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VOLUME NO. 45

OPINION NO. 10

CONFLICT OF INTEREST - Exercise of separation option in collective bargaining agreement by public official;
CONFLICT OF INTEREST - What constitutes "substantial financial interest" under code of ethics for public officers and employees;
CONFLICT OF INTEREST - What constitutes "substantial financial transaction" under code of ethics for public officers and employees;
PUBLIC OFFICERS - Exercise of separation option in collective bargaining agreement by public official;
PUBLIC SERVICE COMMISSION - Exercise of separation option in collective bargaining agreement by commissioner;
MONTANA CODE ANNOTATED - Title 69, chapter 14; sections 2-2-101 to -132, 2-2-104, 2-2-121(2), 2-16-501;
MONTANA CONSTITUTION - Article XIII, section 4;
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 28 (1983), 38 Op. Att'y Gen. No. 55 (1979), 37 Op. Att'y Gen. No. 179 (1978), 37 Op. Att'y Gen. No. 104 (1978).

HELD: A Public Service Commissioner does not violate the code of ethics for public officials and employees by temporarily reactivating and then terminating his employment with a railroad company in order to become eligible to receive a severance payment negotiated between the railroad and the collective bargaining unit to which the commissioner belongs.

July 26, 1993

Mr. Danny Oberg
Commissioner
Public Service Commission
P.O. Box 202601
Helena, MT 59620-2601

Dear Commissioner Oberg:

You have requested an Attorney General's Opinion concerning the propriety of a Public Service Commissioner temporarily reactivating his employment with a railroad company in order to become eligible for a severance payment negotiated between the railroad and the union to which the commissioner belongs. Your question is whether,

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if the commissioner chooses to accept the railroad's severance offer, he becomes ineligible to retain his public office.

For purposes of this response, I assume the following facts, stated in your letter of inquiry: The Burlington Northern Railroad [BN] and the United Transportation Union [UTU] recently entered into a collective bargaining agreement under the terms of which BN will reduce its train crew sizes in exchange for granting severance payment to those employees who agree to terminate their employment with the railroad (referred to in the agreement as "voluntary separation"). Since assuming office in 1983, you have been on leave of absence from your employment with BN but retain your seniority as a railroad brakeman/conductor. As a member of the UTU bargaining unit, you are eligible to receive this severance payment by temporarily reactivating your employment with BN for one eight-hour work shift. It is my understanding that these conditions for payment have now been met and, upon execution of a voluntary separation release agreement, your employment with the railroad has been terminated.

The Montana Public Service Commission [Commission] has general supervision of all railroads engaged in the transportation of passengers or property in the state. MCA §§ 69-14-102 and -111. In that capacity, the Commission is authorized to investigate:

- alleged neglect or violation of the laws by any railroad or its officers or agents;
- railroad accidents resulting in injury, death, or destruction of property greater in value than \$2000; and
- rates, classifications or rules for transportation of freight by any railroad within the state.

MCA §§ 69-14-112 and -114. Under state law, the Commission also has some authority concerning railroad safety, MCA § 69-14-115; rates, MCA §§ 69-14-301 to -322; highway crossings, MCA §§ 69-14-606 and -607; loading platforms and spurs, MCA §§ 69-14-801 to -814; and other duties relating to the operation of railroads in the state of Montana. Despite these seemingly broad powers, the Commission has limited oversight of the day-to-day operations of railroads in Montana; federal law governs most significant matters related to interstate railroad operations and has preempted much of the state's law in the area.¹

Your question requires an examination of the relationship between your duties as a public service commissioner and your rights as a BN employee and member of the UTU-represented bargaining unit.

¹See, e.g., Burlington Northern R.R. v. State of Montana, 815 F. Supp. 1522 (D. Mont. 1992); Burlington Northern v. State of Montana, 880 F.2d 1104 (9th Cir. 1989).

It has long been recognized in Montana that a public office is "created in the interest and for the benefit of the public." State ex rel. Bell v. McCullough, 85 Mont. 435, 438, 279 P. 246 (1929). Thus:

"An incumbent of a public office is invested with certain powers and charged with certain duties pertinent to sovereignty. The powers so delegated to the officer are held in trust for the people and are to be exercised in behalf of the government or of all citizens who may need the intervention of the officer. ... Public officers, in other words, are but the servants of the people, and not their rulers. They are amenable to the rule which forbids an agent or trustee to place himself in such an attitude toward his principal or cestui que trust as to have his interest conflict with his duty."

State ex rel. Grant v. Eaton, 114 Mont. 199, 206, 133 P.2d 588, 591 (1943) (citation omitted). Stated generally, "An officer cannot lawfully act as the agent of one person where the private agency would come in conflict with his official duties." State ex rel. Bell, 85 Mont. at 438, 279 P. at 247. See also State ex rel. Hollibaugh v. State Fish & Game Comm'n, 139 Mont. 384, 394, 365 P.2d 942, 948 (1961); State ex rel. Bonner v. District Court of 1st Jud. Dist., 122 Mont. 464, 470, 206 P.2d 166, 169 (1949).

These authorities correspond with the "long-standing common law doctrine that the faithful performance of official duties is best secured if a governmental officer, like any other person holding a fiduciary position, is not called upon to make decisions that may advance or injure his individual interest." Brown v. Kirk, 355 N.E.2d 12, 15 (Ill. 1976). The doctrine has its genesis in the principle that no one may serve two masters, "a maxim which is especially pertinent if one of the masters happens to be economic self-interest." United States v. Mississippi Valley Generating Co., 364 U.S. 520, 549 (1961).

To codify this principle, article XIII, section 4 of the Montana Constitution directs the Legislature to "provide a code of ethics prohibiting conflict between public duty and private interest" for public officers and employees.² In response to this mandate, the

²There is no constitutional provision specifically concerning the receipt of private compensation while holding public office. Article VI, section 5(2) of the Montana Constitution speaks only to the prohibition against holding dual offices or receiving compensation from more than one governmental agency. See 43 Op. Att'y Gen. No. 32 at 93 (1989). The Constitutional Convention transcripts indicate that the framers intended, through art. XIII, § 5, to entrust the Legislature with the task of delineating the circumstances under which receipt of private compensation would be prohibited. See IV Mont. Const. Conv. 796 (1972).

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1977 Legislature enacted a set of standards governing the conduct of all public officials. MCA §§ 2-2-101 to -132. Based on the concept that "[t]he holding of public office or employment is a public trust," MCA § 2-2-103(1), the code of ethics recognizes "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," MCA § 2-2-101. Thus, "it is necessary to look at each particular transaction or relationship in conjunction with the surrounding circumstances before a determination can be made as to whether or not a breach has occurred." 37 Op. Att'y Gen. No. 104 at 431, 434 (1978).

Montana Code Annotated § 2-2-104(1) enumerates certain actions which constitute a breach of fiduciary duty if performed by any public officer. It provides in part:

A public officer, legislator, or employee may not:

...

(b) accept a gift of substantial value or a substantial economic benefit tantamount to a gift:

(i) which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties; or

(ii) which he knows or which a reasonable person in his position should know under the circumstances is primarily for the purpose of rewarding him for official action he has taken.

Although the term "gift" is not defined by statute, an "economic benefit tantamount to a gift" includes "compensation received for private services rendered at a rate substantially exceeding the fair market value of such services." MCA § 2-2-104(2). Severance pay is not an uncommon feature of union contracts and in this case has been offered to a large class of BN employees of which you are a member. Rather than compensation for services, severance pay connotes payment "beyond [an employee's] wages on termination of his employment." Black's Law Dictionary 1232 (5th ed. 1979). Since the severance payment is part of a negotiated agreement and supported by consideration--here the surrender of accrued seniority and entitlement to reemployment--it does not appear to constitute a "gift" within the meaning of MCA § 2-2-104.³

³For the same reason, I conclude that, under the circumstances presented, your conduct does not violate MCA § 69-1-112, prohibiting acceptance by public service commissioners of gifts or favors from railroads.

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Under MCA § 2-2-121(2), a state officer or employee may not:

(b) engage in a substantial financial transaction for his private business purposes with a person whom he inspects or supervises in the course of his official duties;

...

(e) perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent; or

(f) solicit or accept employment, or engage in negotiations or meetings to consider employment, with a person whom he regulates in the course of his official duties without first giving written notification to his supervisor and department director.

As a preliminary matter, it must be determined whether your termination of employment and acceptance of a severance payment constitute a "substantial financial transaction" for your "private business purposes" within the meaning of section 2-2-121(2)(b). I am of the opinion that you have not engaged in a financial transaction with BN as contemplated by the ethics code.

The collective bargaining agreement was negotiated between BN and UTU. As a member of the affected bargaining unit, you are represented by the union and therefore bound by the agreement. Under the Railway Labor Act, 45 U.S.C. §§ 151 to 188, a representative chosen to act on behalf of the railroad employees is the exclusive agent for collective bargaining purposes; as a member of the employee unit, you are precluded from bargaining individually on behalf of yourself as to matters which are properly the subject of collective bargaining. Steele v. Louisville & N. R.R., 323 U.S. 192, 200 (1944); see also Del Costello v. International Broth. of Teamsters, 462 U.S. 151, 164 n.14 (1983). "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit." Steele, 323 U.S. at 200 (quoting J.I. Case Co. v. National Labor Relations Bd., 321 U.S. 332, 338 (1944)). Neither you nor any other employee was entitled to individual dealings or discussions with BN during the negotiation process. As the agreement is the product of the negotiations conducted by his representative, no employee is at liberty to modify its terms. The "transaction," within the meaning of the statute, is the transaction between UTU and BN.

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In short, by accepting the offered severance payment, you have not engaged in a financial transaction with the railroad within the contemplation of the code of ethics. The substantive transaction occurred between UTU and BN. By exercising your right as a member of the represented unit to receive severance pay in return for surrender of your accrued seniority, you have not engaged in a distinct "financial transaction for ... private business purposes" with the railroad; instead you have merely exercised an entitlement which is contained in a labor agreement negotiated by a collective bargaining representative for the benefit of a substantial group of employees. The conflict of interest against which MCA § 2-2-121(2)(b) protects does not exist since there is no direct or indirect dealing over the involved compensation between the public official as an individual and the supervised entity.

Likewise, I am of the opinion that you do not have a "substantial financial interest" in the railroad company, within the meaning of MCA § 2-2-121(2)(e), by virtue of your severance payment. "Financial interest" is defined to include:

- (a) an ownership interest in a business;
- (b) a creditor interest in an insolvent business;
- (c) an employment or prospective employment for which negotiations have begun;
- (d) an ownership interest in real or personal property;
- (e) a loan or other debtor interest; or
- (f) a directorship or officership in a business.

Although you have had an employment interest with BN, that relationship has been severed, and there is no ongoing financial relationship between you and the railroad. Moreover, subsection (e) is tailored to the prohibition of particular official actions and may be applied only on a case-by-case basis. It does not apply as a general prohibition against holding public office, but serves to prohibit an official from taking action on a matter in which he has a substantial personal interest. See 40 Op. Att'y Gen. No. 28 at 108 (1983), 38 Op. Att'y Gen. No. 55 at 190 (1979), 37 Op. Att'y Gen. No. 179 at 752 (1978).⁴

Finally, it is my opinion that the circumstances you have described do not violate MCA § 2-2-121(2)(f) since, even if your actions constitute the acceptance of employment, the statute only requires written notification to your "supervisor and department director." Since the Commission is the director of the Department of Public Service Regulation, MCA § 2-15-2601, notice to your fellow

⁴Voluntary disclosure of a substantial financial interest will excuse a potential violation of the ethics code only as provided in MCA § 2-2-121(3), where the official is a member of a quasi-judicial or rulemaking board (which would include the Commission) and his participation is necessary to obtain a quorum or to enable the body to act. 40 Op. Att'y Gen. No. 28 at 114 (1983).

commissioners was adequate to comply with the terms of section 2-2-121(2)(f).

In sum, the circumstances described in your inquiry do not present a situation in which you, as a public official, are at risk of advancing your own interests at the expense of the public welfare. Conflict of interest laws are designed "to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation." United States v. Mississippi Valley Generating Co., supra, 364 U.S. at 550. The termination of your employment with the railroad and acceptance of a severance payment negotiated by the union on behalf of an entire class of employees do not constitute the kind of private relationship contemplated by the code of ethics which would threaten the integrity of your position. The situation simply presents no opportunity for you to use the influence you exert in your official position to further your own personal gain.⁵

Aside from issues concerning conflict of interest, I have also considered whether your temporary reactivation of employment and acceptance of severance pay constitute a vacancy in your office and conclude they do not. Generally speaking, a public officer is not prohibited from engaging in another occupation during his term of office, unless expressly prohibited by law from doing so. 67 C.J.S. Officers and Employees § 203, at 665 (1978). Although a public service commissioner may be removed from office for failing to perform his duties, MCA § 69-1-113, there is no statute prohibiting him from engaging in any other employment. Like other state offices, the office becomes vacant "on the happening of any one of the following events before the expiration of the term of the incumbent:"

- (1) the death of the incumbent;
- (2) a determination pursuant to Title 53, chapter 21, part 1, that he is seriously mentally ill;
- (3) his resignation;
- (4) his removal from office;
- (5) his ceasing to be a resident of the state or, if the office be local, of the district, city, county, town, or township for which he was chosen or appointed or within which the duties of his office are required to be discharged;
- (6) his absence from the state, without the permission of the legislature, beyond the period allowed by law;

⁵I am not asked to, and do not, express any opinion concerning the propriety of your taking a leave of absence from employment with BN when you assumed office, particularly since that employment relationship has now been terminated.

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- (7) his ceasing to discharge the duty of his office for the period of 3 consecutive months, except when prevented by sickness or when absent from the state by permission of the legislature;
- (8) his conviction of a felony or of any offense involving moral turpitude or a violation of his official duties;
- (9) his refusal or neglect to file his official oath or bond within the time prescribed;
- (10) the decision of a competent tribunal declaring void his election or appointment.

MCA § 2-16-501. None of these events has occurred in this case, and I conclude therefore that your actions have not resulted in a vacancy within the Public Service Commission.

Since the attorney general's authority to issue opinions is limited solely to questions of law, MCA § 2-15-501(6), I do not resolve any issues raised by your request that require a factual determination.

In conclusion, it is my opinion that your actions in qualifying for receipt of a severance payment under the terms of a collective bargaining agreement do not constitute a breach of your fiduciary duty or effect a vacancy in your office. Obviously, this determination does not affect the ability of a party to an administrative proceeding to raise an issue of disqualification, if otherwise appropriate, under MCA § 2-4-611(4).

THEREFORE, IT IS MY OPINION:

A Public Service Commissioner does not violate the code of ethics for public officials and employees by temporarily reactivating and then terminating his employment with a railroad company in order to become eligible to receive a severance payment negotiated between the railroad and the collective bargaining unit to which the commissioner belongs.

Sincerely,



JOSEPH P. MAZUREK
Attorney General

jpm/esb/dlh