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Legal Opinion 2009-017

TO: Mayor; City Council; Bruce Bender; Mike Painter; Jason Diehl; Jeff Logan; Gail Verlanic; Mike Brady

CC: City Attorney Staff

FROM: Jim Nugent

DATE November 6, 2009

RE: Montana Municipal Law and City of Missoula Self-Government Charter do not Require City Council Approval of Firefighter Promotions.

FACTS:

Earlier this week during a city council public safety and health committee discussion pertaining to the promotion of three (3) city fire fighters to fire fighter captains, one of the individual's promotion was barely recommended for approval by a 5-4 vote. The purported reasons for the opposition did not appear to directly relate to actual employment merit and qualification bases which are the statutory guiding standards for employment decisions. This committee topic discussion has also generated discussion as to whether the city council committee discussion was free from bias as well as whether city fire fighter employment promotions require city council approval.

ISSUE(S):

Is there any requirement in Montana State law or Missoula Self-Government Charter that requires city fire fighter promotions to fire captain to be approved by the city council?

CONCLUSION(S):

No. There is no provision of Montana State law or City Charter that requires city fire fighter promotions to fire captain to be approved by the city council. City council approval of city fire fighter promotions to captain is in conflict with Montana State law Subsection 7-3-213(3) MCA and Article III, §5 of the City of Missoula Self-Government Charter.

LEGAL DISCUSSION:

Title 7, chapter 33, Part 41 MCA is entitled "Municipal Fire Departments". Section 7-33-4106 MCA of this part is entitled "Appointment of Firefighters".

7-33-4106. Appointment of firefighters. The mayor or manager shall nominate and, with the consent of the council or commission, appoint the chief of the fire department, the assistant chief or chiefs of the fire department, and all firefighters. (Emphasis added.)

Pursuant to §1-2-101 MCA of Montana's statutory construction laws for interpreting Montana statutes, language omitted by the Montana State Legislature may not be inserted into a state statute through interpretation.

There is no provision in §7-33-4106 MCA that requires fire fighter employee promotions within the Fire Department to be approved by the city council, except for appointments of the fire chiefs and assistant fire chiefs. The MCA Annotations for §7-33-4106 MCA do not identify any Montana Supreme Court decisions or Montana Attorney General opinions that indicate that city fire fighter promotion to captain are or any other internal fire fighter promotion are required to be approved by the city council.

The City of Missoula form of government is a self-government statutory mayor/city council alternative form of local government with three branches of government with a legislative (city council) branch, an executive (mayor) branch, and a judiciary (judicial/municipal court).

City of Missoula Self-Government Charter Article III is entitled "Mayor". Article III, §5 of the City of Missoula Charter provides:

5. Administration. The Mayor shall have the day-to-day responsibility of administering the affairs of the City. The Mayor may appoint and remove, with consent of the City Council, all department heads in accordance with law. The Mayor may appoint and remove all other department employees in accordance with law. The Mayor shall supervise all City departments, except the Municipal Court. In the course of administering the City, the Mayor shall cause to be prepared on an annual basis a report detailing the financial condition of the City as well as a statement on the operations of the City including progress on programs and initiatives undertaken in the previous year. Once every three months, the Mayor shall make a full and complete statement of the financial condition of the City to the City Council. (Emphasis added.)

This provision of the City of Missoula Self-Government Charter is basically identical to and consistent with subsection 7-3-213(3) MCA, which pursuant to subsection 7-3-113-(1)(e) MCA, is the applicable statutory basis for municipal council-mayor form of government. Subsection 7-3-213(3) MCA provides:

7-3-213. Supervision of personnel. The executive may:

....
(3) appoint, with the consent of a majority of the commission, all department heads and remove department heads and may appoint and remove all other department employees; or

City Council operating rules must comply with provisions of Montana law and city charter, City Council Rule 33 does not require that city fire fighter promotions to captain be approved by the city council. Thus, City Council Rule 33 is consistent with Montana State Law.

Also, subsection 7-4-4303(3) MCA provides that a municipal mayor has power to “supervise the discharge of official duty by all subordinate officers”.

It is also important to note that mayoral administration and supervision of city employees must be in compliance with Federal and State nondiscrimination laws, equal employment opportunity laws, Montana governmental code of fair practices requiring employment decision, including promotions to be based on merit and qualifications”; and to ensure that “appraisal of qualifications is free from bias”. In this instance the fire fighter promotions to city council are not required to be referred to the city council for approval and the city council is without legal authority to require that city fire fighter promotions to captain be approved by the city council.

CONCLUSION(S):

No. There is no provision of Montana State law or City Charter that requires city fire fighter promotions to fire captain to be approved by the city council. In fact, city council approval of city fire fighter promotions to captain is in conflict with Montana State law Subsection 7-3-213(3) MCA and Article III, §5 of the city of Missoula Self-Government Charter.

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