

VOLUME NO. 41

OPINION NO. 81

CONFLICT OF INTEREST - No inherent conflict of interest when city council member is also a city employee;

EMPLOYEES, PUBLIC - City employee may hold position on city council;

LOCAL GOVERNMENT - Elected city official may retain position as a city employee;

MUNICIPAL CORPORATIONS - Municipal official may retain position as a city employee;  
MUNICIPAL GOVERNMENT - City council member may retain position as a city employee;  
PUBLIC OFFICERS - Elected city official may be employed by municipality;  
MONTANA CODE ANNOTATED - Sections 2-2-101, 2-2-103 to 2-2-105, 2-2-125 to 2-2-131, 2-2-201, 7-4-4104, 7-5-4109, 13-1-111, 45-7-401;  
MONTANA CONSTITUTION - Article IV, section 4.

- HELD: 1. There is no inherent conflict of interest when a city employee is also an elected city councilman in a city which has a municipal council-mayor form of local government.
2. A municipality may not enact an ordinance which prohibits city employees from holding office on the city council.

4 September 1986

Gerald S. Navratil  
Glendive City Attorney  
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Dear Mr. Navratil:

You have requested my opinion concerning two questions:

1. Is there an inherent conflict of interest between the positions of city employee and elected city councilman in a city which has a municipal council-mayor form of local government?
2. May such a city pass an ordinance prohibiting a city employee from running for the city council?

Your first question addresses a potential conflict of interest where a Glendive city councilman is also a city employee. Section 7-5-4109, MCA, is the controlling statute regarding conflicts of interest in a city such as Glendive, which has a municipal council-mayor form of local government. That statute provides:

The mayor, any member of the council, any city or town officer, or any relative or employee thereof must not be directly or indirectly interested in the profits of any contract entered into by the council while he is or was in office.

This statute finds a conflict of interest where one of the listed persons has an interest in the profits resulting from a contract with a city or town council. It does not prohibit a city employee from acting as a city councilman. Thus, I conclude that the situation you describe does not involve a conflict of interest pursuant to section 7-5-4109, MCA.

I also see no violation of the relevant statutory guidelines regarding standards of conduct for city officials. These guidelines are found in Title 2, chapter 2, part 1, MCA.

The purpose of this part is to set forth a code of ethics prohibiting conflict between public duty and private interest as required by the constitution of Montana. This code recognizes distinctions between legislators, other officers and employees of state government, and officers and employees of local government and prescribes some standards of conduct common to all categories and some standards of conduct adapted to each category. The provisions of this part recognize 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 surrounding circumstances.

§ 2-2-101, MCA.

Section 2-2-103, MCA, defines a public official's responsibility to act in the public trust and for the benefit of the people. Section 2-2-104, MCA, sets forth standards of conduct for public officers and employees and lists acts which constitute breaches of their fiduciary duty. It provides that a public officer or employee breaches his fiduciary duty if he discloses or uses confidential information acquired in the course of his official duties in order to further substantially his personal economic interests. He also breaches his duty if he accepts a gift which would tend to improperly

influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties, or which he knows or should know under the circumstances is primarily for the purpose of rewarding him for official action he has taken. Section 2-2-125, MCA, also lists acts by local government officers and employees which constitute a breach of fiduciary duty.

Section 2-2-105, MCA, sets forth ethical principles for public officers. It provides:

(1) The principles in this section are intended as guides to conduct and do not constitute violations as such of the public trust of office or employment in state or local government.

(2) A public officer or employee should not acquire an interest in any business or undertaking which he has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by his agency.

(3) A public officer or employee should not, within the months following the voluntary termination of his office or employment, obtain employment in which he will take direct advantage, unavailable to others, of matters with which he was directly involved during his term or employment. These matters are rules, other than rules of general application, which he actively helped to formulate and applications, claims, or contested cases in the consideration of which he was an active participant.

(4) A public officer or employee should not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when he has a substantial financial interest in a competing firm or undertaking.

See also § 2-2-201, MCA.

The fact that a city employee is also a city councilman does not in itself constitute a breach of the fiduciary duty of the councilman/employee. Sections 2-2-104 and

2-2-105, MCA, require more than the opportunity to commit a breach.

Your next question concerns whether a city with general powers may pass an ordinance prohibiting a city employee from running for city council.

Article IV, section 4 of the Montana Constitution provides that any qualified elector is eligible to hold any public office, subject to additional qualifications as provided by the Legislature. Section 13-1-111, MCA, provides elector qualifications. Additionally, the Legislature has granted municipalities authority to adopt by ordinance qualifications for municipal office. § 7-4-4104, MCA.

However, a municipality may not adopt qualifications in an arbitrary manner. The United States Supreme Court in Slochower v. Board of Higher Education, 350 U.S. 551, 555-56 (1956), reh'g denied, 351 U.S. 944 (1956), held that if qualifications are employed, they must have a rational relationship to a legitimate state interest. In Turner v. Fouche, 396 U.S. 346, 362 (1970), the Court held there is "a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualification."

The California Supreme Court in Zeilenga v. Wilson, 484 P.2d 578, 580 (Cal. 1971), held that the right to hold public office is a fundamental right which the First Amendment protects against infringement. The Zeilenga court also held that to justify any impairment of such First Amendment rights, there must be a compelling state interest. 484 P.2d at 580.

The Montana Supreme Court has not addressed the question of an individual's right to hold public office. Therefore it is unclear whether the court would adopt California's "fundamental right" approach or the federal "rational relationship" test. However, the Montana Legislature has enacted a number of statutes which establish a public official's fiduciary duty to avoid a conflict of interest. §§ 2-2-104, 7-5-4109, MCA. Sections 2-2-103 to 105 and 2-2-125 to 131, MCA, provide a comprehensive outline for standards of conduct for public officers and employees. Also provided are remedies for breach of such standards of conduct. §§ 2-2-103, 45-7-401, MCA.

In the situation you present, the City of Glendive seeks to prevent, by passage of a city ordinance, the election of a city employee to the position of city councilman. It appears that the city, by passing such an ordinance, is seeking to avoid any conflict of interest which may arise due to a city employee being a city councilman. As stated earlier in this opinion, an inherent conflict of interest does not exist in that situation. And because it does not, an ordinance prohibiting an employee from holding a position on the city council would not be based on a legitimate or compelling state interest. A court may find such an ordinance to be arbitrary or in violation of a person's right to hold a public office. See Slochower and Zeilenga, supra.

Any breach of a councilman/employee's fiduciary duty should be found pursuant to the statutes discussed above and should be handled pursuant to section 2-2-103, MCA.

THEREFORE, IT IS MY OPINION:

1. There is no inherent conflict of interest when a city employee is also an elected city councilman in a city which has a municipal council-mayor form of local government.
2. A municipality may not enact an ordinance which prohibits city employees from holding office on the city council.

Very truly yours,

MIKE GREELY  
Attorney General