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Legal Opinion 2014-014

TO: John Engen, Mayor; City Council; Bruce Bender; Ginny Merriam; Marty Rehbein; Leigh Griffing; Scott Paasch; Gail Verlanic; and Nikki Rogers

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE March 18, 2014

RE: Municipal oaths of office are to support, protect and defend the United States and Montana Constitutions and perform duties with fidelity. Only qualified electors entitled to vote for the specific elected official may vote to recall an elected official for allegedly violating their oath of office.

FACTS:

Recently a citizen has expressed concern during City Council meetings that a City Council member allegedly violated their oath of office and should resign or be recalled. Based on the information provided by the citizen, the citizen is not currently eligible to vote to recall the City Council member complained about because they are residents of different City Council wards. The citizen complains about the City Council member making a reference to men's penises during City Council discussion of a City Council agenda item and asserts the comment was prejudicially discriminatory against men. Reportedly during the City Council discussion the City Council member stated "when we hear from opponents that we're just a bunch of privileged white people, those of us who don't have penises may have a little bit of a different experience."

ISSUE(S):

1. What is the oath of office required of municipal elected officials in Montana?
2. Who is eligible to seek recall of a Montana elected official?
3. Pursuant to the Montana Recall Act pertaining to the potential recall of an elected government official from an elective government office, what are the grounds for potential recall?

CONCLUSION(S):

1. Pursuant to Article III, Section 3 of the Montana Constitution as well as Section 7-1-4137 MCA the oath of office for a municipal elected official in Montana is to support, protect

and defend the United States and the Montana Constitutions and to discharge the duties of their office with fidelity.

2. Only qualified electors eligible to vote for the elected official's Successor are entitled to vote for the elected official's recall.
3. Pursuant to the Montana Recall Act "the only grounds for recall" that are authorized are 1.) Physical or mental lack of fitness; 2.) Incompetence; 3.) Violation of the oath of office; 4.) Official Misconduct; or 5.) Conviction of a felony offense enumerated in Title 45, Montana's Criminal Code of 1973.

LEGAL DISCUSSION:

Pursuant to Article III, Section 3 of Montana's constitution as well as pursuant to Section 7-1-4137 MCA, the oath of office that Municipal elected officials take is to "support, protect, and defend the constitution of the United States and the Constitution of the State of Montana and to discharge their duties with fidelity." The allegations being asserted against the City Council Member as to what they said during a City Council debate does not appear to violate either the United States or Montana Constitutions. Also, the City Council member comments do not violate any discrimination law. The city council member did not refuse, withhold or deny anything from anyone based on their protected class status. Further, the allegations do not assert a breach of fidelity with respect to integrity or honesty; such as allegations of embezzlement or false claims for monetary reimbursements.

The Montana Recall Act is set forth in Title 2, Chapter 16, Part 6 Montana Code Annotated (MCA). Section 2-16-603 MCA of the Montana Recall Act sets forth that a public official may only be recalled by qualified electors entitled to vote for the elective officer's successor. Also, Section 2-16-603, MCA sets forth the sole grounds for recall. Section 2-16-603 MCA provides:

2-16-603. Officers subject to recall -- grounds for recall. (1) Any person holding a public office of the state or any of its political subdivisions, either by election or appointment, is subject to recall from office.

(2) A public officer holding an elective office may be recalled by the qualified electors entitled to vote for the elective officer's successor. A public officer holding an appointive office may be recalled by the qualified electors entitled to vote for the successor or successors of the elective officer or officers who have the authority to appoint a person to that position.

(3) Physical or mental lack of fitness, incompetence, violation of the oath of office, official misconduct, or conviction of a felony offense enumerated in Title 45 are the only grounds for recall. A person may not be recalled for performing a mandatory duty of the office that the person holds or for not performing any act that, if performed, would subject the person to prosecution for official misconduct. (Emphasis Added)

Clearly an elected City Council member may only be recalled by the qualified electors entitled to vote for the City Council member's successor if the City Council member were successfully recalled. Subsection 2-16-603(3) MCA specifically states that "the only grounds for recall" of

an elected official are 1.) Physical or mental lack of fitness; 2.) Incompetence; 3.) Violation of the oath of office; 4.) Official misconduct; or 5.) Conviction of a felony offense enumerated in Title 45. Title 45 is entitled “Crimes” and is commonly referred to as the Montana Criminal Code.

Sections 1-2-106 and 1-2-107 MCA of Montana’s Statutory Rules of Construction (Interpretation) state as follows:

1-2-106. Construction of words and phrases. Words and phrases used in the statutes of Montana are construed according to the context and the approved usage of the language, but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law or are defined in chapter 1, part 2, as amended, are to be construed according to such peculiar and appropriate meaning or definition.

1-2-107. Applicability of definitions. Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears. (Emphasis supplied)

There is no definition in Montana State Law of the phrase “physical or mental lack of fitness”. However, Montana State Law does define the terms “mentally defective” and “mentally incapacitated” which could potentially be of some value in determining the meaning of the phrase “physical or mental lack of fitness”. Subsections 45-2-101(40) and (41) MCA of the Montana Criminal Code set forth the following definitions:

(40) “Mentally defective” means that a person suffers from a mental disease or defect that renders the person incapable of appreciating the nature of the person’s own conduct.

(41) “Mentally incapacitated” means that a person is rendered temporarily incapable of appreciating or controlling the person’s own conduct as a result of the influence of an intoxicating substance. (Emphasis added)

The only Montana State Law definition related to “incompetence” is “incompetent person” which is set forth in subsection 53-24-103(9) MCA of Montana’s alcoholism and drug dependence laws stating:

“(9) Incompetent person means a person who has been adjudged incompetent by the district court. (Emphasis added)

A third potential ground for recall of an elected official pursuant to the Montana Recall Act is “violation of the oath of office”. Section 7-1-4137 MCA of Montana’s general municipal government laws is entitled “oath of office”:

7-1-4137. Oath of office. (1) Every elected and appointed municipal officer shall take the oath of office prescribed in Article III, section 3, of the Montana constitution. Before the officer performs any official duties, the oath of office, certified by the official before

whom the oath was taken, must be filed. An elected officer shall file the oath with the county election administrator. Except as provided in subsection (2), an appointed officer shall file the oath with the city clerk.

(2) A person appointed to fill a vacancy in an elected municipal office shall file the oath of office with the county election administrator. (Emphasis added)

Article III, Section 3 of Montana's Constitution States:

Section 3. Oath of office. Members of the legislature and all executive, ministerial and judicial officers, shall take and subscribe the following oath or affirmation, before they enter upon the duties of their offices: "I do solemnly swear (or affirm) that I will support, protect, and defend the Constitution of the United States and the Constitution of the State of Montana, and that I will discharge the duties of my office with fidelity (so help me God.)" No other oath, declaration, or test shall be required as a qualification for any office or public trust. (Emphasis added).

A fourth ground for recall is "Official Misconduct", The meaning of the phrase "official misconduct" in Montana for the purposes of the Montana Recall Act is the meaning set forth in section 45-7-401 MCA of Montana's Criminal Code. See Foster v. Kovich, 207M 139, 673 P2d 1239(1983).

Section 45-7-401 MCA provides:

45-7-401. Official misconduct. (1) A public servant commits the offense of official misconduct when in an official capacity the public servant commits any of the following acts:

- (a) purposely or negligently fails to perform any mandatory duty as required by law or by a court of competent jurisdiction;
- (b) knowingly performs an act in an official capacity that the public servant knows is forbidden by law;
- (c) with the purpose to obtain a personal advantage or an advantage for another, performs an act in excess of the public servant's lawful authority;
- (d) solicits or knowingly accepts for the performance of any act a fee or reward that the public servant knows is not authorized by law; or
- (e) knowingly conducts a meeting of a public agency in violation of 2-3-203.

(2) A public servant convicted of the offense of official misconduct shall be fined not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) The district court has exclusive jurisdiction in prosecutions under this section. Any action for official misconduct must be commenced by an information filed after leave to file has been granted by the district court or after a grand jury indictment has been found.

(4) A public servant who has been charged as provided in subsection (3) may be suspended from office without pay pending final judgment. Upon final judgment of conviction, the public servant shall permanently forfeit the public servant's office. Upon acquittal, the public servant must be reinstated in office and must receive all backpay.

(5) This section does not affect any power conferred by law to impeach or remove any

public servant or any proceeding authorized by law to carry into effect an impeachment or removal. (Emphasis Added)

The Montana Supreme Court in Foster v. Kovich, supra, indicated that a public official has not committed “official misconduct” within the meaning of the Montana Recall Act unless the public official has committed one or more of the acts set forth in section 45-7-401MCA.

It is also important to note and emphasize that the Montana Attorney General pursuant to 38 Attorney General Opinion 41 (1979) held that an allegation that a public official voted in a manner contrary to the wishes, will or desires of his constituents is not a sufficient ground for recall. The Attorney General noted that the only bases for recall are enumerated in Section 2-16-603 MCA of the Montana Recall Act. Similarly, what the City Council member stated during City Council debate is not a sufficient ground for recall of the City Council person.

A fifth potential ground for recall of an elected person pursuant to the Montana Recall Act is “Conviction of a felony offense enumerated in Title 45 “MCA, Title 45” MCA, Title 45 MCA is entitled “Crimes” and is commonly referred to as Montana’s Criminal Code.

The term “felony” is defined in subsection 45-2-101(23), MCA as follows:

“(23) “Felony” means an offense in which the sentence imposed upon conviction is death or imprisonment in a state prison for a term exceeding one year.”

Finally, with respect to any recall petition approved by the Missoula County Elections Office, section 2-16-614 MCA of the Montana Recall Act is entitled “Number of electors required for recall petition.” Subsection 2-16-614(4) MCA pertains to recall of Municipal officials provides:

(4) Recall petitions for elected or appointed officers of municipalities or school districts must contain the signatures of qualified electors equaling at least 20% of the number of persons registered to vote at the preceding election for the municipality or school district. (emphasis added)

CONCLUSION(S):

1. Pursuant to Article III, Section 3 of the Montana Constitution as well as Section 7-1-4137 MCA the oath of office for a municipal elected official in Montana is to support, protect and defend the United States and the Montana Constitutions and to discharge the duties of their office with fidelity.
2. Only qualified electors eligible to vote for the elected official to be recalled are entitled to vote for the elected official’s recall.
3. Pursuant to the Montana Recall Act “the only grounds for recall” that are authorized are 1.) Physical or mental lack of fitness; 2.) Incompetence; 3.) Violation of the oath of office; 4.) Official Misconduct; or 5.) Conviction of a felony offense enumerated in Title 45, Montana’s Criminal Code of 1973.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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