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Legal Opinion 2015-027

TO: Jane Kelly; Marty Rehbein; Mayor John Engen; Dale Bickell; Steve Johnson; Ginny Merriam; Department City Clerk; and City Council

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE: August 19, 2015

RE: Legal concerns about political candidates campaigning at city neighborhood council, community forum and leadership team meetings.

FACTS:

A City clerk's office staff member has been experiencing challenging citizen conduct at city neighborhood council, leadership meetings and community forum type meetings during which citizens attempt to engage in political campaign activity during the meetings when there is not a scheduled candidate forum for meeting the candidates. A member of the city clerk's staff is generally assigned to attend many of these meetings. Some city general fund monies are generally allocated to assisting neighborhood councils and the community forum to conduct their public meetings.

It has been requested that a writing be prepared to provide some guidance as well as assist the city clerk's office in addressing these challenging factual circumstances as they arise. This summer a city council candidate attempted to conduct a question and answer session after having introduced their self as a candidate during a meeting. On another occasion potential political campaign materials for a ballot issue were distributed. More such activities are expected to be attempted during the next few months.

ISSUE:

Are there any Montana state law guidelines with respect to political activity at public government functions or activities?

CONCLUSION:

Yes. Pursuant to section 2-2-121 MCA pertaining to rules of conduct for public officers and public employees there is a statutory provision that provides that public time, facilities,

equipment, supplies, personnel or funds are not to be utilized to solicit support for or opposition to any political committee, the nomination or election of any person to public office or the passage of ballot issues unless otherwise authorized by law.

LEGAL DISCUSSION:

Pursuant to Montana state law pertaining to the mayor/city council form of alternative municipal local government as set forth in Title 7, Chapter 3, Part 2 MCA, subsection 7-3-223(3) MCA authorizes the municipal local government by ordinance to authorize community councils to advise the city council/city commission. The City of Missoula June 4, 1996 city voter adopted city charter effective January 1, 1997 contains two pages of provisions pertaining to establishment of neighborhood councils and community councils. The Missoula City Council also has adopted Title 1, Chapter 18 Missoula Municipal Code pertaining to neighborhood councils, community forum and leadership teams.

Clearly neighborhood councils, community forums and related leadership teams are local municipal government associated entities that must abide by Montana open meeting and public participation laws that require that the entity provide an opportunity for allowing public comment on items not on the agenda but within the jurisdiction of the entity conducting the public meeting. This basically provides assistance to citizens seeking to exercise free speech to address topics of concern or urge something to be considered in the future and/or provide general praise for something that has occurred.

However, despite these general public participation in public meetings provisions of law, there also are Montana statutory limitations or restrictions with respect to political conduct or activity potentially associated with public entities or their elected officials or staffs. Section 2-2-121 MCA of Montana state law pertaining to rules of conduct for public officers and public employees expressly provides that public officers or public employees 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 otherwise authorized by law.

Section 2-2-121 MCA states as follows:

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.

(d) (i) If the public officer or public employee is a Montana highway patrol chief or highway patrol officer appointed under Title 44, chapter 1, the term "equipment" as used in this subsection (3) includes the chief's or officer's official highway patrol uniform.

(ii) A Montana highway patrol chief's or highway patrol officer's title may not be referred to in the solicitation of 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.

(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. (emphasis added)

City general fund public funds support the neighborhood councils and community forum. The neighborhood councils and community forum consist of representatives elected by their respective neighborhood councils who are serving as city public officers on the respective entities. A city clerk staff person is also generally in attendance at the meetings; so city publicly funded city staff are also in attendance at the public meetings. Thus, the neighborhood council and community forum meetings are within the scope of public time, public facilities, public equipment, public supplies, public personnel, etc. and are subject to the political conduct restrictions set forth in section 2-2-121 MCA.

While it could be acceptable for a person during public comment to introduce themselves and state that they are a candidate for public office, the person should not be allowed to campaign and/or turn the meeting into a political campaign stop or rally. It is going to be a very fine line sometimes; but city clerk staff should be working in advance with the chairperson of the meeting to be ready to address and enforce Montana state law with respect to any political conduct that might start to evolve at any neighborhood council, community forum or leadership team meeting.

CONCLUSION:

Yes. Pursuant to section 2-2-121 MCA pertaining to rules of conduct for public officers and public employees there is a statutory provision that provides that public time, facilities, equipment, supplies, personnel or funds are not to be utilized to solicit support for or opposition to any political committee, the nomination or election of any person to public office or the passage of ballot issues unless otherwise authorized by law.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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