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Legal Opinion 2016-012

TO: Mayor Engen; City Council; Dale Bickell; Marty Rehbein; Donna Gaukler; Ellen Buchanan; MRA; Steve Johnson; Laurie Pfau; Mike Brady; Jason Diehl; John Wilson; Mike Haynes; Dept/Div Heads

CC: Attorney Department

FROM: Jim Nugent, City Attorney

DATE May 13, 2016

RE: Montana State Law restrictions on public officers and employees political activities while at work as well as prohibitions on use of public work time, public facilities equipment, supplies, personnel or funds for political activity purposes.

FACTS:

Earlier this week our office received an expression of concern that a city staff person, while at work, was wearing a tee shirt supporting a current candidate for political office.

ISSUE(S):

- 1.) Pursuant to Montana state law, what statutory restrictions exist with respect to political activities for public employees while on the job?
- 2.) What specific Montana law restricts public officers and public employee political activities with respect to public work time, as well as use of public facilities, equipment, supplies, personnel or funds?
- 3.) When not at work or using public facilities, supplies, personnel, equipment, or funds, may a public employee be engaged in political activity on their personal time.

CONCLUSION(S):

- 1.) Mont. Code Ann. § 13-35-226(4) of Montana's election law provides:

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. *(Emphasis added.)*

2.) Mont. Code Ann. § 2-2-121(3) of Montana's standards of conduct law pertaining to the rules of conduct for public officers and public employees provides:

(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;

51 Op. Att'y Gen. 1 (2005) holds that generally, pursuant to Mont. Code Ann. § 2-2-121, public officers and public employees may not use public time, facilities, equipment, supplies, personnel or funds for political speech or political activity.

Mont. Code Ann. § 7-32-4114(4) of Montana's municipal law enforcement law provides:

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 if the activity does not otherwise interfere with the performance of duties.

Mont. Code Ann. § 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.

3.) The Montana Attorney General states that Montana law allows a public employee the right to be politically active when not at work and not utilizing public facilities, supplies, personnel, equipment, or funds.

LEGAL DISCUSSION:

Since 2016 is an election year for national, state and county elected offices, it is important to remind city employees and officers of Montana law restrictions on public employee political related conduct while at work as well as statutory prohibitions on use of public time, facilities, equipment, supplies, personnel or funds for political activity.

Title 13, chapter 35 Montana Code Annotated is entitled *Election and Campaign Practices and Criminal Provisions*. Mont. Code Ann. § 13-35-226, entitled *Unlawful Acts of Employers and Employees*: Section 13-3-226 MCA states:

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 Montana Code Annotated is entitled *Standards of Conduct*. Part 1 of this chapter is entitled *Code of Ethics*. Mont. Code Ann. § 2-2-121, 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.

(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(8)(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.*)

Montana Attorney General Mike McGrath interpreted Mont. Code Ann. § 2-2-121(3) 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.)

Montana Attorney General Mike McGrath explained his legal reasoning as follows at pages 2 and 3 of his Attorney General Opinion.

It is not personal political speech that is prohibited by subsection (3)(a); rather, it is the use of public time or resources in the presentation or furtherance of political speech. While a public officer or employee is not required to shed his public persona in order to exercise his right to free speech, he may not use public resources when expressing personal political beliefs.

Your questions pose scenarios involving elected officers, like county commissioners and sheriffs, whose unique positions require them to work a schedule outside of the typical 8 to 5 schedule of most public employees. You ask, for instance, what of the county commissioner who receives phone calls at home in the evenings, or the sheriff who is on call 24 hours a day?

In *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 605-606 (1967), the Supreme Court stated, "a government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment." Likewise, a county commissioner or sheriff (or any other public employees or officers) does not relinquish her First Amendment rights by the mere fact that she may be a public official. Pursuant to the plain language of Mont. Code Ann. § 2-2-121(3)(a), so long as a public officer or employee is not using "public time, facilities, equipment, supplies, personnel, or funds" she may engage in political speech. See *Dahl v. Uninsured Employers' Fund*, 1999 MT 168, ¶ 16, 295 Mont. 173, 983 P.2d 363.

Although "public time" is not defined, a reasonable construction would be those hours for which an employee receives payment from a

public employer. Elected officials, of course, do not have specific hours of employment nor do they receive vacation leave or other time off duty. They receive annual salaries rather than hourly wages. Thus, they could be considered to be on "public time" at all times. However, as long as public facilities, equipment, supplies, or funds are not involved, elected officials are not restricted in the exercise of political speech by the provisions of Montana law.

You also ask if subsection (3) prohibits a public employee or officer from signing a letter to the editor with his official title or prevents a law enforcement officer from wearing a uniform to campaign for a political issue or candidate. I conclude that, for the reasons stated above, subsection (3)(c) allows a public official to sign a letter to the editor, expressing personal political beliefs, with his official title, so long as public resources were not used to create the letter. Moreover, a sheriff would not be prohibited from wearing a uniform while campaigning for a political issue or candidate. In my opinion, neither activity would be prohibited by subsection (3).

Again, subsection (3)(a) only prevents use of "public time, facilities, equipment, supplies, personnel, or funds" in the furtherance of personal political speech. A title or a uniform is simply an accouterment of a public employee's or officer's position. A sheriff is not required to shed all associations, including his uniform, with his official position in order to exercise his protected right to express personal political beliefs.

The presumption is that free speech rights are protected and only the very specific restrictions in Mont. Code Ann. § 2-2-121 can be invoked to limit a public officer's or public employee's right to political speech. (*Emphasis added*).

THEREFORE, IT IS MY OPINION:

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.

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

Title 7, chapter 32, part 41 Montana Code Annotated is entitled *Municipal Police Force*. Mont. Code Ann. § 7-32-4114 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. 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 provided that 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.

CONCLUSION(S):

1.) Mont. Code Ann. § 13-35-226(4) of Montana's election law provides:

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. *(Emphasis added.)*

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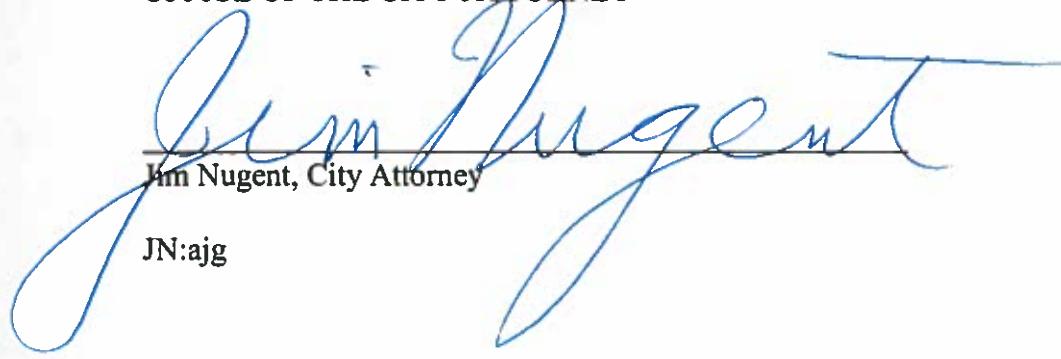
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