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**OFFICE OF THE CITY ATTORNEY**

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**Legal Opinion 2008-005**

**TO:** Mayor John Engen; City Council; Bruce Bender, Chief Administrative Officer; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk; Donna Gaukler, Parks & Recreation Director; Jackie Corday, Open Space Manager; Dept./Div. Heads; Rusty Wickman, Police Chief; Mark Muir, Assistant Police Chief; Brentt Ramharter; Beckie Christiaens; Gail Verlanic; Steve King; Kevin Slovarp; Gregg Wood; Doug Harby

**FROM:** Jim Nugent, City Attorney

**DATE** May 2, 2008

**RE:** Montana statutory restrictions on political activity of public officers and employees with respect to ballot issues and/or political candidates

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**FACTS:**

Some City departmental inquiry has arisen this year pertaining to Montana statutory restrictions on political activity of public officers and employees. There has been discussion of several potential ballot issues, such as a new City law enforcement building, soccer field development, to an up to two (2) cent Missoula countywide voter approved gasoline fuel tax in addition to numerous county, state and federal candidate elections this year.

**ISSUES:**

1. What specific statutory restrictions apply to Municipal police officers?
2. What Montana statutory restrictions exist with respect to political activities by public officers and employees at work or at their work sites?

**CONCLUSION:**

1. 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 that it does not otherwise interfere with the performance of duties.

Mont. Code Ann. § 7-32-4114(4) prohibits an officer or member of a police department from participating in political activity while on duty or in uniform.

2. 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.

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;

(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. (Emphasis added.)

Also see 51 Op. Att'y Gen. 1 (2005) holding 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.

### **LEGAL DISCUSSION:**

City officials and employees need to be aware of and informed of what political activities are prohibited while at work, especially with respect to the prohibitions on the use of government assets or government funds.

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.

(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 that it does not otherwise interfere with the performance of duties. (Emphasis added.)

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* as amended by the 2005 Montana State Legislature effective upon the governor's signature April 28, 2005, provides:

**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.)

Mont. Code Ann. § 13-35-226(3) provides that “[a] public employee may not solicit support for or opposition to any . . . election of any person to public office, or the passage of a ballot issue while on the job or at the place of employment.” (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) 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.

(4) 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.

(5) 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.

(6) 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.

(7) 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.

(8) 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 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.)

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

## **CONCLUSIONS:**

1. 1. 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 that it 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.

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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:

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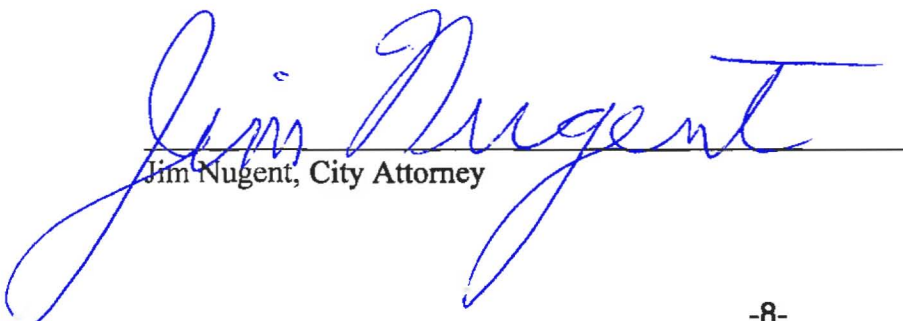
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