

January 16, 2008

Ms. Cindy E. Younkin
Moore, O'Connell & Refling
P.O. Box 1288
Bozeman, MT 59771-1228

Re: City Ordinance

Dear Ms. Younkin:

In your capacity as City Attorney for White Sulfur Springs you have requested an opinion from the Attorney General regarding "a city council's ability to take the action of appointing one of its members as the office/employee manager in a municipality with a commission/executive form of government." Related to the same subject, on August 24, 2007, this office received a letter from White Sulfur Springs Mayor Julian Theriault raising questions about the same ordinance. Because the issues you raise are local in nature it has been determined that a letter of advice rather than a formal opinion is appropriate in response to your respective letters.

The ordinance in question is described in an outline which both of you have provided with your respective letters. According to the outline, the ordinance (1) appoints one of the council members as "Office/Employee Manager" (hereafter "Manager"), (2) assigns duties to the Manager including certain purchasing and personnel responsibilities, (3) reduces the salary of the mayor by \$150 "[d]ue to the extra duties placed on the [Manager]" and provides for the payment of a like amount to the Manager, and (4) designates certain duties for the Mayor and the City Clerk.

Mayor Theriault raises several issues with respect to the ordinance. First, he states that the ordinance "was brought up and passed at an executive meeting called by a council member," implying that there may have been a violation of the open meeting and public participation requirements found in Mont. Code Ann. Title 2, chapter 3. I lack the necessary facts to offer any guidance on this question. There is, however, an abundance of guidance from published opinions of this office and reported court decisions that

outline a municipality's responsibility to conduct business in open sessions with adequate notice to the public.

Mayor Theriault next suggests that the ordinance created a new form of local government without following the procedures for local government review found in Mont. Code Ann. Title 7, chapter 2. I disagree with that conclusion, since the ordinance as described in the outline does not create an office of city manager as contemplated in the statutes governing the commission-manager form or otherwise alter the form of the city's government. It does appear to me, however, that portions of the ordinance conflict with the allocation of duties between the mayor and council. I also conclude that the appointment of a council member to serve in the Manager position would violate the common law doctrine of incompatibility of offices.

Your letters do not state that White Sulfur Springs has adopted any alternative form of government since the implementation of the local government review and alteration provisions found in Article XI of the Montana Constitution, and I therefore assume for purposes of this letter that the city operates under the commission-executive or council-mayor form of government described in Mont. Code Ann. §§ 7-3-201 to 7-3-224, and that the default provisions for such governments provided in 7-3-113 are in place. Under these provisions, the executive has the duty to:

- (1) enforce laws, ordinances, and resolutions;
- (2) perform duties required by law, ordinance, or resolution;
- (3) administer affairs of the local government;
- (4) carry out policies established by the commission;
- (5) recommend measures to the commission;
- (6) report to the commission on the affairs and financial condition of the local government;
- (7) execute bonds, notes, contracts, and written obligations of the commission, subject to the approval of the commission;
- (8) report to the commission as the commission may require;
- (9) attend commission meetings and may take part in discussions;
- (10) execute the budget adopted by the commission; and
- (11) appoint, with the consent of the commission, all members of boards, except the executive may appoint without the consent of the commission temporary advisory committees established by the executive.

Mont. Code Ann. § 7-3-203. The executive has the power to appoint administrative assistants answerable solely to the executive, Mont. Code Ann. § 7-3-212(2), to appoint departments heads and appoint and remove other employees with the consent of the

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council, Mont. Code Ann. § 7-3-213(3), veto ordinances, Mont. Code Ann. § 7-3-214(2), prepare a budget, Mont. Code Ann. § 7-3-215, and “exercise control and supervision of all departments and boards to the degree authorized by ordinance of the commission,” Mont. Code Ann. § 7-3-216(2).

The general powers of the council include the authority to adopt “all bylaws, ordinances, orders, and resolutions not repugnant to the constitution . . . or to the provisions of this title, necessary for the government or management of the affairs of a city or town.” Mont. Code Ann. § 7-5-4101. The council “has the power to fix the compensation and to prescribe the duties of all employees of the city” Mont. Code Ann. § 7-5-4110.

In my view, the council has the authority under Mont. Code Ann. § 7-5-4110 to create the position of Office/Employee Manager and assign to it the duties described in the outline. The statute explicitly allows the council to “prescribe the duties” of city employees, and the statutory authority of the mayor to supervise employees is limited “to the degree authorized by ordinance of the [council]” under Mont. Code Ann. § 7-3-216(2). There is no statute of which I am aware that assigns to the mayor sole responsibility for purchasing or for “channeling work assignments” to employees from the council or mayor or “channeling” grievances from the mayor or council. It does not appear to me that the duties assigned to the Manager as set forth in the outline infringe on any statutory authority given exclusively to the mayor.

It is my opinion, however, that the designation by the council of a council member to serve in the position of Office/Employee Manager at a salary is improper for two reasons. First, Montana Code Annotated § 7-3-213(3) gives the mayor the authority to “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.*” Granting the power of the council to create the position and set its compensation, the power to determine who should be appointed to the position rests with the mayor under this section, not with the council.

Second, the common law doctrine of incompatibility of offices holds that no person may simultaneously hold two positions if the positions are incompatible with one another. A city council member may not hold employment in a city job the existence and compensation of which depend on action of the city council. The Montana Supreme Court decided a case on all fours in State ex re. Klick v. Whitmer, 50 Mont. 22, 144 P. 648 (1914). In that case, the council created the position of city purchasing agent and set the duties and compensation for the position. A sitting alderman was appointed to the position. The Court described the doctrine of incompatibility as follows:

Offices are “incompatible” when one has power of removal over the other, when one is in any way subordinate to the other, when one has power of supervision over the other, or when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both.

55 Mont. at 24-25 (citations omitted). The Court concluded that holding the purchasing position was incompatible with service as an alderman because, in pertinent part:

The office of purchasing agent was not created [by statute]; the city council may therefore, by a bare majority vote, abolish it at any time and discharge the person appointed to fill it Thus the incumbent of it, if he be an alderman, may, in certain circumstances, exercise absolute control over the existence and tenure of his office, or, in the desire to save his office threatened by abrogation, he may be induced to assent to measures the virtue of which he does not perceive. Again, as to a portion of his duties he is an agent of the council and subject to its supervision. It may disavow or curtail his general policy, reject his recommendations, or disallow the bills incurred by him; in any event, as member of the council he is placed in the position of supervising and affirming his own acts.

55 Mont. at 25.

This discussion is largely applicable to the case presented here. The council, of which the Manager is a member, created the position and can abolish it, effectively discharging the incumbent from the position. The council sets the position’s salary, and has by the ordinance established the parameters of the position’s authority, which it may by ordinance change at any time. In my opinion the two offices are incompatible.

It should be noted that the common law doctrine of incompatibility coexists with the further statutory ethics requirements that govern self-dealing by local government office-holders. 47 Op. Att’y Gen. No. 19 (1998). The two sets of laws operate independently from one another such that compliance with one is not necessarily determinative of the other. It is therefore not material to the incompatibility inquiry whether the Manager complies with the governing ethical requirements found in Mont. Code Ann. Title 2, chapter 2.

Mayor Theriault also asserts that the council may not diminish the salary during his term of office. I have found no statute that provides protection against salary diminution during a term of office for a mayor. Cf. Mont. Const. Art VII, § 7 (judicial salaries may not be diminished during a term of office).

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I hope the foregoing provides helpful guidance. It may not be cited as an official opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN
Chief Civil Counsel

cdt/jym

c: Mayor Julian Theriault