

COMMISSIONER OF
POLITICAL PRACTICES



STATE OF MONTANA

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November 4, 2013

Franke Wilmer
Professor
Political Science and International Relations
Wilson Hall Dept. of Political Sciences
Montana State University
Bozeman, MT 59717

COPP-2013-AO-0002; Advisory Opinion Re Section 2-2-
104 MCA ethics requirements

Dear Professor Wilmer:

I write in response to your September 16, 2013 request for an advisory opinion "as to whether the terms of the [Wilmer-MSU] MOU...is in compliance with Montana Code 2-2-104". You explained that you have served as an elected representative to the Montana legislature for the 2007, 2009, 2011 and 2013 terms, doing so under terms of the memorandum of understanding (MOU) between yourself and your primary employer, Montana State University. You provided my office with a copy of the MOU. A copy of the MOU accompanies this advisory opinion.

This advisory opinion is based on the following representations made by Professor and Legislator Wilmer:

1. That the MOU accompanying this opinion applies as set out above.
2. That the language of the MOU was the same for each of the four sessions served in the Montana legislature.
3. That the current (and highest) compensation received for service as a legislator is \$10.33 per hour for an 8 hour day (\$82 per day) for the 90 days of session for a total of \$7300.
4. That the 40% pay reduction for the period of time defined in the MOU is about \$16,000.

Montana has a part-time, citizen legislature. It is likely many legislators continue to receive income from their private business interests at the same time they are paid by people of Montana for their legislative duties. Other legislators, such as Professor Wilmer, take leave of other public employment in order to serve in the legislature.

There could be conflicts in the interface between long term private/public employment and short-term legislative employment. The ethical measure of any such conflicts is set out in Section 2-2-104 MCA, entitled: “[r]ules of conduct for public officers, legislators and public employees.” In part, §2-2-104 MCA sets out ethical standards that measure conflicts between private interest and public duties. In pertinent part §2-2-104(3) MCA also measures the conflict between two public employers and responds by prohibiting a legislator from receiving “...salaries from two separate public employment positions that overlap for the hours being compensated...” The prohibition does not apply if “the legislator...reimburses the public entity from which the employee is absent for the salary paid for performing the function from which the ...legislator...is absent.” The prohibition also does not apply if the legislator’s salary “...from one employer is reduced by the amount of salary received from the other public employer...”

Professor and legislator Wilmer at times receives a salary from two public employers; her long term public employer, Montana State University, and her short term public employer, the people of Montana through the legislature. Professor and legislator Wilmer asks whether the manner in which the MOU allocates payments from the two public employers violates her ethical duties under §2-2-104(3) MCA.

ADVISORY OPINION

Based on the language of the MOU and the above four recited facts this advisory opinion determines that the arrangement defined by the MOU does not violate any term or condition of §2-2-104(3) MCA. Professor Wilmer and Montana State University have designed an MOU, the language of which meets both the reimbursement of the public entity standard and the reduction of salary standard. These standards define and allow for exceptions under which Ms. Wilmer may, for the same calendar period, receive public employee payment as a Professor from Montana State University and public employee payment as a Legislator from the people of Montana. The MOU, supported by the recited facts, meets allowed exceptions by adjusting the payments in the manner afforded by law.

LIMITATIONS ON ADVISORY OPINION

This advisory opinion is not intended to, and does not, address the employer and employee relationship, including the right, if any, of any part of the University system, including the Board of Regents, to set standards that may differ from those of §2-2-104(3) MCA. The respective positions and rights of Professor Wilmer, Montana State University and the Board of Regents as to the terms and conditions of any prospective MOU are to be determined between the parties. This Advisory Opinion is directed solely to ethical implications of the terms of the MOU attached to this advisory opinion.

The Commissioner notes that prior Commissioners have deferred opportunities to consider and issue advisory opinions dealing with matters of ethics. This deference stemmed from the informal hearing examiner role assigned to the Commissioner [see §2-2-136(1)(c)MCA] in regard to ethics complaints. Commissioners, understandably, wished to avoid an action, such as an advisory opinion, that may later interfere with their ability to later sit in a quasi-judicial role as a neutral hearing officer. There is, however, no legal limitation on the Commissioner's authority to issue an ethics related advisory opinion [See 44.10.201(1)(a) ARM]. Further, a judicial body can and will issue an advisory opinion concerning conduct for which it may be the ultimate authority. See *In re Advisory Opinion to the Comm'n on Practice* (1971) 159 Mont. 541, 495 P.2d 1128. Still further, under §2-2-104(3)(c)MCA the Commissioner is charged to "determine compliance" of a "two salary" public employment circumstance with ethics law. Given the defined and limited facts of this matter, the special placement of this ethics matter in law, as well as the efficiency and benefit to all parties, the Commissioner chooses not to defer but issues this advisory opinion.

This letter is an advisory opinion based on the specific written facts and questions as presented above. This advisory opinion may be superseded, amended, or overruled by subsequent opinions or decisions of the Commissioner of Political Practices or changes in applicable statutes or rules. This advisory opinion is not a waiver of any power or authority the Commissioner of Political Practices has to investigate and prosecute alleged violations of the Montana laws and rules over which the Commissioner has jurisdiction, including alleged violations involving all or some of the matters discussed above.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Motl', is written over the printed name.

Jonathan R. Motl
Commissioner of Political Practices

MEMORANDUM OF UNDERSTANDING

This MEMORANDUM OF UNDERSTANDING is hereby made between Franke Wilmer, "Faculty Member", and Montana State University.

A. PURPOSE

The purpose of this MOU is to establish workload responsibilities and corresponding reduction in salary and benefits, for the Faculty Member during the 2013 Legislative Session while she serves in the Montana House of Representatives.

B. STATEMENT OF MUTUAL BENEFIT AND INTERESTS

The Faculty Member wishes serve the public through elective office, which will involve, normally, 90 days of full-time public service for which legislators are compensated. The University wishes to retain the Faculty Member and make an adjustment to workload responsibilities and a corresponding reduction in salary during the time of service in 2013 Legislative Session.

C. The Faculty Member shall

1. Carry a normal 1.0 FTE workload when the legislature is not in session, with responsibilities distributed approximately 40% time spent on teach and teaching-related duties (such as advising), 40% spent on research and scholarship as measured and evaluated according to Departmental, College, and University role and scope guidelines, and 20% on university service and community outreach.
2. During the regular session of the legislature, the faculty member will be assigned a workload at the rate of .6 FTE. The Faculty Member will not deliver classroom instruction, but will retain responsibilities for research and scholarship, and community outreach during the months of the regular legislative session. The Faculty Member will document the work performed during the Legislative Session and will provide a written report to the Commissioner of Higher Education and the President on or before June 1, 2013.
3. If a Special Session is called and for official responsibilities that occur during the Interim, the Faculty Member will make suitable arrangements for any absences from class and will maintain the required number of contact hours with students for the semester.
4. Be evaluated in the same manner as other faculty as outlined in the Tenure Track Faculty Collective Bargaining Agreement. For the period that the Faculty Member's FTE is reduced, she will be evaluated according to the above assignment, i.e. 40% scholarship and creativity and 20% community outreach.

D. The Department will hire adjunct instructor/s to teach the classes normally taught by the Faculty Member during the semester in which she is relieved of classroom teaching responsibilities.

E. The Dean will make an adjustment in the Faculty Member's salary during the Legislative Session in the amount of a .4 FTE reduction and agrees to return the salary savings from the .4 FTE reduction to the Department to be used to hire replacement adjunct instructor/s.

F. BENEFITS

1. Retirement benefits during the semester of the .6 FTE appointment will accrue for 90 days at the reduced rate commensurate with .6 FTE.
2. Health benefits will be continuous and deducted from salary according to the guidelines used by the Office of Payroll and Benefits.

G. This MOU is limited to the 2013 Legislative Session.

The MOU is not effective until approved by the parties listed as signatories below.

Faculty Member, Franke Wilmer

Date

Department Head, Linda Young

Date

Paul Lutz, Dean L&S

Date

Martha Potvin, Provost

Date

Waded Cruzado, President

Reviewed and approved by:

Clay Christian, Commissioner of Higher Education
