

## 47 Op. Att'y Gen. No. 16

CITIES AND TOWNS - Appointment of nonelective officers;

OFFICES - Vacancies in office;

OFFICES - Holding over in office;

MONTANA CODE ANNOTATED - Sections 7-4-4102(4)(a), -4103(4)(c), -4111, -4303(1), (2), -4602(1).

HELD:

1. A vacancy in the office of town attorney is not created when the attorney holds over following expiration of the term of office.
2. A qualified town attorney lawfully holding over in the office continues to hold the office until the mayor nominates a successor and the council approves the appointment.

August 12, 1998

Mr. Jack H. Morris  
Whitehall Town Attorney  
P.O. Box 488  
Whitehall, MT 59759-0488

Dear Mr. Morris:

You have requested my opinion on the following question:

May the acting town attorney, whose two-year term of office has expired, continue to discharge the duties of the office when the mayor has appointed a new town attorney but the town council has not approved the appointment?

Your letter informs me that you have served as the acting town attorney for the Town of Whitehall pursuant to a two-year term which expired August 24, 1997. Prior to February 9, 1998, no successor had been appointed and you continued to serve in that capacity. On that date, the newly-elected mayor submitted the appointment of a successor to the council, which rejected the appointment. A dispute has now arisen as to whether you or the mayor's appointee is entitled to serve in the office in an acting capacity pending appointment and qualification of a successor.

### Powers of the Mayor and Council

In a town with general powers, governmental responsibilities are divided between the mayor, whose powers are executive, and the town council, the legislative body. The mayor may nominate or appoint all nonelective officers but he may do so only "with the consent of the council." Mont. Code Ann. § 7-4-4303(1). The mayor may also suspend or remove nonelective officers but, again, only with the consent of the council. Mont. Code Ann. § 7-4-4303(2).

Montana law specifically provides that the city attorney may be appointed by the mayor "with the advice and consent of the council." Mont. Code Ann. § 7-4-4102(4)(a). Similarly, the mayor of a town may appoint, with the "advice and consent of the council," other officers necessary to carry out the law. § 7-4-4103(4)(c). The phrase "other officers" obviously would include a town's attorney.

Because the statutes do not distinguish between the office of city attorney and the office of town attorney, there is no separate provision for the term of office of a town attorney. In the matter which gave rise to your opinion request, all parties have assumed that the term of office of the acting town attorney was two years, and that the term has expired. For purposes of this opinion and in order to answer your question, I will assume, without resolving the issue, that the office of "town" attorney is for a term of two years.

## Vacancies in Office

Your question requires me to determine whether the office of town attorney is vacant following expiration of the term of that office. By statute, a city or town office is deemed vacant (prior to expiration of the term of office) in the event of death, mental illness, resignation, removal from office, and for similar enumerated reasons. Mont. Code Ann. § 7-4-4111. This statute does not provide that an office becomes vacant upon expiration of the incumbent's term of office.

In State ex rel. Nagle v. Stafford, 97 Mont. 275, 34 P.2d 372 (1934), the Court examined similar provisions of the predecessor to Mont. Code Ann. § 7-4-4111. The Court held that the enumerated "events" which trigger a vacancy in an office are exclusive. Consequently, the office of one holding over pending appointment of a successor is not a vacant office. State ex rel. Nagle v. Stafford, 97 Mont. at 291, 34 P.2d at 379-80. Montana law distinguishes between "tenure" (which is the actual time in office) and "term" (which is a fixed or definite time period). State ex rel. Racicot v. District Court, 243 Mont. 379, 386, 794 P.2d 1180, 1184 (1990).

As discussed below, an incumbent officer is legally entitled to continue service or hold over until a qualified successor is appointed and approved as provided by law. State ex rel. Olsen v. Swanberg, 130 Mont. 202, 209-10, 299 P.2d 446, 450-52 (1956). Therefore, during the tenure of the officer who is holding over, the office is not vacant. State ex rel. Olsen v. Swanberg, 130 Mont. at 209-10, 299 P.2d at 450-51; State ex rel. Nagle v. Stafford, 97 Mont. at 291, 34 P.2d at 379-80; Chenoweth v. Acton, 31 Mont. 37, 41-42, 77 P. 299, 301 (1908).

## Holding Over in Office

In State ex rel. Sandquist v. Rogers, 93 Mont. 355, 18 P.2d 617 (1933), the Court considered whether the city engineer was allowed to discharge his duties until a successor was appointed and qualified. In Rogers, the newly elected mayor twice attempted to nominate persons to assume the duties of city engineer. Both nominations were rejected by the city council. Rogers, the acting city engineer, was directed by the council to continue his duties but the mayor refused to sign warrants needed to pay Rogers' salary. The Court held that Rogers was allowed to hold his office until a successor was appointed and qualified. In reaching its holding, the Court followed the prevailing common law rule:

The general rule of law is that an officer shall hold over until his successor is appointed and qualified, unless by the language of the statute such holding over is expressly or by clear implication prohibited.

State ex rel. Sandquist v. Rogers, 93 Mont. at 362, 18 P.2d at 618. The rule followed in Rogers is still the prevailing rule which is followed in a large number of states. See 3 McQuillin, Municipal Corporations § 12.110, at 529-37 (3d ed. 1990).

In State ex rel. Olsen v. Swanberg, the Court addressed the governor's appointment of the chairperson of the Industrial Accident Board. The appointment required the approval of the Senate, but because the legislature was not in session when the appointment was made, the appointment was not approved by the Senate. The term of office of the acting chairperson, Swanberg, had expired. Nonetheless, the Court held that Swanberg (rather than the governor's appointee) was still the office holder. The Court stated:

It follows that Mr. Swanberg holds office as a member and chairman of the Industrial Accident Board for the specific term of four years and thereafter until his successor has been appointed and qualified.

State ex rel. Olsen v. Swanberg, 130 Mont. at 208, 299 P.2d at 450.

In Dewar v. City of Great Falls, 178 Mont. 21, 582 P.2d 1171 (1978), a police officer who was charged with theft challenged the jurisdiction of the police commission which suspended him. One of the issues on appeal was whether members of the commission had validly held over after expiration of their terms and before qualification and appointment of their successors. The Court, holding that the members of the commission had validly held over after expiration of their terms, relied upon the Court's decision in State ex rel. Sandquist v. Rogers, 93 Mont. at 362, 18 P.2d at 617, wherein it is plainly stated that every officer

must continue to discharge the duties of his office although his term has expired, until his successor has qualified. This right is qualified only by express or clear implication of prohibition in the language of the statute.

Dewar v. City of Great Falls, 178 Mont. at 24, 582 P.2d at 1173 (citations omitted).

The policy underlying the common law rule is the strong public interest in continuing the work of important governmental offices when a qualified officer is holding over pending appointment and approval of a successor. Although the statutes are silent regarding the right of appointed officers to hold over, the present statutory scheme does not abrogate the common law rule or the policy underlying the rule. A prohibition against holding over is not clearly provided by statute and, in my opinion, a statutory prohibition against holding over cannot be implied.

Finally, a mayor's nominee to replace a holdover town attorney requires council approval. The mayor's appointment is ineffective unless and until the nominee is approved by the council. Mont. Code Ann. §§ 7-4-4103(4)(c), -4303(1), -4602(1). In State ex rel. Sandquist v. Rogers, 93 Mont. 355, 361, 18 P.2d 617, 618 (1933), the Court stated:

The nominees of a mayor who fail to be confirmed by a city council do not become effective as officers, and cannot assume that status until concurred in by a majority of the city or town council.

See also State ex rel. Olsen v. Swanberg, 130 Mont. at 206, 299 P.2d at 448-49.

THEREFORE, IT IS MY OPINION:

1. A vacancy in the office of town attorney is not created when the attorney holds over following expiration of the term of office.
2. A qualified town attorney lawfully holding over in the office continues to hold the office until the mayor nominates a successor and the council approves the appointment.

Sincerely,

JOSEPH P. MAZUREK  
Attorney General

jpm/mwm/dm