the incumbent's resignation;
- (4) the incumbent's removal from office;
- (5) the incumbent's absence from the city or town continuously for 10 days without the consent of the council;
- (6) the incumbent's open neglect or refusal to discharge duties;
- (7) the incumbent's ceasing to be a resident of the city or town or, in the case of a city council member, ceasing to be a resident of the city council member's ward. This subsection does not apply to an appointed municipal officer who resides outside the city or town limits with the approval of the city or town governing body and within a distance of the city or town approved by the governing body.
- (8) the incumbent's ceasing to discharge the duty of office for a period of 3 consecutive months, except when prevented by illness or when absent from the city or town by permission of the governing body;
- (9) the incumbent's conviction of a felony or of any offense involving moral turpitude or a violation of official duties;
- (10) the incumbent's refusal or neglect to file an official bond within the time prescribed;
- (11) the decision of a competent tribunal declaring void the incumbent's election or appointment. (*Emphasis added*)

It should also be noted that both Article VIII(1) of the City of Missoula charter, and section 7-4-4111 MCA both also indicate that open neglect or refusal to discharge duties of office is also a legal grounds for declaring an office vacant, without any necessity to await a minimum time period.. See Article VIII(1)(6) City of Missoula charter and subsection 7-4-4111(6) MCA

CONCLUSION(S):

Yes. Both the City charter of Missoula as well as Montana state law provide that a municipal office becomes vacant if the person appointed to the office ceases to discharge their duties of their office for three (3) consecutive months, except when prevented by illness or when absent with permission of the city council.

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/s/

Jim Nugent, City Attorney

JN:ajg