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Legal Opinion 2016-021

TO: Mayor Engen; City Council; Dale Bickell; Steve Johnson; Laurie Pfau; Mike Brady; Scott Hoffman; Jason Diehl; Jeff Brandt; Chad Nicholson; Ellen Buchanan; Chris Behan; Marty Rehbein; Ginny Merriam; Leigh Griffing; Donna Gaukler; Mike Haynes; John Wilson; Ron Regen; Rod Austin; Kathleen Jenks; Tina Reinicke

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE September 15, 2016

RE: Montana Supreme Court decision upholding enforcement of statutory limitations on public official and public employee political activity

FACTS:

There is a relatively recent Montana Supreme Court decision that upholds enforcement of Montana limitations on political activity of public officers or public employees which officials and employees should be aware of.

ISSUE(S):

Is there Montana Supreme Court case law interpreting Montana law limiting some political conduct or activity by either Montana public officials or public employees?

CONCLUSION(S):

Yes, the Montana Supreme Court decision in *Molinar v. Fox*, 2013 MT 132, 370 Mont. 238, 301 P.3d 824, 2013 Mont. LEXIS 158 (2013) provides some enforcement interpretation of a public officer's use of public time, facilities or equipment for political purposes.

LEGAL DISCUSSION:

Title 2, chapter 2 MCA is entitled STANDARDS OF CONDUCT. Part 1 of this chapter is entitled CODE OF ETHICS". Section 2-2-121 MCA is entitled RULES OF CONDUCT FOR PUBLIC OFFICERS AND PUBLIC EMPLOYEES. Section 2-2-121 MCA states:

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.

Subsection 2-2-121(3)(a) MCA generally prohibits a public officer or public employee from using 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 with certain statutorily identified exceptions.

The Montana Attorney General in 51 Attorney General Opinion No. 1 (2005) indicated that it is not personal public speech that is prohibited; but rather the use of public time or resources in the presentation or furtherance of political speech that is limited. A public officer or public employee may engage in political speech, including the support or opposition of a candidate or ballot issue, as long as the political speech does not involve the use of public time, facilities, equipment, supplies, personnel or public funds.

The Montana Supreme Court in *Molnar v. Fox*, 2013 Mt 132, 370 Mont. 238, 301 P 3d 824, 2013 Mont. LEXIS 158 affirmed a district court conclusion that a Montana Public Service Commissioner improperly used Montana state government facilities for political purposes. The public service commissioner used his state email address on a campaign fundraising letter and website; solicited a campaign editorial from state email, sent campaign related media emails from his state account and used his state email to arrange accommodations for a campaign appearance. The Montana Supreme Court indicated that the existence of a violation of Montana state law for an elected official turned on whether the elected official used public equipment, supplies, or funds for political purposes.

In this case, there were several other legal issues including, but not limited to, Brad Molinar accepting \$1000 gifts from two utilities that were allegedly used personally and not appropriately for “educational material” or “educational activity” as contemplated by law, Brad Molinar was also found to have inappropriately used public facilities for his reelection five (5) times.

The Montana Supreme Court at paragraph 44 of its decision stated,

“The District Court correctly concluded that Molinar used public facilities to solicit support for his reelection to the PSC in violation of 2-2-121(3)(a), MCA when he posted his PSC email address on his campaign website and listed his PSC address email and phone number as his contact information in the fundraising letter.”

Also, in paragraph 45, the Montana Supreme Court indicated that the prohibition against using public facilities for campaign purposes applies all day every day not just during work business hours.

Title 7, chapter 32, part 41 MCA is entitled “MUNICIPAL POLICE FORCE”. Section 7-32-4114 MCA is entitled RESTRICTIONS ON ACTIVITIES OF POLICE OFFICERS. Section 7-32-4114 MCA states:

7-32-4114. Restrictions on activities of police officers. (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 if 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.

The political restrictions for municipal police officers set forth in section 7-32-4114 MCA is that an officer of a police department may not participate in political activity if the officer is on duty or in uniform and as long as the activity does not interfere with the officer's police officer duties.

Title 13, MCA is entitled “ELECTIONS”. Title 13, chapter 35 MCA is entitled “ELECTION AND CAMPAIGN PRACTICES AND CRIMINAL PROVISIONS”. Section 13-35-226 MCA is

entitled UNLAWFUL ACTS OF EMPLOYERS AND EMPLOYEES. Section 13-35-226 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.

Section 13-35-226 MCA is the most comprehensive Montana state law placing limitations on public employees as well as more generally employers and employees other than public employees.

CONCLUSION(S):

Yes, the Montana Supreme Court decision in *Molinar v. Fox*, 2013 MT 132, 370 Mont. 238, 301 P.3d 824, 2013 Mont. LEXIS 158 (2013) provides some enforcement interpretation of a public officer's use of public time, facilities or equipment for political purposes.

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