

VOLUME NO. 38

OPINION NO. 76

GIFTS - To public servants by persons subject to jurisdiction;
SHERIFFS - Receipt of gifts from persons subject to jurisdiction;
SHERIFFS - Propriety of sales as fund raising activities;
MONTANA CODE ANNOTATED - Sections 45-2-101(44), 45-2-101(51), 45-7-101, 45-7-104.

- HELD: 1. Section 45-7-104, MCA, prohibits the receipt by a sheriff's department of pecuniary gifts from individuals or organizations within the sheriff's regulatory or investigative jurisdiction.
2. Section 45-7-104, MCA, does not prohibit the use by sheriff's departments of fund-raising programs involving the sale of goods or services.

22 April 1980

Charles A. Graveley, Esq.
Lewis & Clark County Attorney
Lewis & Clark County Courthouse
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Dear Mr. Graveley:

You have requested my opinion as to whether fund-raising activities such as the solicitation of donations and the sale of tickets to a circus by the sheriff's department constitute a violation of section 45-7-104, MCA. The pertinent provisions are as follows:

45-7-104. Gifts to public servants by persons subject to their jurisdiction. (1) No public servant in any department or agency exercising a regulatory function, conducting inspections or investigations, carrying on a civil or criminal litigation on behalf of the government, or having custody of prisoners shall solicit, accept, or agree to accept any pecuniary benefit from a person known to be subject to such regulation, inspection, investigation, or custody or against whom such litigation is known to be pending or contemplated.

(5) This section shall not apply to:

(a) fees prescribed by law to be received by a public servant or any other benefit for which the recipient gives legitimate consideration or to which he is otherwise entitled; or

(b) trivial benefits incidental to personal, professional, or business contracts and involving no substantial risk of undermining official impartiality.

This statute was enacted to cover situations not commonly thought to be within the definition of bribery. The gravamen of the felony offense of bribery is the giving of consideration for the purpose of affecting a particular action or transaction. See § 45-7-101, MCA. In order to prove the misdemeanor offense of receipt of a gift by a public servant under section 45-7-104, MCA, the particular intent to affect a given action need not be shown. The latter statute governs situations where a pecuniary benefit is bestowed upon a public servant by one who is or may be subject to that public servant's regulatory or investigatory jurisdiction even absent a present intention to influence an official action. The statute punishes the appearance of or potential for improper influence. This view is born out by the exceptions stated in subsection (5). One exception permits the receipt of money as a fee prescribed by law or in exchange for "legitimate consideration." The other permits the receipt of "trivial" pecuniary benefits arising from personal, professional, or business contracts, when there is "no substantial risk of undermining official impartiality."

In my opinion, the solicitation or receipt by the sheriff's department of gifts from individuals or organizations subject to the sheriff's investigative or regulatory jurisdiction (i.e., those who are located in the county) is prohibited by the statute. The donors are "persons" within the meaning of the statute, see § 45-2-101(44), MCA, and the sheriff and his deputies are obviously "public servants" exercising regulatory and investigative jurisdiction. § 45-2-101(51), MCA. More to the point, the potential for the appearance of favoritism in the department's dealings with the donor organization is obviously present. This is not to suggest that the sheriff's department in this or any other county might show favoritism or engage in any other kind of impropriety. However, the Legislature has determined that the giving of gifts to or receipt of gifts by the department under circumstances which might create the appearance of such impropriety is simply against the public policy of this state.

The second example you give--the sale of circus tickets--presents a different question. The statute explicitly recognizes the propriety of receiving a pecuniary benefit if the donor receives a corresponding "legitimate consideration." In my opinion, the provision allows the use of

mercantile fund-raising projects such as sales, dances (e.g., the traditional Policemen's Ball), circuses and the like. The "donor" in such cases receives a "legitimate consideration" in return for the pecuniary benefit bestowed on the sheriff, in the form of goods sold, tickets to a dance or circus, etc. The Legislature has determined that such exchanges are not subject to criminal penalty.

THEREFORE, IT IS MY OPINION:

1. Section 45-7-104, MCA, prohibits the receipt by a sheriff's department of pecuniary gifts from individuals or organizations within the sheriff's regulatory or investigative jurisdiction.
2. Section 45-7-104, MCA, does not prohibit the use by sheriff's departments of fund-raising programs involving the sale of goods or services.

Very truly yours,

MIKE GREELY
Attorney General