

October 29, 2009

Mr. Gary Ryder
Colstrip City Attorney
P.O. Box 72
Hysham, MT 59038-0072

Re: Opinion Request--Incompatible Offices

Dear Mr. Ryder:

The Attorney General has referred your letter of August 21, 2009, to me for response. The question you raise is controlled by earlier opinions of this office, and we have therefore determined that a letter of advice rather than a formal opinion is appropriate in response to your question.

Your letter informs us that an employee of the City Public Works Department currently sits as an elected member of the Colstrip City Council, and that another such employee seeks election to the Council. You ask whether the doctrine of incompatible offices prevents these city employees from serving on the council.

Colstrip operates under a self-government Charter. Your letter states that the Public Works Department is managed by a Director appointed by the mayor with the consent of the Council. The City Council sets both policy and budgets for the Public Works Department. Accordingly, Council members, including the Public Works Department employees at issue in your request, could exercise significant control over the policies and budgets of the Department and its Director, including the power to vote to approve the Director's appointment.

"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." State ex rel. Klick v. Whitmer, 50 Mont. 22, 24-25, 144 P. 648, 649 (1914) (citations omitted). For the reasons

that follow, I conclude that it clearly would contravene public policy to allow an employee of the Public Works Department to sit as a member of the Council. Attorney General Mazurek addressed the same situation you present in 47 Op. Att’y Gen. No. 19 (1998), holding that an employee of the Glendive Public Works Department could not simultaneously serve as member of the City Council. The opinion noted the public policy problem “which occurs when an employee’s elected position has revisory power over the employee’s superior in another position.” The situation described in your letter raises this concern.

Other public policy problems are apparent. Your letter states that as Council members the employees will abstain from voting on matters directly affecting the Public Works Department. If two Department employees serving on the Council were to abstain from voting regarding a Department matter, significant problems could arise under legislative procedures set forth in the Charter.

The Charter gives the Mayor power to veto any ordinance or resolution, subject to override by “the affirmative votes” of three members of the Council. Charter, § 3.06. Should the mayor choose to veto an ordinance or resolution touching on the affairs of the Public Works Department (which presumably would always include the City budget), abstention by two Council members who are Department employees would effectively prevent the Council from overriding the veto.

I also note that the Charter requires that on final reading of an ordinance, “[t]hree of the four council members must be present to vote for approval.” Charter, § 2.08. While the intent of this provision is not crystal clear, it could be argued with some force that a Council member is not “present to vote” when the member will abstain from voting. If that interpretation is correct, abstention by two Council members who are Department employees would effectively prevent the Council from approving on final reading any ordinance or resolution relating to the Department.

When they adopted the Charter, the citizens of Colstrip expected that the legislative procedures they adopted would be fully effective and workable. They intended that four Council members would exercise the City’s legislative power. With respect to any question involving the Public Works Department, including the adoption of the City budget, a Council that included a Department employee could not function in the way the citizens intended. The holding in 47 Op. Att’y Gen. No. 19 (1998) dictates that employment with the City Public Works Department is incompatible with service as a member of the Council.

Mr. Gary Ryder
October 29, 2009
Page 3

I hope you will find this helpful. This letter of advice may not be considered a formal opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN
Chief Civil Counsel

cdt/jym