

PUBLIC EMPLOYEES - Right to exercise political speech;
PUBLIC OFFICERS - Right to exercise political speech;
STATUTORY CONSTRUCTION - Construing plain meaning of words of statute;
MONTANA CODE ANNOTATED - Section 2-2-121, (3), (a), (b), (c).

HELD: A public officer or public employee may engage in political speech so long as his or her speech does not involve the use of public time, facilities, equipment, supplies, personnel, or funds.

January 31, 2005

Mr. Mathew J. Johnson
Jefferson County Attorney
P.O. Box H
Boulder, MT 59632

Dear Mr. Johnson:

You have requested my opinion on a number of questions concerning public officers and political speech. I have rephrased your questions as follows:

Does Mont. Code Ann. § 2-2-121 limit a public officer's or employee's right to support or oppose a political candidate or passage of a ballot issue?

Mont. Code Ann. § 2-2-121 sets forth the rules of conduct for public officers and employees. Subsection (3) includes a prohibition against the use of public time and resources for political speech, as well as a provision protecting a public officer or employee's freedom to express personal political beliefs. It provides:

(3)(a) A public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue unless the use is:

(i) authorized by law; or

(ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.

(b) As used in subsection (3), "properly incidental to another activity required or authorized by law" does not include any activities related to solicitation of support for or opposition to the nomination or election of a person to public office or political committees organized to support or oppose a candidate or candidates for public office. With respect to ballot issues, properly incidental activities are restricted to the activities of a public officer, the public officer's staff, or legislative staff related to determining the impact of passage or failure of a ballot issue on state or local government operations.

(c) This subsection (3) is not intended to restrict the right of a public officer or public employee to express personal political beliefs.

(Emphasis added.)

It is not personal political speech that is prohibited by subsection (3)(a); rather, it is the use of public time or resources in the presentation or furtherance of political speech. While a public officer or employee is not required to shed his public persona in order to exercise his right to free speech, he may not use public resources when expressing personal political beliefs.

Your questions pose scenarios involving elected officers, like county commissioners and sheriffs, whose unique positions require them to work a schedule outside of the typical 8 to 5 schedule of most public employees. You ask, for instance, what of the county commissioner who receives phone calls at home in the evenings, or the sheriff who is on call 24 hours a day?

In Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589, 605-606 (1967), the Supreme Court stated, "a government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment." Likewise, a county commissioner or sheriff (or any other public employees or officers) does not relinquish her First Amendment rights by the mere fact that she may be a public official. Pursuant to the plain language of Mont. Code Ann. § 2-2-121(3)(a), so long as a public officer or employee is not using "public time, facilities, equipment, supplies, personnel, or funds" she may engage in political speech. See Dahl v. Uninsured Employers' Fund, 1999 MT 168, ¶ 16, 295 Mont. 173, 983 P.2d 363.

Although "public time" is not defined, a reasonable construction would be those hours for which an employee receives payment from a public employer. Elected officials, of

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course, do not have specific hours of employment nor do they receive vacation leave or other time off duty. They receive annual salaries rather than hourly wages. Thus, they could be considered to be on “public time” at all times. However, as long as public facilities, equipment, supplies, or funds are not involved, elected officials are not restricted in the exercise of political speech by the provisions of Montana law.

You also ask if subsection (3) prohibits a public employee or officer from signing a letter to the editor with his official title or prevents a law enforcement officer from wearing a uniform to campaign for a political issue or candidate. I conclude that, for the reasons stated above, subsection (3)(c) allows a public official to sign a letter to the editor, expressing personal political beliefs, with his official title, so long as public resources were not used to create the letter. Moreover, a sheriff would not be prohibited from wearing a uniform while campaigning for a political issue or candidate. In my opinion, neither activity would be prohibited by subsection (3).

Again, subsection (3)(a) only prevents use of “public time, facilities, equipment, supplies, personnel, or funds” in the furtherance of personal political speech. A title or a uniform is simply an accouterment of a public employee’s or officer’s position. A sheriff is not required to shed all associations, including his uniform, with his official position in order to exercise his protected right to express personal political beliefs.

The presumption is that free speech rights are protected and only the very specific restrictions in Mont. Code Ann. § 2-2-121 can be invoked to limit a public officer’s or public employee’s right to political speech.

THEREFORE, IT IS MY OPINION:

A public officer or public employee may engage in political speech so long as his or her speech does not involve the use of public time, facilities, equipment, supplies, personnel, or funds.

Very truly yours,

MIKE McGRATH
Attorney General

mm/anb/jym