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Legal Opinion 2014-004

TO: Mayor John Engen, Bruce Bender, Human Resources Department, City Department Heads

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE January 27, 2014

RE: Public employees may not use public time, facilities, equipment, supplies, personnel, or funds for private business purposes.

FACTS:

As a new calendar year commences, it is important for City Department Heads to be aware and to remind their respective employees that a public employee may not use public time, facilities, equipment, personnel, or funds for a public employee's private business purposes.

ISSUE(S):

Does Montana state law set forth a standard of conduct addressing a public employee's potential use of public time, facilities, equipment, supplies, personnel or funds for private business purposes?

CONCLUSION(S):

Yes, subsection 2-2-121(2)(a) MCA provides that a public employee may not use public time, facilities, equipment, supplies, personnel or funds for private business purposes.

LEGAL DISCUSSION:

Title 2, chapter 2 Montana Code Annotated (MCA) is entitled "STANDARDS OF CONDUCT". Part 1 of title 2, chapter 2 MCA is entitled "CODE OF ETHICS". Section 2-2-121 MCA entitled "RULES OF CONDUCT FOR PUBLIC OFFICERS AND PUBLIC EMPLOYEES" in part specifically states that public employees may not use public time, facilities, supplies, personnel or funds for private business purposes. See subsection 2-2-121(2)(a) MCA.

Section 2-2-121 "RULES OF CONDUCT FOR PUBLIC OFFICERS AND PUBLIC EMPLOYEES" provides in its entirety as follows:

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 (emphasis added);
- (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.