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Legal Opinion 2011-018

TO: John Engen, Mayor; City Council; Bruce Bender; Marty Rehbein; Nikki Rogers; Donna Gaukler; Ellen Buchannan, MRA; Gail Verlanic; Mark Muir; Mike Brady; Mike Painter; Jason Diehl; JD Brandt

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE: October 4, 2011

RE: Political Activity restrictions on public officers and employees while at work.

FACTS:

Once again, during political election season, it is important that City officers and employees be aware of statutory restrictions on political activity by municipal officers and employees.

ISSUE:

Pursuant to Montana state law, what statutory restrictions exist with respect to political activities by any city officers and employees at their work sites?

CONCLUSION:

There are several provisions of Montana state law that establish some restrictions on political activities of public employees that City officers and employees should be aware of.

See 13-35-226(4), 2-2-121(3), 7-32-4114, and 90-14-106 MCA. Also see 51 Op. Att'y Gen. 1 (2005) which holds that public officers and public employees may not use public time, facilities, equipment, supplies, personnel or funds for political speech or political activity, pursuant to 2-2-121 MCA.

MCA 7-32-4114(4) also prohibits an officer or member of a police department from participating in political activity while on duty or in uniform.

LEGAL DISCUSSION:

It is important that City officers and employees are informed of what political activities are prohibited while at work.

Title 13, chapter 35 MCA is entitled *Election and Campaign Practices and Criminal Provisions*. 13-35-226 MCA, entitled *Unlawful Acts of Employers and Employees*, provides:

13-35-226. Unlawful acts of employers and employees. (1) It is unlawful for any employer, in paying employees the salary or wages due them, to include with their pay the name of any candidate or any political mottoes, devices, or arguments containing threats or promises, express or implied, calculated or intended to influence the political opinions or actions of the employees.

(2) It is unlawful for an employer to exhibit in a place where the employer's workers or employees may be working any handbill or placard containing:

(a) any threat, promise, notice, or information that, in case any particular ticket or political party, organization, or candidate is elected:

(i) work in the employer's place or establishment will cease, in whole or in part, or will be continued or increased;

(ii) the employer's place or establishment will be closed; or

(iii) the salaries or wages of the workers or employees will be reduced or increased; or

(b) other threats or promises, express or implied, intended or calculated to influence the political opinions or actions of the employer's workers or employees.

(3) A person may not coerce, command, or require a public employee to support or oppose any political committee, the nomination or election of any person to public office, or the passage of a ballot issue.

(4) A public employee may not solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue while on the job or at the place of employment.

However, subject to 2-2-121, this section does not restrict the right of a public employee to perform activities properly incidental to another activity required or authorized by law or to express personal political views.

(5) A person who violates this section is liable in a civil action authorized by 13-37-128, brought by the commissioner of political practices or a county attorney pursuant to 13-37-124 and 13-37-125. (Emphasis added).

Title 2, chapter 2 MCA is entitled *Standards of Conduct*. Part 1 of this chapter is entitled *Code of Ethics*. 2-2-121 MCA, entitled *Rules of Conduct for Public Officers and Public Employees* provides:

2-2-121. Rules of conduct for public officers and public employees. (1) Proof of commission of any act enumerated in subsection (2) is proof that the actor has breached a public duty.

(2) A public officer or a public employee may not:

(a) subject to subsection (7), use public time, facilities, equipment, supplies, personnel, or funds for the officer's or employee's private business purposes;

(b) engage in a substantial financial transaction for the officer's or employee's private business purposes with a person whom the officer or employee inspects or supervises in the course of official duties;

(c) assist any person for a fee or other compensation in obtaining a contract, claim, license, or other economic benefit from the officer's or employee's agency;

(d) assist any person for a contingent fee in obtaining a contract, claim, license, or other economic benefit from any agency;

(e) perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which the officer or employee either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent; or

(f) solicit or accept employment, or engage in negotiations or meetings to consider employment, with a person whom the officer or employee regulates in the course of official duties without first giving written notification to the officer's or employee's supervisor and department director.

(3) (a) Except as provided in subsection (3)(b), a public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue unless the use is:

(i) authorized by law; or

(ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.

(b) As used in this subsection (3), "properly incidental to another activity required or authorized by law" does not include any activities related to solicitation of support for or opposition to the nomination or election of a person to public office or political committees organized to support or oppose a candidate or candidates for public office. With respect to ballot issues, properly incidental activities are restricted to:

(i) the activities of a public officer, the public officer's staff, or legislative staff related to determining the impact of passage or failure of a ballot issue on state or local government operations;

(ii) in the case of a school district, as defined in Title 20, chapter 6, compliance with the requirements of law governing public meetings of the local board of trustees, including the resulting dissemination of information by a board of trustees or a school superintendent or a designated employee in a district with no superintendent in support of or opposition to a bond issue or levy submitted to the electors. Public funds may not be expended for any form of commercial advertising in support of or opposition to a bond issue or levy submitted to the electors.

(c) This subsection (3) is not intended to restrict the right of a public officer or public employee to express personal political views.

(4) (a) A candidate, as defined in 13-1-101(6)(a), may not use or permit the use of state funds for any advertisement or public service announcement in a newspaper, on radio, or on television that contains the candidate's name, picture, or voice except in the case of a state or national emergency and then only if the announcement is reasonably necessary to the candidate's official functions.

(b) A state officer may not use or permit the use of public time, facilities, equipment, supplies, personnel, or funds to produce, print, or broadcast any advertisement or public service announcement in a newspaper, on radio, or on television that contains the state officer's name, picture, or voice except in the case of a state or national emergency if the announcement is reasonably necessary to the state officer's official functions or in the case of an announcement directly related to a program or activity under the jurisdiction of the office or position to which the state officer was elected or appointed.

(5) A public officer or public employee may not participate in a proceeding when an organization, other than an organization or association of local government officials, of which the public officer or public employee is an officer or director is:

(a) involved in a proceeding before the employing agency that is within the scope of the public officer's or public employee's job duties; or

(b) attempting to influence a local, state, or federal proceeding in which the public officer or public employee represents the state or local government.

(6) A public officer or public employee may not engage in any activity, including lobbying, as defined in 5-7-102, on behalf of an organization, other than an organization or association of local government officials, of which the public officer or public employee is a member while performing the public officer's or public employee's job duties. The provisions of this subsection do not prohibit a public officer or public employee from performing charitable fundraising activities if approved by the public officer's or public employee's supervisor or authorized by law.

(7) A listing by a public officer or a public employee in the electronic directory provided for in 30-17-101 of any product created outside of work in a public agency is not in violation of subsection (2)(a) of this section. The public officer or public employee may not make arrangements for the listing in the electronic directory during work hours.

(8) A department head or a member of a quasi-judicial or rulemaking board may perform an official act notwithstanding the provisions of subsection (2)(e) if participation is necessary to the administration of a statute and if the person complies with the disclosure procedures under 2-2-131.

(9) Subsection (2)(d) does not apply to a member of a board, commission, council, or committee unless the member is also a full-time public employee.

(10) Subsections (2)(b) and (2)(e) do not prevent a member of the governing body of a local government from performing an official act when the member's participation is necessary to obtain a quorum or to otherwise enable the body to act. The member shall

disclose the interest creating the appearance of impropriety prior to performing the official act.

Montana Attorney General McGrath interpreted 2-2-121(3) MCA pursuant to Op. Att’y Gen. 1 (2005) and held:

A public officer or public employee may engage in political speech so long as his or her speech does not involve the use of public time, facilities, equipment, supplies, personnel, or funds. (Emphasis added).

Pursuant to 7-4-4101(1) MCA, the mayor, city council, city treasurer, and judge are included in the identification of those municipal officers considered to be public officers.

Title 7, chapter 32, part 41 MCA is entitled *Municipal Police Force*. Mont. 7-32-4114 MCA, entitled *Restrictions on Activities of Policemen*, provides:

7-32-4114. Restrictions on activities of policemen. (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.

(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 provided that the officer does not do so while on duty or in uniform or that it does not otherwise interfere with the performance of duties.

Pursuant to the Montana Community Services Act set forth in title 90, chapter 14 MCA entitles *Community Service*, 90-14-106(4) MCA makes it unlawful to attempt to assess public officers, employees, or volunteers for monies to be used to political purposes. 90-14-106 MCA provides:

90-14-106. Prohibited activities. (1) The office of community service and agencies listed in 90-14-105 that are designated by the governor and engaged in developing and approving work experience and volunteer projects shall ensure that:

(a) work available to participants is not available as the result of a labor dispute, strike, or lockout and will not be assigned to cause a layoff or downgrading of a position or to prevent the return to work of an available competent employee; and

(b) a work experience project:

(i) does not impair existing contracts for service or collective bargaining agreements; and

(ii) is not inconsistent with the terms of a collective bargaining agreement without written concurrence of the labor organization and employer concerned.

(2) It is unlawful for a person to demand from any public officer, agency, employee,

volunteer, or volunteer crewleader an assessment or percentage of any money or profit or its equivalent in support, service, or any other thing of value, with the express or implied understanding that it will be used for political purposes. This part may not be construed to prohibit voluntary contributions to any political committee or organization for legitimate political purposes to the extent allowed by law. (Emphasis added).

“Community service” and “volunteer” are defined in 90-14-102(2) & (5) MCA as follows.

90-14-102. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

(1) "Commission" means the commission on community service appointed by the governor to assist in implementation of this part.

(2) "Community service" means any kind of public service that provides a benefit to the state of Montana, any of its political subdivisions, or a tribal government or that benefits disadvantaged or low-income persons, disabled persons, or senior citizens of Montana.

(3) "Director" means the person appointed by the governor as the community service director to administer and coordinate the provisions of this part.

(4) "Program" means the Montana community service program, which includes all of the volunteer projects established under this part.

(5) "Volunteer" means a person performing services under this part for an association, not-for-profit corporation, hospital, school, or state, local, or tribal governmental entity without compensation, except that partial or full reimbursement may be made for actual expenses incurred.

CONCLUSION:

There are several provisions of Montana state law that establish some restrictions on political activities of public employees that City officers and employees should be aware of.

See 13-35-226(4), 2-2-121(3), 7-32-4114, and 90-14-106 MCA. Also see 51 Op. Att’y Gen. 1 (2005) which holds that public officers and public employees may not use public time, facilities, equipment, supplies, personnel or funds for political speech or political activity, pursuant to 2-2-121 MCA.

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/s/

Jim Nugent, City Attorney

JN: mdg