

VOLUME NO. 37

OPINION NO. 104

EMPLOYEES, PUBLIC - Code of ethics; COUNTY OFFICERS AND EMPLOYEES - Code of ethics; CORONER - Conflict of interest; SHERIFF, DEPUTIES - Outside employment; CONFLICT OF INTEREST - Public employees, code of ethics; REVISED CODES OF MONTANA, 1947 - Sections 39-1701 et seq. 35 OP. ATTY. GEN. NO. 92.

- HELD: 1. A member of a county board breaches a fiduciary duty if he enters into a substantial financial transaction for personal business with a person he inspects or supervises in the course of his official duties.
2. The voluntary disclosure provisions of section 59-1710, R.C.M. 1947, will serve to excuse an act which would otherwise be a violation of the Code of Ethics only if the individual involved is a member of the local governing body, or a state department head or member of a state quasi-judicial or rulemaking board.
3. A county coroner who is also a mortician violates the provisions of section 59-1707(2)(b), R.C.M. 1947, if he directs that a body be taken to a funeral parlor in which he has a substantial financial interest, unless he has no discretion to select the funeral parlor.
4. A deputy sheriff may accept employment as a security guard without violating section 59-1707(2)(a), R.C.M. 1947.
5. A county employee breaches his fiduciary duty to the county if he engages in a substantial financial transaction for private business purposes with a county employee he supervises in the course of his official duties.
6. The Code of Ethics prohibits a county employee from using confidential information acquired in the course of his official duties to further his economic interest, but it does not prohibit a county employee from bidding on county property being sold at public auction or limit the employees' ability to purchase tax deeds.

10 January 1978

The Honorable Frank Murray  
Secretary of State  
State Capitol  
Helena, Montana 59601

Dear Mr. Murray:

You have requested my opinion on the following questions pursuant to your authority to issue advisory ethics opinions under section 59-1711:

1. May a member of a county board enter into a partnership agreement with other individuals to develop property, which the board member owned prior to taking office, if the proposed development does not require action or approval by the board of which he is a member? The individual partners may from time to time appear before the board on entirely unrelated matters.
2. If a member of a county board may enter into such an arrangement, is he subject to the disclosure requirements of section 59-1710, R.C.M. 1947?
3. Does the county coroner, who is also a mortician, violate the provisions of section 59-1707(2)(b), R.C.M. 1947, when acting in his official capacity as coroner, if he directs that a body be taken to a funeral parlor in which he has an ownership interest?
4. May a deputy sheriff accept employment as a security guard on his own time without violating section 59-1707(2)(a), R.C.M. 1947?
5. May a county employee employ in his private business a county employee he supervises in the course of his official duties without violating section 59-1707(2)(a), R.C.M. 1947?
6. Does any provision of the Code of Ethics prohibit or limit the right of a county employee to bid on county property being sold at public auction, or to bid on or purchase tax deeds from the county?

The 1972 Montana Constitution directed the Legislature to provide a code of ethics for government employees. Chapter 17, Title 59 was enacted by the 45th Legislature as a partial response to that mandate. Section 59-1701 provides that the purpose of the chapter is to establish a code prohibiting "conflict between public duty and private interest."

The ethical ramifications of public duty have received considerable scrutiny in the courts. See e.g., Schumacher v. City of Bozeman, 34 Mont. Rep. 1288 (1977). The United States Supreme Court in considering the rationale of a federal conflict of interest statute held:

The obvious purpose of the statute is to insure honesty in the government's business dealings by preventing federal agents who have interests adverse to those of the government's from advancing their own interest at the expense of public welfare.

The Court also held that such statutes must be given broad interpretation:

The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.

U.S. v. Mississippi Valley Co., 364 U.S. 520 (1961). See also People v. Savaino, 335 N.E.2d 553 (Ill. 1975); Stigall v. City of Taft, 375 P.2d 289 (Cal. 1962).

The Montana Code of Ethics, section 59-1701 et seq., provides that the holding of public office or employment is a public trust. The Code prohibits certain activities, the

commission of which constitutes a breach of the employee's fiduciary duty to the state. The measure of liability for fiduciary transgressions is provided in section 86-310; the officer or employee may be required to account to the public for all profits, proceeds or the reasonable value of any benefit to him by virtue of his misconduct.

The prohibitions and penalties of the Code do not preempt prior statutory provisions which may make other activity by public employees unlawful. See for example the provisions of section 59-501, R.C.M. 1947, regarding public contracts, and the criminal provisions for official misconduct, section 94-7-401, especially the provisions for knowingly performing an act prohibited by law.

Our Code recognizes a distinction between legislators, other officers and employees of the state government and officers and employees of local government. The Code recognizes that some actions are "conflicts per se between public duty and private interest," while other actions may or may not pose such conflicts depending upon the particular circumstances. Section 59-1701.

While some actions are described as being "conflicts per se," it is necessary to look at each particular transaction or relationship in conjunction with the surrounding circumstances before a determination can be made as to whether or not a breach has occurred. For example, a number of prohibitions require a "substantial" financial transaction or an act "substantially" affecting economic benefit. In those instances, what is "substantial" may depend largely on the particular facts and circumstances involved.

Your first two questions describe a situation where a member of a county board enters into a partnership agreement with other individuals to develop property. The proposed development does not require action or approval by the board, but the individuals with whom the board member proposes to associate have appeared before the board in the past and may in the future appear and require board approval regarding matters not related to the proposed property development.

Section 59-1707, "Rules of Conduct for Local Government Officers and Employees" provides:

- (1) Proof of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty.

(2) An officer or employee of local government may not:

(a) engage in a substantial financial transaction for his private business purposes with a person whom he inspects or supervises in the course of his official duties; or

(b) perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent.

(3) A member of the governing body of a local government may perform an official act notwithstanding this section when his participation is necessary to obtain a quorum or otherwise enable the body to act, if he complies with the voluntary disclosure procedures under 59-1710.

Section 59-1702(3) specifically provides that a member of a "board, commission or committee" is an "employee" under the meaning of the Code. A partnership to develop property is a "substantial financial transaction" under the definition of "financial interest" established in sections 59-1702(4)(a) and 59-1702(4)(d).

For the partnership to violate the Code however, it is necessary to determine whether the proposed partners are persons whom the board member "inspects or supervises in the course of his official duties." A fundamental principle of statutory interpretation is that words should be construed favoring the plain meaning of the language used. State ex rel. Huffman v. District Court, 154 Mont. 201, 461 P.2d 847 (1969). Webster's New International Dictionary, Second Edition, defines the word "inspect" as:

to look upon; to view closely and critically, esp. so as to ascertain quality or state, to detect errors, etc.; to scrutinize; (2) to view and examine officially.

The same volume defines "supervise" in pertinent part "to oversee for direction; to superintend; to inspect with authority." To determine whether the board member inspects or supervises the prospective partner, it is necessary to examine the duties of the particular board in question and interpret the facts in accord with the statute on a case by case basis. If the board member does "inspect or supervise

in the course of his official duties" one of his potential partners, then engaging in that business activity would be a breach of fiduciary duty under the provisions of section 59-1707(2)(a).

Your second question refers to voluntary disclosure. If it is determined above that no fiduciary breach is involved and that the board member may enter into such an arrangement, then he is subject to the provisions of section 59-1707(2)(b), and may not perform an official act which directly and substantially affects a business in which he has a substantial interest. Section 59-1710 does allow a member of a local governing board to perform an "official act" in certain circumstances if he complies with the disclosure procedures of section 59-1710.

The disclosure provisions of section 59-1710 provide:

A public officer or employee may, prior to acting in a manner which may impinge on his fiduciary duty, disclose the nature of his private interest which creates the conflict. He shall make the disclosure in writing to the secretary of state, listing the amount of his financial interest, if any, the purpose and duration of his services rendered, if any, and the compensation received for the services or such other information as is necessary to describe his interest. If he then performs the official act involved, he shall state for the record the fact and summary nature of the interest disclosed at the time of performing the act.

Section 59-1710 standing alone does not state that a public officer or employee is relieved of his obligations for breach of fiduciary duty by following the disclosure provisions of that section. As a practical matter, this section has no effect on a potential fiduciary breach other than to show good faith on the part of the individual disclosing. Section 59-1711 provides that the Secretary of State may issue advisory opinions. However, nothing in section 59-1711 gives the disclosing party a right to rely on opinions the Secretary may issue.

There are only two instances in chapter 17 where voluntary disclosure exonerates a potential breach. Section 59-1706(3), Rules of Conduct for State Officers and Employees states:

(3) A department head or a member of a quasi-judicial or rulemaking board may perform an official act, notwithstanding subsection (2)(e), if his participation is necessary to the administration of the statute and if he complies with the voluntary disclosure procedures under 59-1710.

Section 59-1707(3), Rules of Conduct for Local Government Officers and Employees, has a similar provision:

(3) A member of a governing body of a local government may perform an official act notwithstanding this section when his participation is necessary to obtain a quorum or otherwise enable the body to act, if he complies with the voluntary disclosure provision procedures under 59-1710.

Other than the two quoted provisions, nothing in chapter 17 permits a public officer or employee to perform an act which would be a fiduciary breach by conforming to the voluntary disclosure provisions of 59-1710. Legislative intent must be determined from the actual words used in the statute and statutory interpreters are not permitted to insert language possibly omitted. In re Transportation of School Children, 117 Mont. 618, 161 P.2d 901 (1945).

The answer to your second question can be answered by review of the Code of Ethics. You will note from the above quoted provisions of section 59-1707(3), only members of a local governing body are permitted to perform an official act by complying with the voluntary disclosure procedures of section 59-1710. If the county board concerned is the board of county commissioners then the disclosure provisions under section 59-1707(3) apply. If the individual is a member of any other county board the disclosure provisions of that section will not exonerate an official act performed in derogation of fiduciary responsibilities.

Question three involving county coroners who are also morticians was addressed in 35 OP. ATT'Y GEN. NO. 92 which held that section 59-501, prohibiting county officers from being personally interested in any contract made in their official capacity, did not prohibit the county coroner, who is also a licensed mortician, from assigning coroner cases to a mortuary in which he had an interest. Section 59-501(2)(d) specifically excludes contracts for professional services. It was held that a licensed mortician is a professional, and

therefore contracts entered into by licensed morticians were contracts for professional services and exempt by the statute.

However, the Code of Ethics, specifically section 59-1707(2)(b), was enacted subsequent to that opinion and on its face prohibits such activity by a county coroner. A county coroner is a local government officer and employee as defined by sections 59-1702(3) and (6). The facts of each case must be examined to determine if there is a substantial financial interest involved, as well as a direct and substantial economic affect when a coroner directs that a body be taken to a funeral parlor in which he has an ownership interest. Clearly, a majority or sole ownership interest is substantial but a 10% ownership interest may not be.

An official act is required for the prohibitions of section 59-1707(2)(b) to apply. Therefore, an additional consideration is raised by your question. Section 59-1702(5) defines "official act" as:

...a vote, decision, recommendation, approval, disapproval, or other action including inaction which involves the use of discretionary authority. (Emphasis added.)

Regarding duties of the coroner, section 82-443 provides:

When a medical examiner or coroner takes custody of a body of a deceased person for purposes of examination and no other person claims the body, the coroner of the county in which the death occurred or the body was found shall cause it to be decently interred. (Emphasis added.)

It is clear that a coroner has the absolute responsibility of seeing the body is given a decent burial. But there are circumstances where the coroner has no discretion. For example, in many communities throughout the state the coroner is the only mortician in the jurisdiction. A coroner only has jurisdiction within his own county. See e.g., sections 95-812 and 16-2406. In counties where the only mortician is the coroner, the only feasible manner in which a coroner can perform the statutory duties of section 82-443 may be to refer the corpse to the mortuary with which he is associated. That is not a matter reasonably within the discretion of the coroner and therefore is not strictly an official act within the meaning of the Code of Ethics.

However, only in those limited instances where no discretion is involved will the coroner not be in violation of section 59-1707(2)(b).

In response to the fourth question, a deputy sheriff may work as a security guard on his off-duty hours without violating section 59-1707(2)(a). A deputy sheriff is an employee of local government and his work as a security guard probably would be a substantial financial transaction under the definitions in the chapter. However, his work as a security guard is not a financial transaction with a person whom he inspects or supervises in the course of his official duties as the terms "inspect" or "supervise" are defined above. Consequently, there is no violation of that particular statute.

In response to your fifth question, a county employee who supervises a number of other county employees may not under the Code employ in his private part-time business, if it is a "substantial financial transaction," another county employee whom he supervises in the course of his official duties. Again, section 59-1707(2)(a) prohibits a county employee from engaging in a substantial financial transaction with a person he inspects or supervises. In pertinent part section 59-1702(5) defines "financial interest" as an interest held by an individual which is:

(c) an employment or perspective employment for which negotiations have begun.

The issue of whether the particular financial transaction described in your question is to be considered substantial, however, will have to be decided on a case by case basis. Consideration should be given to the nature and extent of the transaction; the nature and extent of the employee-supervisor relationship; and the amount of remuneration in proportion to the individual salaries involved, as well as the intent and purpose of the Code.

In response to your last question, there is no provision in the Code of Ethics which strictly prohibits or limits the right of a county employee to bid on county property being sold at public auction or bid on or purchase tax deeds being sold by the county. However, under the rules of conduct for all public employees, enumerated in section 59-1704, an employee may not:

(a) disclose or use confidential information acquired in the course of his official duties in order to further substantially his personal economic interests.

This provision should be liberally construed. U.S. v. Mississippi Valley Co., supra. In addition the provisions of sections 59-501 and 59-502 may apply in some situations. Any employee purchasing property or acquiring property through the county must certainly be mindful of the potential danger of conflict and act accordingly.

THEREFORE, IT IS MY OPINION:

1. A member of a county board breaches a fiduciary duty if he enters into a substantial financial transaction for personal business with a person he inspects or supervises in the course of his official duties.
2. The voluntary disclosure provisions of section 59-1710, R.C.M. 1947, will serve to exonerate an act which would otherwise be a violation of the Code of Ethics only if the individual involved is a member of the local governing body, a state department head or member of a state quasi-judicial or rulemaking board.
3. A county coroner who is also a mortician violates the provisions of section 59-1707(2)(b), R.C.M. 1947, when he directs a body be taken to a funeral parlor in which he has a substantial financial interest, unless he has no discretion to select the funeral parlor.
4. A deputy sheriff may accept employment as a security guard without violating section 59-1707(2)(a), R.C.M. 1947.
5. A county employee breaches his fiduciary duty to the county if he engages in a substantial financial transaction for private business purposes with a county employee he supervises in the course of his official duties.
6. The Code of Ethics prohibits a county employee from using confidential information acquired in the course of his official duties to further his

economic interest, but it does not prohibit a county employee from bidding on county property being sold at public auction or limit the employees' ability to purchase tax deeds.

Very truly yours,

MIKE GREELY  
Attorney General