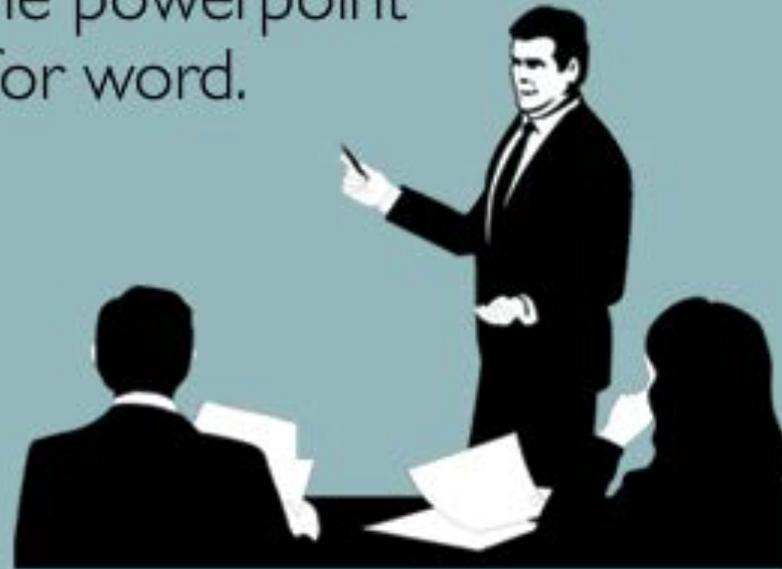


Rouge Mayors, Council Cousins, and Stubborn Judges

**“A Separation of Powers
Cautionary Tale”**

No Promises

For my presentation today, I'll be reading the powerpoint slides word for word.



Learning Outcomes

- Proactive versus Reactive Lawyering?
- Who does the City Attorney Represent?

November 2017

City Employee elected Mayor

(Protect the Innocent)

City of PLaurel



Background

Retained as City Attorney December 2003

- City terminated the previous City Attorney who then sued the city (wda)
- Replaced the current part-time city attorney who happily turned over the keys to city hall

Skepticism 101

- an attitude of doubt or a disposition to incredulity either in general or toward a particular object (Merriam-Webster)

“incredulity” a feeling that you do not or cannot believe or accept that something is true or real. (incre duality)

Years of Representation



Stability

- Help create systems
- Contracts
- Policies
- Certainty
- Standardize Ordinance Process
- Resolutions Drafting

Stability

- City Attorney under two Mayors since 2003
(15 Years)
- Stable and Consistent City Council

Result

- Council trusts Mayor
- Mayor trusts Council
- Employees trust Mayor and Council
- Council, Mayor and Employees trust City Attorney

Mayoral Style 2003-2013

Strong-Mayor system is when the mayor has strong executive powers, mayor tends to dominate city government, and mayor has the power to veto ordinances.



Mayor

- Carry out policies
- Make all appointments to Committees/Commissions
- Prepares budget
- Manages daily operations of the City
- City Council adopts policies but no administrative authority
- Veto power over Council Legislation

ch-ch-ch-changes

ch-ch-ch-changes

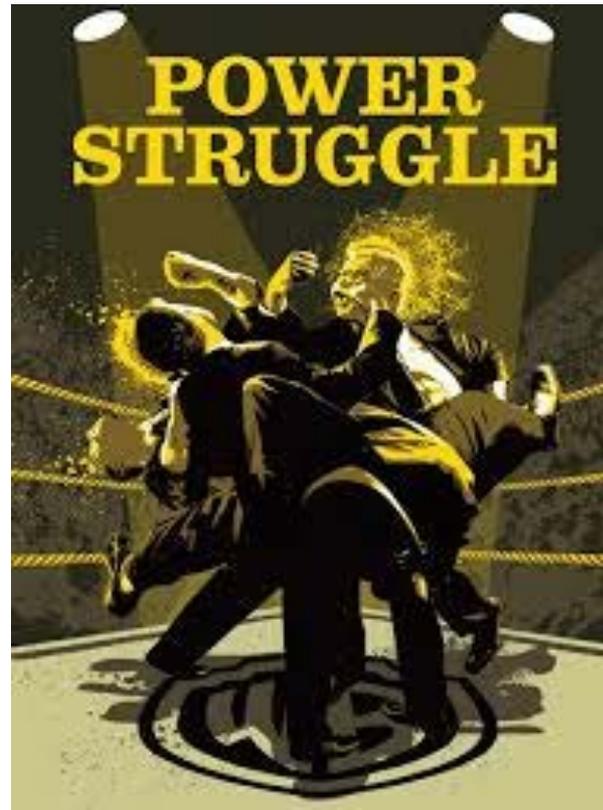
NOVEMBER 6, 2007



Voters Approved a new Charter

- Authorized Mayor to employ a Chief Administrative Officer (“CAO”)
- By written contract
- CAO under direct supervision of the Mayor
- Duties delegated by the Mayor to the CAO in writing
- *Reserved certain powers **ONLY** to Mayor

New Charter



2007-2013 City experiences



Answer



Growing Pains

- Mainly Human Resources
- Small Community
- Families know families
- Church ladies
- Parent pressure
- Mayor remained dominant position
- CAO somewhat powerless

January 7, 2014



Change in Leadership

- New Mayor takes office
- Employed Full-Time elsewhere
- Hands off Approach
- Relies Completely on CAO for City's Operation
- January 2014 to December 2016

January 2014 to December 2016

- CAO takes control over all city operations
- Job Descriptions updated and revised
- Employees expected to work
- Feet held to the fire/discipline suspensions and terminations
- Old school employees retired

Ruffled Feathers



Times were changing...

- New Council Members
- 2011 Flood Jellystone River
- Changed Flow of the River
- Flood rendered the City water intake installed in 2003 non-functional during certain parts of the year
- Creating substantial stress on the City of Plaurel

Change in Leadership

- Financial Strain of the City
- Employee wages were close to frozen
- Unions used to generous wages
- Caused substantial hard feelings between certain employees and CAO

Employees Fight Back

- Certain city union employees began challenging the city by filing numerous grievances:

Notable Grievances:

1. Office payroll clerk demands reclassification of position to hire grade and pay since she was forced to learn “new software” for the position
(payroll was performed by hand until software purchased)

2. Overtime demanded by union employee since a City Supervisor had stopped at the scene of a water break at 5:15 p.m. and turned the water off with key to stop the water fountain...
3. Personal Favorite: Union Member Court Clerks demanded cash in lieu of steel toed boots since City purchases steel toed boots for other union employees...

City Attorney asks...



Employee Effort

- Run for elected office
- Council Positions (write-ins)
- As Candidates for Council Positions
- For the Mayor Position

Unsuccessful

However:

2011 Election a Union Member came within single digits of defeating a sitting Council Member through an organized write in campaign



City Attorney Question?

- Is this the time for Proactive versus Reactive Lawyering?
- Benefit of Hindsight
- Cautionary advice “TAKE SOME ACTION”
- Anticipate the Train Wreck

City Failed

- City Attorney included
- Met with employees and union over the next year
- Provided general advice that a city employee may not serve as an Elected City Official
- No formal legal opinion requested and NONE issued

RESULT

City Public Works Department (Union) Employee files to run for Mayor 2017 November Election:

- City Meets with Union and advises the union that their member can not serve as mayor and remain employed if successful
- Union advises their Member has retained legal counsel and has a legal opinion that provides the opposite advice
- City takes no action to avoid any claims of disqualification of a candidate
- Distinguish eligible to run for office and eligible to hold office

History of PLaurel

HISTORICAL FACT:

**All Successful Mayors who are elected must
have the Support of a particular City
Department or he/she will lose the election.**

Unnamed City Department?



That Sponsors a Celebration



CAO/Employee Relations

- Certain City Department and CAO Dispute
- Departmental Spending is questioned
- CAO and Department Head embroiled in turf war
- CAO begins disciplinary proceedings against the Department Head
- No Support for CAO effort from Mayor
- Emboldened the Department Head
- CAO/Department Head relationship breaks down
- CAO and City Clerk approach a City Committee for assistance

Result

City Budget and Finance Committee Completely Removes the Department Heads authority to spend city funds without prior CAO/Mayor and City Clerk Approval

Action gets a Reaction



Months Pass

- Department Head Complies (somewhat)
- But gets Mayor's Signature on purchase orders (prior and after)
- Dispute simmers for months
- Mayor no support for CAO
- CAO finds support at Budget and Finance Committee
- City Department and Mayor Candidate find a friend in the local Newspaper (bashing begins)

What did I forget?



Campaigning

- Mayor Candidate One: Current Council President (tactics)
- Mayor Candidate Two: City Public Works Department Employee (tactics)

Employee Candidate Promises

INTERNAL PROMISES

- Fire the CAO
- Restore purchasing authority to the aggrieved Department Head
- Approve major increase in a Department's Budget
- Negotiate and Execute Union Contract with Public Works Union substantial wage increases
- Fire the Public Works Director
- Fire the City Attorney

Employee Candidate's Public Platform

- Trump like platform
- Existing government corrupt
- Drain the swamp
- CAO incompetent/outsider need “local”
- Need “local” residents in all positions
- Local Newspaper assisted GREATLY

Headlines and Result

- **Laurel elected a city employee its next mayor. Now people are asking if he can legally do both.** (Billings Gazette)
- **Laurel mayor-elect told he has to choose city job or mayor position (KPAX TV)**
- **NOTE: Two council positions filled by candidates with no elective office experience**

City Government Reaction

- November 17, 2017 until January 2, 2018
- CAO resigns in mid-December
- Public Works Director seeking other employment (advised to stay)
- Meetings held with newly elected Employee/Mayor to discuss inability to serve both positions
- Legal Challenge Promised

Legal Opinion Requested

- City Council formally requested a legal opinion regarding the employee/mayor's ability to serve in both positions
- Current Mayor and existing Council concerns
- City operations threatened
- How to pay bills and provide services if employee/mayor takes office and begins terminating employees...

November 27, 2017

- Significance of the date?

Realized I had become the City's James Comey



Legal Opinion Issued

- City's Legal Opinion was based on the doctrine of incompatible positions. My conclusion was simple:
- The short answer is no, based on Montana law Mr. Employee may not serve as mayor and remain a City employee. As a result, Mr. Employee must choose to remain an employee and decline to serve as Mayor or alternatively accept the Mayor position and resign his employment.

Incompatible Positions

- Attorney General Mazurek in his AG Opinion

47 Op. Att'y Gen. No. 19 (1998).

State ex. rel. Klick v. Wittmer, 50 Mont. 22 (1914):

“two offices are incompatible when one has the power of removal over the other, when one is in any way subordinate to the other, when one has the power of supervision over the other, or when the nature and duties of the two offices are such as to render it improper (for public policy reasons) for one person to retain both.”

City's Charter

- The City's Charter provides the basis for the conclusion the positions are incompatible in two specific places:
- Article III, Section 3.05 (Administrative Duties of the Mayor): (2) appoint with the consent of a majority of the council, all department heads and may remove department heads without the consent of the council and may appoint and remove all other city employees (emphasis added); and
- Article III, Section 3.10 (4): The chief administrative officer shall not have the authority to terminate any city employee, that authority being reserved to the mayor (emphasis added).

City's Charter

The City's Charter provides the mayor with the sole and absolute authority to remove all city employees, including supervisors and department heads, without consent or approval of the council. The mayor's authority to supervise and terminate city employees is unilateral and requires no council consent or action.

City Attorney Opinion

Released at a work shop: (copies provided the employee/mayor in a private meeting previous to council meeting)

Employee/Mayor appeared at the Council Workshop and declared:

“it doesn’t matter what the City Attorney says, his opinion is meaningless, the voters have spoken..”

Reported on television, newspapers...etc.

Positions Established

- How does the City proceed?
- File a Declaratory Action?
- First met with employee/mayor and Union Representatives
- Discussed positions and intentions
- Agree that his decision would be made within 5 days

Deadline

Urged Employee for the good of the City:

- Resign and accept Mayor position; or
- Remain an employee and decline Mayor position

Deadline...means nothing..

- Union Representative advised the employee (union member)/mayor decided to retain his position AND serve as the Mayor

City takes Action

Proposed a plan:

- Shift burden to employee/mayor for legal challenge.
- Recommend City Council making a decision to appoint a “mayor” to be sworn and serve only if the employee/mayor refuses to resign his city employment by the January 2, 2018 Council Meeting
- If the employee/mayor had not resigned by the meeting the mayor position would be declared vacant since the employee/mayor could not serve both positions.

City Council takes action

- RESOLUTION OF THE CITY COUNCIL APPOINTING A MAYOR TO SERVE UNTIL THE CITY'S NEXT GENERAL ELECTION TO BE EFFECTIVE ONLY IF THE MAYOR ELECT FAILS TO RESIGN HIS CURRENT CITY EMPLOYMENT RENDERING HIM UNABLE TO SERVE AS THE CITY'S ELECTED MAYOR WHILE REMAINING A CITY EMPLOYEE.

Council Resolution

- Council appointed the Council President who lost the election contingent upon employee's refusal to resign.
- If employee/mayor resigned his city employment, the resolution was of no effect and the employee would be sworn in at the January 2 Council Meeting

Solved Problem?

January 2, 2018 Council Meeting:

- City Employee/mayor does not resign and does not show up at the meeting
- TV Stations, newspapers, standing room only

EVEN better...

The Appointed Mayor did not show up to be sworn in pursuant to the City Council Resolution.

Headlines

- Laurel has no mayor after the man the town elected and the man the council appointed miss swearing-in (Billings Gazette)
- Montana Town Leaderless After Mayor-Elect Ditches and the man appointed to take his spot didn't show up either. (U.S. News)

End Result

- Appointed Mayor sworn in the next day
- No legal challenge filed
- City Attorney quite popular since he disenfranchised all those voters...

HOWEVER...from Anaconda..

Bill Everett Sucks



Closing

- A void in power or authority will be filled...
- Absent Executive: Council or Committee will fill in..
- If you spot a void, do not wait ...City Attorney must be proactive.
- Defend separation of powers vigilantly and aggressively. (Judge's Pay)
- City Attorney represents the CITY as a whole
- Mayor's Attorney?
- Hangover Problems continue...