

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2012-018

TO: Mayor, John Engen; City Council; Bruce Bender; Brentt Ramharter; Scott Paasch; Kris Blank; Gail Verlanic; Carl Horton; Marty Rehbein; Steve King; Kevin Slovarp; Don Verrue; Jessica Miller; Donna Gaukler; Mark Muir; Mike Brady; Jason Diehl; Jeff Brandt; Ellen Buchanan; Chris Behan; Anne Guest; Doug Waters; Mike Barton; Denise Alexander; Laval Means

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE November 26, 2012

RE: Limitations on potential gifts to public servants/ public employees

FACTS:

Recently a citizen was inquiring of the city finance department about potential gifts or limitations on gifts to city employees. This legal opinion identifies limitations with respect to gifts to city employees as public servants.

ISSUE(S):

Does Montana state law establish any statutory limitations pertaining to potential gifts to public servants or public employees?

CONCLUSION(S):

Yes, Montana state law does statutorily address the potential issue of gifts to public servants or public employees, primarily pursuant to the Montana Criminal Code offense entitled "GIFTS TO PUBLIC SERVANTS BY PERSONS SUBJECT TO THEIR JURISDICTION" that is set forth in section 45-7-104 MCA.

LEGAL DISCUSSION:

Pursuant to Montana state criminal code law, the term "public servant" is defined in subsection 45-2-101 (64) MCA as meaning:

“(64) (a) ‘Public servant’ means an officer or employee of government including but not limited to legislators, judges, and firefighters, and a person participating as a juror, adviser, consultant, administrator, executor, guardian, or court appointed fiduciary. The term ‘public servant’ includes one who has been elected or designated to become a public servant. (b) The term does not include witnesses.”

Montana state criminal code section 45-7-104 MCA is entitled “GIFTS TO PUBLIC SERVANTS BY PERSONS SUBJECT TO THEIR JURISDICTION.” This section of Montana state law states as follows:

45-7-104. Gifts to public servants by persons subject to their jurisdiction. (1) A public servant in any department or agency exercising regulatory function, conducting inspections or investigations, carrying on a civil or criminal litigation on behalf of the government, or having custody of prisoners may not solicit, accept, or agree to accept any pecuniary benefit from a person known to be subject to the regulation, inspection, investigation, or custody or against whom litigation is known to be pending or contemplated.

(2) A public servant having any discretionary function to perform in connection with contracts, purchases, payments, claims, or other pecuniary transactions of the government may not solicit, accept, or agree to accept any pecuniary benefit from any person known to be interested in or likely to become interested in any contract, purchase, payment, claim, or transaction.

(3) A public servant having judicial or administrative authority and a public servant employed by or in a court or other tribunal having judicial or administrative authority or participating in the enforcement of its decision may not solicit, accept, or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before the public servant or tribunal with which the public servant or tribunal is associated.

(4) A legislator or public servant employed by the legislature or by any committee or agency of the legislature may not solicit, accept, or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before the legislature or any committee or agency of the legislature.

(5) This section does not apply to:

(a) fees prescribed by law to be received by a public servant or any other benefit for which the recipient gives legitimate consideration or to which the public servant is otherwise entitled; or

(b) trivial benefits incidental to personal, professional, or business contacts and involving no substantial risk of undermining official impartiality.

(6) A person may not knowingly confer or offer or agree to confer any benefit prohibited by subsections (1) through (5).

(7) A person convicted of an offense under this section shall be fined not to exceed \$500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. Section 45-7-104 MCA quoted above was originally adopted in 1973. Section 45-7-104 MCA is broader than the former Montana criminal law that dealt with bribery of public servants. The Montana Code Annotated Annotations from section 45-7-104 MCA,

volume 9, pages 532-533, indicate that pursuant to section 45-7-104 MCA proscribes conduct which while suspect was beyond the scope of the prior criminal law. Now pursuant to section 45-7-104 MCA “all that need be shown is the jurisdiction or probable jurisdiction and the transfer, offer to transfer, agreement to transfer, or solicitation of a pecuniary benefit. Section 45-7-104 MCA “is limited in that the benefit must be pecuniary in nature.”

The term “pecuniary benefit” is defined in Montana criminal code pursuant to subsection 45-2-101(56) MCA as meaning

“(56) ‘Pecuniary benefit’ is benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain.”

The terms “solicit” or solicitation” are defined in Montana Criminal Code pursuant to subsection 45-2-101 (69) MCA as meaning:

“(69) ‘Solicit’ or ‘solicitation’ means to command, authorize, urge, incite, request, or advise another to commit an offense”.

The Montana Code Annotated Annotations for section 45-7-104 MCA state in part: “It should be noted that this section makes it an offense to either solicit, accept, or agree to ‘accept’, or to ‘confer, offer or agree to confer’ a prohibited gift. Accordingly either party to the transaction can be subject to criminal sanctions.”

It should be noted and emphasized that subsection 45-7-104(5) MCA statutorily sets forth the following exceptions:

“(5) This section does not apply to:

- (a) Fees prescribed by law to be received by a public servant or any other benefit for which the recipient gives legitimate consideration or to which the public servant is otherwise entitled; or
- (b) TRIVIAL BENEFITS INCIDENTAL TO PERSONAL, PROFESSIONAL, OR BUSINESS CONTACTS AND INVOLVING NO SUBSTANTIAL RISK OF UNDERMINING OFFICIAL IMPARTIALITY.” (emphasis added)

The Montana Code Annotated Annotations for section 45-7-104 MCA explain that since there must be a “pecuniary benefit” and a “pecuniary benefit” is defined as meaning “benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain”; “This would seem to exclude from the scope of this section (45-7-104 MCA) such gifts as the traditional Christmas bottle of Scotch or advertising gifts such as pens, note pads or calendars.”

There is a Montana Attorney General Opinion issued to the Lewis and Clark County Attorney pertaining to potential receipt of gifts by the sheriff’s department and discussing the application of section 45-7-104 MCA that indicates a couple of legal points of interest:

(1) 38 Attorney General Opinion 76 (1980) indicates that section 45-7-101 MCA prohibits the receipt by a sheriff's Department of pecuniary gifts from individuals or organizations within the Sheriff's regulatory or investigative jurisdiction.

(2) Also, 38 Attorney General Opinion 76 (1980) indicates that section 45-7-104 MCA does not prohibit the use by Sheriffs Departments of fundraising programs involving the sale of goods or services.

Montana Attorney General Mike Greely explained the reasoning and rationale for his two conclusions set forth above at page two of his opinion stating:

.... More to the point, the potential for the appearance of favoritism in the department's dealing with the donor organization is obviously present. This is not to suggest that the sheriff's department in this or any other county might show favoritism or engage in any other kind of impropriety. However, the Legislature has determined that the giving of gifts to or receipt of gifts by the department under circumstances which might create the appearance of such impropriety is simply against the public policy of this state.

The second example I give – the sale of circus tickets—presents a different question. The statute explicitly recognizes the propriety of receiving a pecuniary benefit if the donor receives a corresponding “legitimate consideration.” In my opinion, the provision allows the use of mercantile fund-raising projects such as sales, dances, (e.g., the traditional Policeman's Ball”, circuses and the like. The “donor” in such cases receive a “legitimate consideration” in return for the pecuniary benefit bestowed on the sheriff, in the form of goods sold, tickets to a dance or circus, etc. The Legislature has determined that such exchanges are not subject to criminal penalty.

Approximately, five (5) years later in an informal opinion letter dated November 12, 1985, a copy of which is attached hereto, issued to the City of Missoula concerning a public employee's ability to accept discounts which are not given exclusively to the public employees but which are offered as a normal course of business exclusively to selected segments of the population, Attorney General Greely explained his 1980 Attorney General Opinion quoted above as follows:

I have previously considered this section in 38 Op. Att'y Gen. No. 76 at 264 (1980). In that opinion, I noted that the statute was enacted to cover situations not commonly considered to be within the definition of bribery. Rather, the statute punishes the appearance of or potential for improper influence. I concluded that the Legislature had determined that the giving of gifts to or receipt of gifts by a department under circumstances which might create the appearance of such impropriety is simply against the public policy of the state.

In the instant case, it is my opinion that acceptance by a police officer of discounts which are not given exclusively to police officers but which are offered as a normal course of business to selected segments of the population does not violate section 45-7-104, MCA. The statute specifically excludes “any other benefit for which the recipient gives legitimate consideration or to which he is otherwise entitled.” The two instances which

you asked me to consider are discounts for uniform cleaning and discounts for health club memberships. In both instances, the discounts would be available to anyone who fell within the category of the discount. Anyone bringing in any sort of uniform would be eligible for the discount of uniform cleaning. Similarly, anyone who is an officer or employee or member of a corporation would be eligible for the health club discount. In these two instances, the discounts would not violate the statute. Other discounts should be examined on a case-by-case basis ... to determine exemptions or whether there is potential for an appearance of impropriety. (emphasis added)

CONCLUSION(S):

Yes, Montana state law does statutorily address the potential issue of gifts to public servants or public employees, primarily pursuant to the Montana Criminal Code offense entitled “GIFTS TO PUBLIC SERVANTS BY PERSONS SUBJECT TO THEIR JURISDICTION” that is set forth in section 45-7-104 MCA.

OFFICE OF THE CITY ATTORNEY

/s/ _____
Jim Nugent, City Attorney

JN:tfa

STATE
OF
MONTANA
ATTORNEY GENERAL
MIKE GREELY

JUSTICE BUILDING, 215 N SANDERS, HELENA, MONTANA 59620
TELEPHONE (406) 444-2026

12 November 1985

Jim Nugent
Missoula City Attorney
201 West Spruce Street
Missoula MT 59801

11/14/85

Dear Mr. Nugent:

You have requested my opinion concerning whether a public servant, such as a law enforcement officer, may accept discounts for uniform cleaning and health club memberships without violating section 45-7-104, MCA, pertaining to gifts to public servants. Your letter explains that a dry cleaning business in Missoula gives a discount for the cleaning of all uniforms, i.e., band uniforms, postal workers' uniforms, or law enforcement uniforms. A health club gives discounts on the membership fee to individuals who are members of a corporation. Missoula city police officers belong to the Missoula Police Association. That association is incorporated. The city is also commonly known as a municipal corporation. All city employees of the municipal corporation have been considered members of a corporation for purposes of such discounts.

Section 45-7-104, MCA, provides:

(1) No public servant in any department or agency exercising regulatory function, conducting inspections or investigations, carrying on a civil or criminal litigation on behalf of the government, or having custody of prisoners shall solicit, accept, or agree to accept any pecuniary benefit from a person known to be subject to such regulation, inspection, investigation, or custody or against whom such litigation is known to be pending or contemplated.

....

(5) This section shall not apply to:

(a) fees prescribed by law to be received by a public servant or any other benefit for which

the recipient gives legitimate consideration or to which he is otherwise entitled; or

(b) trivial benefits incidental to personal, professional, or business contacts and involving no substantial risk of undermining official impartiality. [Emphasis added.]

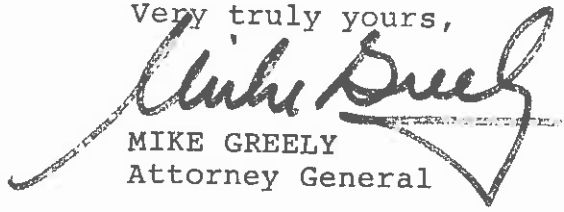
I have previously considered this section in 38 Op. Att'y Gen. No. 76 at 264 (1980). In that opinion, I noted that the statute was enacted to cover situations not commonly considered to be within the definition of bribery. Rather, the statute punishes the appearance of or potential for improper influence. I concluded that the Legislature had determined that the giving of gifts to or receipt of gifts by a department under circumstances which might create the appearance of such impropriety is simply against the public policy of the state. In that opinion, I addressed the questions of whether a sheriff's department could solicit donations or gifts from individuals or organizations and whether a sheriff's department could engage in fund-raising projects such as sales, dances, or circuses in which a "donor" receives a "legitimate consideration" in return for the pecuniary benefit bestowed upon the sheriff. It was my opinion that section 45-7-104, MCA, prohibited the receipt by a sheriff's department of pecuniary gifts from individuals or organizations within the sheriff's regulatory or investigative jurisdiction. The section, however, did not prohibit the use by sheriff's departments of fund-raising programs involving the sale of goods or services.

In the instant case, it is my opinion that acceptance by a police officer of discounts which are not given exclusively to police officers but which are offered as a normal course of business to selected segments of the population does not violate section 45-7-104, MCA. The statute specifically excludes "any other benefit for which the recipient gives legitimate consideration or to which he is otherwise entitled." The two instances which you asked me to consider are discounts for uniform cleaning and discounts for health club memberships. In both instances, the discounts would be available to anyone who fell within the category of the discount. Anyone bringing in any sort of uniform would be eligible for the discount on uniform cleaning. Similarly, anyone who is an officer or employee or member of a corporation would be eligible for the health club discount. In these two instances, the discounts would not violate the statute. Other discounts should be examined on a

Jim Nugent
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case-by-case basis by the chief of police or yourself to
determine whether they clearly fall within the
exemptions or whether there is potential for an
appearance of impropriety.

Very truly yours,

A handwritten signature in cursive script that reads "Mike Greely". The signature is written in dark ink and is positioned above the typed name.

MIKE GREELY
Attorney General

cc: Doug Chase, Chief of Police