



State Administration and Veterans' Affairs Interim Committee
62nd Montana Legislature

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LEGAL MEMORANDUM

TO: Members, Committee on State Administration and Veterans' Affairs

FROM: David Niss, Staff Attorney

RE: Statutory Weaknesses Discovered Researching Issues Related to the Former Commissioner of Political Practices

DATE: January 23, 2012

I
INTRODUCTION

Even though the former Commissioner of Political Practices (Commissioner) has resigned, several statutory issues that came to light during the former Commissioner's final days in office still remain and should be addressed by the State Administration and Veterans' Affairs Interim Committee (Committee). This memorandum explains those statutory issues and suggests several methods for their resolution.

II
DISCUSSION

The two statutes that concern the former Commissioner working on nonstate business at the same time that Commissioner was allegedly working on state business and with state resources are sections 13-37-108 and 2-2-121, MCA. Section 13-37-108, MCA, applies only to the Commissioner, but section 2-2-121, MCA, applies to all public employees. These two sections provide, in part, as follow:

13-37-108. Commissioner of political practices – restrictions. During the commissioner's term of office, the commissioner may not knowingly, as defined in 45-2-101:

(1) hold another position of public trust or engage in any other occupation or business if the position of public trust or the other occupation or business interferes with or is inconsistent with the commissioner executing the duties of the commissioner's office;

* * * * *

- (5) participate in a matter pertaining to the commissioner's office that:
 - (a) is a conflict of interest or results in the appearance of a conflict of interest between public duty and private interest pursuant to Title 2, chapter 2;

2-2-121. Rules of conduct for public officers and public employees. (1) Proof of commission of any act enumerated in subsection (2) is proof that the actor has breached a public duty.

(2) A public officer or a public employee may not:

- (a) subject to subsection (7), use public time, facilities, equipment, supplies, personnel, or funds for the officer's or employee's private business purposes;

The difficulties with the first section are (1) there is no indication of what is meant by the language regarding another business or occupation that “interferes with or is inconsistent with” the Commissioner executing the duties of the Commissioner’s office, and (2) there is no mechanism at all in the statutes for enforcing any of the prohibitions in section 13-37-108, MCA.

As to section 2-2-121, MCA, which applies to all public employees, the enforcement mechanism that is provided in the statutes with regard to all public employees is that the Commissioner may hold a hearing to determine if the violation occurred and, if it did, the Commissioner may, by virtue of section 2-2-136(2)(a), MCA, impose an administrative penalty of not less than \$50 or more than \$1,000 and under section 2-2-136(2)(c), MCA, may assess the costs of the proceeding against the employee. If the violator was a state employee, the Commissioner may also recommend that the employee be disciplined by the agency employing the employee. While this penalty might still be seen as adequate even when the violator is the Commissioner, there is no mechanism provided in the statutes for someone other than the Commissioner to bring the “charges” and assess the penalty when the violator is the Commissioner.

Concerning the lack of specificity in the meaning of “interferes with or is inconsistent with”, the Committee should decide whether or not to allow nonstate business to be conducted by the Commissioner during state business hours and, if the Committee means to prohibit that type of other employment, craft language to so provide.

Concerning the lack of an enforcement mechanism for either section 13-37-108 or 2-2-121, MCA, when the Commissioner is the potential violator, the Committee could use either of two methods of resolving these statutory issues. First, the Committee might recommend the use the mechanism provided for in section 13-37-111(3) and (4), MCA, for the appointment of a “deputy” when the Commissioner has a conflict in the

duty to administer election laws and simply provide for the appointment of another individual, perhaps from the Attorney General's Office (however, the Commissioner does receive legal advice from the Attorney General's Office) to prosecute the action against the Commissioner. The other alternative is for the Committee to survey similar laws in other states to see how those states provide for an enforcement mechanism when it is the principal person in an office like the Commissioner's who violates similar legal restrictions.

III CONCLUSION

The recent episode involving the former Commissioner has disclosed several weaknesses in the statutes that govern the ability of the Commissioner to engage in nonstate business at the same time that the Commissioner conducts the work of the Commissioner's office. These weaknesses are a lack of specificity in one of the prohibitions in section 13-37-108, MCA, and a lack of an enforcement mechanism in that section and in section 2-2-121, MCA, when it is the Commissioner who engages in secondary employment on state time and with state resources. If the Committee intends to strengthen the statutes in these areas, the Committee might simply recommend the obvious statutory changes or it might first survey similar laws of other states to see how those states have dealt with similar issues.

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