

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2009-018

**TO:** Mayor; Dept. City Clerk; City Council; Bruce Bender; Mike Painter; Jason Diehl; Jeff Logan; Gail Verlanic; Mark Muir; Mike Brady; Chris Odlin; Gregg Willoughby; Scott Hoffman; Brentt Ramharter; Steve King; Kevin Slovarp; Donna Gaukler; Ellen Buchanan; Ann Guest; Doug Waters

**CC:** City Attorney Staff

**FROM:** Jim Nugent

**DATE** November 6, 2009

**RE:** Municipal Government Employee Promotions are to be Based on Merit and Qualifications without regard to Several Statutorily Identified Potentially Discriminatory Factors.

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### FACTS:

Earlier this week at city council public safety and health committee some city council members discussion occurred with respect to three (3) fire fighters recommended by the fire chief to be promoted to fire captain that reportedly was not based on the fire fighter's fire employment work experience, merit or qualifications as a fire fighter. While the committee vote was reportedly 5-4 to recommend approval of the promotion, concern has arisen about some city council discussion not being based on the fire fighter's fire fighter work experience, work performance, work merit or qualifications. Further, some concern exists that some city council comment may have violated Montana State law because it might have been based on a statutorily protected factor that is not to be considered with respect to government employee employment promotions. Concern arose that some city council member comment might generate another human rights commission complaint against the city council based on political reasons similar to *John Fletcher v City of Missoula City Council* generated on city council member comment when not appointing John Fletcher to a board appointment.

### ISSUE(S):

Generally, what does Montana State law require with respect to standards that must be adhered to with respect to employment promotion of government employees?

## **CONCLUSION(S):**

The Montana "Governmental Code of Fair Practices" provides pursuant to §49-3-201 MCA that Montana State and local government employment promotion decisions be based on merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin as well as that "appraisal of qualifications is free from bias".

## **LEGAL DISCUSSION:**

Federal law as well as Montana law establish protected grounds or status factors that are not to be considered with respect to various decisions including employment decisions. Other areas of decision making include government services, housing, finance, public accommodations, education, etc.

For example Title 49, Chapter 2 MCA is entitled "Illegal Discrimination". Part 3 of Title 49, Chapter 2 is entitled "Prohibited Discriminatory Practices". Section 49-2-303 MCA entitled "Discrimination in Employment" provides:

**49-2-303. Discrimination in employment. (1) It is an unlawful discriminatory practice for:**

(a) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction;

(b) a labor organization or joint labor management committee controlling apprenticeship to exclude or expel any person from its membership or from an apprenticeship or training program or to discriminate in any way against a member of or an applicant to the labor organization or an employer or employee because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the program do not require an age, physical or mental disability, marital status, or sex distinction;

(c) an employer or employment agency to print or circulate or cause to be printed or circulated a statement, advertisement, or publication or to use an employment application that expresses, directly or indirectly, a limitation, specification, or discrimination as to sex, marital status, age, physical or mental disability, race, creed, religion, color, or national origin or an intent to make the limitation, unless based upon a bona fide occupational qualification;

(d) an employment agency to fail or refuse to refer for employment, to classify, or otherwise to discriminate against any individual because of sex, marital status, age, physical or mental disability, race, creed, religion, color, or national origin, unless based upon a bona fide occupational qualification.

(2) The exceptions permitted in subsection (1) based on bona fide occupational qualifications must be strictly construed.

(3) Compliance with 2-2-302 and 2-2-303, which prohibit nepotism in public agencies, may not be construed as a violation of this section.

(4) The application of a hiring preference, as provided for in 2-18-111 and 18-1-110, may not be construed to be a violation of this section.

(5) It is not a violation of the prohibition against marital status discrimination in this section:

(a) for an employer or labor organization to provide greater or additional contributions to a bona fide group insurance plan for employees with dependents than to those employees without dependents or with fewer dependents; or

(b) for an employer to employ or offer to employ a person who is qualified for the position and to also employ or offer to employ the person's spouse.

(Emphasis added.)

There also is a federal illegal discrimination in employment law as well.

Montana Constitution, Article II, Section 4, entitled "Individual dignity" establishes a Montana Constitutional right that no person be denied equal protection of the law or be discriminated against based on any political ideas. Article II, Section 4 provides:

**Section 4. Individual dignity.** The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas. (Emphasis added.)

Pursuant to Title 49, Chapter 3 MCA the Montana State Legislature has enacted the Montana "Governmental Code of Fair Practices". Section 49-3-201 MCA is entitled "Employment of State and Local Government Personnel" and is much more specific than the previously cited and quoted illegal discrimination in employment law. Section 49-3-201 MCA requires government employment decisions, including government employee promotions to be based on "merit and qualifications" without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability or national origin as well as that "appraisal of qualifications is free from bias".

Section 49-3-201 MCA provides:

**49-3-201. Employment of state and local government personnel.** (1) State and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin.

(2) All state and local governmental agencies shall:

(a) promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state and local government;

(b) regularly review their personnel practices to assure compliance; and  
(c) conduct continuing orientation and training programs with emphasis on human relations and fair employment practices.

(3) The department of administration shall ensure that the entire examination process, including appraisal of qualifications, is free from bias.

(4) Appointing authorities shall exercise care to ensure utilization of minority group persons.

(5) Compliance with 2-2-302 and 2-2-303, which prohibit nepotism in public agencies, may not be construed as a violation of this section.

(Emphasis added.)

Montana State law pursuant to Montana's "Governmental Code of Fair Practices" law expressly requires that government employment promotion decisions be based on "merit and qualifications" and that "appraisal of qualifications is free from bias" with respect to the statutorily protected categories identified in §49-3-201 MCA.

#### **CONCLUSION(S):**

The Montana "Governmental Code of Fair Practices" provides pursuant to §49-3-201 MCA that Montana State and local government employment promotion decisions be based on "merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin" as well as that "appraisal of qualifications is free from bias".

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Jim Nugent, City Attorney

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