

CITIES AND TOWNS - Authority of mayor to appoint administrative assistant;
EMPLOYEES, PUBLIC - Status of administrative assistant to mayor as officer or employee;
MUNICIPAL GOVERNMENT - Authority of mayor to appoint administrative assistant;
PUBLIC OFFICERS - Status of administrative assistant to mayor as officer or employee;
MONTANA CODE ANNOTATED - Sections 7-3-113, 7-3-203, 7-3-212(2), 7-3-213, 7-3-214(2), 7-3-215(2), 7-3-216(2), 7-4-4101(3), 7-4-4105, 7-4-4108, 7-4-4303, 7-5-4101, 7-5-4102, 7-5-4301(1), 7-6-4103, 7-6-4224 to 7-6-4231;
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 46 (1984).

HELD: Section 7-3-212(2), MCA, authorizes mayoral appointment of an administrative assistant without city council approval.

7 February 1986

Jim Nugent
Missoula City Attorney
201 West Spruce
Missoula MT 59802-4297

Dear Mr. Nugent:

You have requested my opinion concerning a question which I have phrased as follows:

Is the mayor, in a municipal council-mayor government provided under section 7-3-113, MCA, required to secure city council approval of his appointment of an administrative assistant pursuant to section 7-3-212(2), MCA?

I conclude, based principally on the language of sections 7-3-212(2) and 7-3-213(3), MCA, that such approval is not necessary.

The City of Missoula has chosen to retain the municipal council-mayor form of government provided under section 7-3-113, MCA. As a general matter, the mayor, or "executive," in that governmental structure is responsible for the day-to-day administration of the municipality, while the city, or "municipal," council discharges traditionally legislative functions such as enacting ordinances and budgets. See §§ 7-3-203, 7-4-4303, 7-5-1101, 7-5-4102, 7-6-4103, 7-6-4224 to 4231, MCA. The mayor's and city council's responsibilities are largely complementary, i.e., the mayor is charged with enforcing, inter alia, the council's lawful actions in administering the city's affairs and is further obligated to assist the council in its legislative activities. See §§ 7-3-203, 7-3-215(2), 7-3-216(2), 7-4-4303, 7-5-4102, MCA. Relevant statutory provisions are, moreover, explicit concerning when the mayor must seek city council approval of his actions and when he may veto council actions. See, e.g., §§ 7-3-203, 7-3-213(3), 7-3-214(2), MCA.

The carefully structured relationship between the mayor and city council indicates generally that, when the Legislature intended to require council approval of mayoral actions, it said so. This conclusion is illustrated graphically by section 7-3-213, MCA, which contains four different approaches to an executive's authority to appoint and remove employees.

The executive may:

(1) appoint and remove all employees of the local government;

(2) appoint and remove, with the consent of a majority of the commission, all employees of the local government;

(3) appoint, with the consent of a majority of the commission, all department heads and remove department heads and may appoint and remove all other department employees; or

(4) appoint and remove, with the consent of a majority of the commission, all department heads and appoint and remove all other employees of the local government.

Under section 7-3-113(1)(e), MCA, subparagraph 3 above applies to Missoula and unequivocally mandates city council consent as to the appointment of department heads but not to their removal or to the appointment or removal of any other department employees. Similarly unambiguous is section 7-3-212(2), MCA, which specifically addresses appointment of mayoral administrative assistants in Missoula: "The executive ... may appoint one or more administrative assistants to assist him in the supervision and operation of the local government, and such administrative assistants shall be answerable solely to the executive." Construed in pari materia with section 7-3-213(3), MCA, section 7-3-212(2), MCA, grants the mayor authority to appoint an administrative assistant without city council consent unless such assistant also serves as a department head. Neither your letter nor the attached Ordinance 2146 indicates that the position at issue involves discharge of department head duties, and city council approval of the mayor's appointment is consequently unnecessary.

You also ask whether, section 7-3-212(2), MCA, notwithstanding, administrative assistants are nonelective officers subject to approval by the city council under section 7-4-4303, MCA. The distinction between public officers and mere employees has been discussed in various Montana Supreme Court decisions and Attorney General Opinions. See, e.g., Forty-Second Legislative Assembly v. Lennon, 156 Mont. 416, 481 P.2d 330 (1971); State ex rel. Running v. Jacobson, 140 Mont. 221, 370 P.2d 483 (1962); Turnbull v. Brown, 128 Mont. 254, 273 P.2d 387 (1954); State ex rel. Rusch v. Board of County Commissioners, 121 Mont. 162, 191 P.2d 670 (1948); Aleksich v. Industrial Accident Fund, 116 Mont. 127, 151 P.2d 1016 (1944); Adami v. Lewis and Clark County, 114 Mont. 557, 138 P.2d 969 (1943); State ex rel. Dunn v. Ayers, 112 Mont. 120, 113 P.2d 785 (1941); State ex rel. Nagle v. Kelsey, 102 Mont. 8, 55 P.2d 685 (1936); State ex rel. Nagle v. Page, 98 Mont. 14, 37 P.2d 575 (1934); State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411 (1927); 40 Op. Att'y Gen. No. 46 (1984). The leading decision is State ex rel. Barney v. Hawkins, 79 Mont. at 528-29, 257 P. at 418, which identified the essential indicia of officer status:

After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity and not be only temporary or occasional. In addition, in this state, an

officer must take and file an official oath, hold a commission or other written authority and give an official bond, if the latter be required by proper authority.

Even a cursory analysis of Ordinance 2146 establishes that at least the fourth factor is lacking since the administrative assistant is directly supervised by the mayor and is principally responsible for implementing, and not independently determining, municipal policy. The administrative assistant thus falls within that class of individuals, often referred to as "assistants," "whose duties are to help his superior and who must look to him for his authority to act. In the ordinary use of the word, it does not contemplate persons who ... are given the dignity of officers." State ex rel. Dunn v. Ayers, 112 Mont. at 126, 113 P.2d at 789. City of Missoula administrative assistants also do not take or file an oath of office. See § 7-4-4108, MCA.

It seems equally clear, moreover, that the administrative position was authorized by Ordinance 2146 in direct response to section 7-3-212(2), MCA, which if interpreted harmoniously with sections 7-4-4101(3) and 7-4-4105, MCA, does not contemplate creation of a nonelective officer position because city council approval is not required and the council may not unilaterally abolish such position. Thus, while it may be theoretically possible for a municipal council to establish a nonelective office with the title of "administrative assistant" under section 7-4-4101(3), MCA, Ordinance 2146 has not done so. I must emphasize here that section 7-3-212(2), MCA, does not require affirmative action by a municipal council to create the administrative assistant position.

Finally, the city council's authority under section 7-5-4301(1), MCA, to make contracts and under section 7-6-4231, MCA, to approve final budgets including, inter alia, employee salaries is not inconsistent with my interpretation of section 7-3-212(2), MCA. Although the city council's contract and budget approval powers may affect the mayor's practical ability to provide a particular compensation amount to an administrative assistant or establish other employment conditions, they do not obviate his authority to fill that position without council approval.

THEREFORE, IT IS MY OPINION:

Section 7-3-212(2), MCA, authorizes mayoral appointment of an administrative assistant without city council approval.

Very truly yours,

MIKE GREELY
Attorney General