

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES
STATE OF MONTANA

In Re: Ethics Complaint of CARON COOPER v. BRADLEY JOHNSON, Chairman of the Montana Public Service Commission	CAUSE NO. COPP-2016-ETH-007 SUMMARY DECISION OF COMPLAINT WITHOUT INFORMAL CONTESTED CASE HEARING
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On October 31, 2016, Ms. Caron Cooper of Livingston, Montana, filed an ethics complaint with the Office of the Commissioner of Political Practices (COPP), posed as a complaint against Mr. Bradley Johnson, Chairman of the Montana Public Service Commission (PSC).

On November 3, 2016, then-Commissioner Jonathan Motl requested further information from each of the parties in this matter on the following issues:

1. Please explain the capacity in which the letter to the editor was written, be specific as to whether public time or public resources (including computer use) was involved in the production of the letter.
2. Please specify whether it was your intention that the letter be seen as advocacy for or against the election of Ms. Cooper to the PSC. If your contention was that it was not advocacy, please explain the timing of the letter.

Later that same day Ms. Cooper provided her response to the questions posed by Commissioner Motl. On November 11, Mr. Johnson mailed a request for an extension of time to respond, which Commissioner Motl granted. On December 8, Mr. Johnson provided his written response through his private attorney Jim Brown. On April 5, 2017, Commissioner Motl issued a notice that the Ethics Complaint filed by Ms. Cooper was accepted for filing with the COPP.

JURISDICTION AND AUTHORITY

The Commissioner of Political Practices has jurisdiction to hear and decide complaints filed under Montana's Code of Ethics against state officers, legislators, state employees and county attorneys, Mont. Code Ann. § 2-2-136. Unless a complaint is dismissed as frivolous, or for failing to state a claim of a potential violation of the code, the Commissioner "shall hold an informal contested case hearing," Mont. Code Ann. § 2-2-136(1)(c). However, "[i]f the issues presented in a complaint have been addressed and decided in a prior decision and the commissioner determines that no additional factual development is necessary, the commissioner may issue a summary decision without holding an informal contested case hearing on the complaint," *id.*

Having reviewed Ms. Cooper's and Mr. Johnson's responses, Commissioner Mangan determines from the facts presented and admitted in the record that no additional factual development is necessary pursuant to a prior decision of this office, *Fox v. Molnar*, September 13, 2010.¹ Therefore the Commissioner issues the following summary decision without holding an informal contested case hearing on the complaint, Mont. Code Ann. § 2-2-136(1)(b).

CONTENTIONS

Ms. Cooper's Complaint alleges that "PSC Chairman Brad Johnson has violated MT Code section 2-2-121 by using his state email and his official title in a letter to the editor sent to multiple Montana newspapers.... His political agenda is clear throughout his letter, and his concluding sentence says it all...." The statute referenced by Ms. Cooper is found in the Montana Code of Ethics and provides:

Public officers are prohibited from using:

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... 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.

¹ Affirmed by the Thirteenth Judicial District Court in *Molnar v. Fox*, Cause No. DV-10-1718 (Feb. 6, 2012); affirmed by the Montana Supreme Court in *Molnar v. Fox*, 2013 MT 132, 370 Mont. 238, 301 P.3d 824 (May 14, 2013).

(b) As used in this [section], "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....

(c) This [section] is not intended to restrict the right of a public officer or public employee to express personal political views.

Mont Code Ann. § 2-2-121(3).

Mr. Johnson contends that his emailed Letter to the Editor was properly incidental to his position as Chairman of the PSC in responding to misinformation regarding the conduct of the PSC and consumer energy rates. Mr. Johnson also contends that his Letter to the Editor is protected speech under the First Amendment and an expression of his personal political views which are specifically protected in section (3)(c) above.

FINDINGS OF FACT

In order to apply the law to Ms. Cooper's and Mr. Johnson's contentions, the following Findings of Fact are necessary:

Finding of Fact 1: Bradley Johnson was elected to the Montana Public Service Commission, District 5 on November 4, 2014, his term will expire in early 2019.

Finding of Fact 2: Caron Cooper was an Independent candidate for Public Service Commissioner, District Three, in the November 8, 2016 general election.

Finding of Fact 3: On October 24, 2016, Mr. Johnson emailed a Letter to the Editor to a number of newspapers. (Exhibit A.)

Finding of Fact 4: The Letter to the Editor was drafted at the PSC office, on a PSC computer, and sent to the press using Mr. Johnson's state email account. (Johnson Response; (Exhibit B.)

Finding of Fact 5: Mr. Johnson used the PSC's Legal Counsel to review his draft Letter to the Editor prior to emailing it to the press. (Johnson Response.)

Finding of Fact 6: Several newspapers published Mr. Johnson's letter including the Montana Standard (October 25, 2017), Livingston Enterprise (October 26), the Independent Record (October 28), and the Missoulian (October 31). (Johnson Response; Judicial Notice, Mont. R. Evid. 201(b).)

DISCUSSION

The Montana Legislature adopted the Code of Ethics for Montana state and local officers and employees and legislators "prohibiting conflict between public duty and private interest," Mont. Constitution, Article XIII, §4. "The holding of public office or employment is a public trust, created by the confidence that the electorate reposes in the

integrity of public officers, legislators, and public employees... [who] shall carry out the individual's duties for the benefit of the people of the state," Mont. Code Ann. § 2-2-103(1). "A public officer ... or public employee whose conduct departs from the person's public duty is liable to the people of the state and is subject to the penalties provided ... for abuse of the public's trust," *id.* (2).

ANALYSIS

Mr. Johnson is an elected official and a board member of the Montana Public Service Commission; he is currently PSC Chairman. The PSC Board is made of five elected Commissioners serving four-year terms on a staggered election schedule. The Code of Ethics defines a public officer as "any state officer," Mont. Code Ann. § 2-2-102(8)(a). A state officer "includes all elected officers and directors of the executive branch of state government," Mont. Code Ann. § 2-2-102(11). The PSC is a department in the executive branch, Mont. Code Ann. § 2-15-104(1)(k). Chairman Johnson therefore is a public officer and subject to the Montana Code of Ethics.

As an individual, Mr. Johnson has a right to express his own personal political views. Mont. Code Ann. § 2-2-121(3)(c); 51 Op. Att'y Gen. No. 1 (2005). Further, there are exceptions for the use of public resources by public officers, employees and agencies when the uses are "properly incidental to another activity required or authorized by law," Mont. Code Ann. §2-2-121(3)(a)(i)-(ii). For example, it is a proper use of state resources for a public officer or employee to determine the impact of the passage or failure of proposed of ballot issues on governmental operations, *id.* (3)(b)(i).

However, public officers and employees are specifically prohibited from using:

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 ... unless the use is ... properly incidental to another activity require or authorized by law, such as the function of an elected public officer, the officer's staff...in the normal course of duties. As used in this [section] "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.

Mont. Code Ann. § 2-2-121(3) (emphasis added).

Mr. Johnson argues that his letter to the editor is specifically exempted from the definition of an election or electioneering communication which solicits support for or opposition to a specific candidate for office (Exhibit A), and therefore the letter to the editor cannot be a violation of the Code of Ethics. This is mixing apples and oranges. Under campaign finance law, a letter to the editor is a specifically-exempted reporting and disclosure election activity that individuals can engage in without becoming a political committee, Mont. Code Ann. § 13-1-101 (14)(a)(iii) and (15)(b)(i). The Complaint at issue here, however, was not alleging a violation of campaign finance law. Rather, it alleges a violation of the Code of Ethics, which includes a prohibition on the use of state resources by public officers and employees to promote one's political viewpoint, *Molnar v. Fox*, 2013 MT 132, ¶¶35-46.

The Code of Ethics, as laid out herein above, expressly prohibits a public officer or employee from soliciting support for or opposition to a candidate for office using state resources. Mr. Johnson responds that his letter to the editor was an appropriate use of state resources to correct the public record on facts which Ms. Cooper had gotten incorrect in her public statements during her campaign for Public Service Commission, and therefore is not political speech. Mr. Johnson then argues that his letter to the editor is political speech which is protected by the First Amendment and must be protected by the COPP, citing *Buckley v. Valeo*, 424 US 1 (1976).

The letter is either political speech, or it isn't, it cannot be both. To be clear, we are talking about the use of state resources to engage in political speech, not an elected official's right to speak his mind under the First Amendment, 51 Op. Att'y Gen. No. 1 (2005).²

1. "Support For or Opposition To"

Mr. Johnson's conflicting response as to whether or not the letter to the editor is political speech can be resolved by a review of the language he used in the letter (Exhibit A). Mr. Johnson asserts that none of the words used in the letter meet the "magic word" test set forth in *Buckley*, and must be followed as a "fixed and definite meaning" of the

² "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," 51 Op. Att'y Gen. No. 1 (2005). Affirmed by *Molnar v. Fox*, 2013 MT 132, ¶39.

interpretation of "support for or opposition to" in Montana's statutory language (Exhibit B). The Commissioner disagrees. *Yamada v. Snipes*, 786 F.3d 1182, 1190-91 (9th Cir. 2015) (citing *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007)(herein, *WRTL*)), petition for writ of certiorari denied, 136 S. Ct 569 (Nov. 30, 2015).

The U.S. Supreme Court in *Buckley* narrowly construed the application of regulation and disclosure obligations regarding certain "expenditures" (18 U.S.C. § 608(e)(1)), as "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, at 44. In doing so, the Court recognized that there is a distinction between a discussion of issues (issue advocacy) versus a discussion of a particular candidate for election (express advocacy).

The Court then listed examples of words that are clearly express advocacy: "this construction would restrict the application of §608(e)(1) to communications containing express words of advocacy of election or defeat **such as** 'vote for,' '**elect**,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.*, at n. 52 (emphasis added). Here, Mr. Johnson's letter to the editor twice says "if elected" in reference to Ms. Cooper's candidacy. Even under the *Buckley* test, Mr. Johnson's letter to the editor is express advocacy which solicits opposition to Ms. Cooper, a clearly identified state candidate.

By way of background, in order to get around reporting and disclosure of express advocacy expenditures during elections, organizations took to just leaving the "magic words" out of their messaging, and then claimed that their messaging was pure issue advocacy. Courts then articulated the "functional equivalent of express advocacy," *WRTL* test summarized as "a court should find that an ad [letter] is the functional equivalent of express advocacy only if the ad [letter] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 467-490 (emphasis supplied).

Chief Justice Roberts stated and applied the test as follows:

Under this test, *WRTL*'s three ads are plainly not the functional equivalent of express advocacy. First, their contents is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on

the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party or challenger; and they do not take a position on a candidate's character, qualifications or fitness for office.

WRTL, at 470.

Mr. Johnson's letter to the editor does not focus on a legislative issue, or urge the public to contact the PSC and take action; instead the letter focuses on Ms. Cooper's candidacy, character and fitness for office "if elected[.]" Objectively and clearly, under the *WRTL* test, Mr. Johnson's letter to the editor is also the functional equivalent of express advocacy and "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.*, at 469-470; (Exhibit A).

The Montana Code of Ethics does not provide a specific definition of the phrase "support for or opposition to," so it is reasonable for the Commissioner to look to other definitions in statute, Mont. Code Ann. § 1-2-107. The Disclose Act, passed by the 2015 Montana Legislature, defined "support or oppose" in the campaign finance reporting and disclosure realm, which will also apply to the Code of Ethics, *id.*

"Support or oppose," including any variations of the term, means:

(a) using express words, including but not limited to "vote", "oppose", "support", "elect", "defeat", or "reject", that call for the nomination, election, or defeat of one or more clearly identified candidates, the election or defeat of one or more political parties, or the passage or defeat of one or more ballot issues submitted to voters in an election; or

(b) otherwise referring to or depicting one or more clearly identified candidates, political parties, or ballot issues in a manner that is susceptible of no reasonable interpretation other than as a call for the nomination, election, or defeat of the candidate in an election, the election or defeat of the political party, or the passage or defeat of the ballot issue or other question submitted to the voters in an election.

Mont. Code Ann. § 13-1-101(49)(2015). In plain language, the above definitions represent the *Buckley* test (a) and the *WRTL* test (b).

As discussed herein above, the Commissioner determines that Mr. Johnson's letter to the editor solicited opposition to Ms. Cooper as a candidate for the Montana Public Service Commission. Mr. Johnson's solicitation of opposition to Ms. Cooper was not properly incidental to his position as PSC Chairperson, and is not an exempted

communication under Mont. Code Ann. § 2-2-121(3)(c). Therefore, Mr. Johnson's letter to the editor was a violation of the Montana Code of Ethics if public "time, facilities, equipment, supplies, personnel, or funds" were used to create the letter to the editor, Mont. Code Ann. § 2-2-121(3)(a).

2. Public Time

The Code of Ethics prohibits public officers from using "public time" to promote or oppose the election of a candidate to office, Mont. Code Ann. § 2-2-121(3)(a). However, as an elected official, Mr. Johnson receives a salary, and could be considered on "public time" at all times, *see e.g. Fasbender v. Toole*, Deputy Comm. Honzel (Feb. 21, 2012) and 51 Op. Att'y Gen. No. 1 (2005). To the extent the Complaint contains allegations that Mr. Johnson improperly used "public time" to write the letter to the editor, the Commissioner determines that Mr. Johnson's time cannot be the basis for a finding of an ethics violation against him and thus dismisses the same, *Molnar v. Fox*, 2013 MT 132, ¶¶37-39.

3. Public Facilities and Equipment

The Code of Ethics also prohibits public officers from using public "facilities, [and] equipment" to promote or oppose the election of a candidate to office, Mont. Code Ann. § 2-2-121(3)(a). In his response, Chairman Johnson twice admits to using his state computer, at the PSC office, and the state's email system to send his letter to the editors of several newspapers (Exhibit B)(FOF Nos. 3-4). At least four newspapers received and published the letter (FOF No. 6). The Commissioner determines that Chairman Johnson improperly used state facilities and equipment to oppose the election of a candidate for office in violation of Mont. Code Ann. § 2-2-121(3)(a).

4. Public Personnel

The Code of Ethics also prohibits public officers from using public "personnel" to promote or oppose the election of a candidate to office, Mont. Code Ann. § 2-2-121(3)(a). In his response, Chairman Johnson admits "the op-ed was reviewed by the Commission's legal counsel to ensure compliance with the law prior to it being remitted to the press," (Exhibit B; FOF No. 5). The Commissioner determines that Chairman Johnson improperly used state personnel (PSC's legal counsel) to oppose the election of a candidate for office in violation of Mont. Code Ann. § 2-2-121(3)(a).

CONCLUSION

Mr. Johnson has a right to express his personal political views, Mont. Code Ann. § 2-2-121(3)(c). What Mr. Johnson does not have, however, is a right to the use of state resources to express those personal political views, *id.*, at (a). To be clear, had Mr. Johnson conducted the same activity using his personal resources, the Commissioner would have dismissed the complaint as frivolous on its face.

Prohibited Use of State Resources	Permissible Political Speech
Drafted on PSC Computer at the PSC	Drafted on personal computer
Reviewed by PSC Attorney time	Reviewed, if desired, by personal attorney
Emailed on PSC state email system	Emailed on personal email system
	Using Title as PSC Chairperson

The violations of the Montana Code of Ethics would exist, even if Mr. Johnson's letter was actually published by the newspapers. It is up to the individual public employees and officers, and the agencies that they work for, to know the obligations that the code of ethics places on them while on the job, at the workplace, and in the use of state resources. Public employment and service comes imbued with the public trust. The public trust requires proper use of state resources by all public servants for the good of all Montanans, Mont. Code Ann. § 2-2-103(1).

Instead of realizing his error and doing what could be done to take responsibility for the lapse, through his attorney, Mr. Johnson took an unsupportable legal position which has been clarified by the attorney general for all public employees and officers since 2005.³ Further, the Mr. Johnson insisted on arguing an outdated 40-year-old standard for interpreting the obligations of the Code of Ethics under the First Amendment. Even if the position asserted were correct, Mr. Johnson's letter still failed the 40-year-old *Buckley* "magic words" test that he suggested.

CONCLUSIONS OF LAW

1. Mr. Johnson's letter to the editor solicited opposition to Ms. Cooper as a candidate for the Montana Public Service Commission.
2. Mr. Johnson's solicitation of opposition to Ms. Cooper was not properly incidental to his position as PSC Chairperson, and is not an exempted communication under Mont. Code Ann. § 2-2-121(3)(c).

³ 51 Op. Att'y Gen. No. 1 (2005).

3. Mr. Johnson's time cannot be the basis for a finding of an ethics violation against him and the same are dismissed.
4. Mr. Johnson improperly used both state facilities and state equipment in the creation and emailing of a letter to the editor which opposed the election of a candidate for office in violation of Mont. Code Ann. § 2-2-121(3)(a).
5. Mr. Johnson improperly used state personnel to review his letter to the editor which opposed the election of a candidate for office in violation of Mont. Code Ann. § 2-2-121(3)(a).

ORDER

The Code of Ethics provides that when the Commissioner has determined there has been a violation, "an administrative penalty of not less than \$50 or more than \$1,000" and "costs of the proceeding" may be imposed, Mont. Code Ann. § 2-2-136(2)(a), (c).

1. The Commissioner finds and decides that Mr. Johnson is liable for three separate violations of the Code of Ethics for improper use of (1) facilities, (2) equipment and (3) personnel to draft, review, and send a letter to the editor to several newspapers opposing a candidate for office on October 24, 2016.⁴ For these three violations the Commissioner orders that Mr. Johnson is personally liable to the people of the State of Montana for a total of \$3,000 for misuse of state resources to oppose a candidate for office.
2. During these proceedings, Ms. Cooper did not retain an attorney, and it appears that the costs that she incurred would be minimal. Therefore the Commissioner will not assess Ms. Cooper's costs against Mr. Johnson.

⁴ Previous Commissioners have interpreted this statute differently, such as suggesting a separate fine for each radio station to which a public service announcement was sent. *MT Republican Party v. Schweitzer*, Final Decision, p. 3.

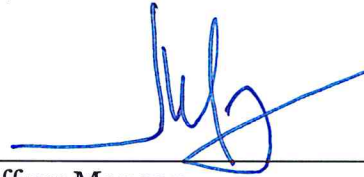
This Commissioner concludes that in this case it is a more appropriate use of state resources to assess a full \$1,000 fine for each category of misuse, rather than incurring the expense of an entire informal contested case proceeding to determine the number of discrete violations in each category of misuse (*e.g.*, \$750 x 4 letters to the editor = \$3,000 penalty for emailing the letter to the 4 newspapers identified herein, plus a separate penalty for misuse of state public facilities and equipment, and an additional penalty for use of public personnel).

3. The Commissioner's office did incur costs in dealing with this matter, through the use of in-house and outside counsel, personnel, time, equipment, facilities and supplies. Given that the issues in this complaint were addressed and decided in prior decisions and no additional factual development was needed, the Commissioner will not assess the COPP's costs against Mr. Johnson for the Summary Decision proceedings.

NOTICE

The Commissioner provides notice to the parties that this dismissal is a final agency order, and either party may seek judicial review of the Commissioner's determination pursuant to Montana Code Annotated, Title 2, Chapter 4, part 7. Mont. Code Ann. § 2-2-136(3). The parties are further informed that the Complaint, record established, and Decision are available for public inspection. Mont. Code Ann. § 2-2-136(4).

ORDERED this 10th day of July, 2017.



Jeffrey Mangan
Commissioner of Political Practices
P.O. Box 202401
Helena, MT 59620-2401

CERTIFICATE OF SERVICE

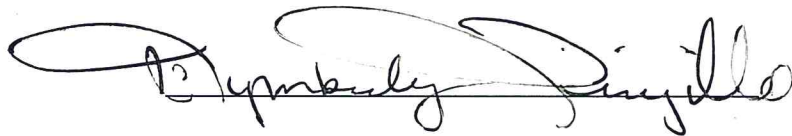
I hereby certify that I caused a true and accurate copy of the foregoing to be emailed and send by first class US mail to:

Caron Cooper
P.O. Box 123
Livingston, MT 59047
caroncoopermtpsc@gmail.com

Brad Johnson
3724 B Old Highway 12 East
East Helena, MT 59635
bradleysjohnson@live.com

James Brown
The James Brown Law Office, PLLC
30 South Ewing St
Helena, MT 59601-5704
thunderdomelaw@gmail.com

DATED this 10th day of July, 2017.

A handwritten signature in black ink, appearing to read "Kimberly Jeyll". The signature is written in a cursive style with a large initial "K" and a long horizontal stroke at the end.

Begin forwarded message:

From: "Johnson, Bradley" <BJohnson@mt.gov>
Date: October 24, 2016 2:16:25 PM MDT (CA)
To: Undisclosed recipients;;
Subject: LETTER: Distorting PSC's Record is a Disservice to Consumers

Distorting PSC's Record is a Disservice to Consumers

By: Brad Johnson

As the saying goes, everyone is entitled to their own opinions, but they are not entitled to their own facts.

Caron Cooper, the independent candidate for the District 3 seat on the Montana Public Service Commission, apparently thinks it prudent to create her own facts.

Cooper has repeatedly claimed over the past month that residential electricity rates in Montana have increased 15 percent in the last four years. This is false.

According to utility bill data, the average residential electricity rate for NorthWestern Energy's customers in Montana—the vast majority of electricity customers in the state regulated by the PSC—have increased 2.6 percent (adjusted for inflation) since January 2013. This increase was largely due to NorthWestern Energy's acquisition of 11 hydro-electric dams in 2014. The purchase price of the dams was actually higher due to the zero-carbon emitting nature of the generators.

Cooper has also criticized commission action in recent months to prevent consumers from paying for overpriced solar energy. The current commission is very much pro-renewable, but not if ratepayers are harmed in the process.

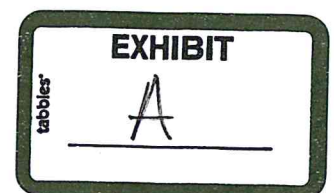
If elected to the commission, Cooper clearly will have a tough time reconciling her "develop renewables at any cost" mentality with her claimed desire to protect ratepayers.

For someone running for the Public Service Commission, Cooper has shown a surprising lack of knowledge of the subject matter she will be working on. She appears driven by an ideological urge to support green energy at any cost to ratepayers; a dangerous characteristic in a PSC commissioner. I encourage Cooper to spend more time researching the subject matter that she will be working on if elected. And if she still feels it necessary to shun objectivity in favor of ideological pursuits, then I encourage her to rethink her fitness to serve on the PSC.

Brad Johnson, R-East Helena, is Chairman of the Montana Public Service Commission

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Brad Johnson
Chairman
Montana Public Service Commission
1701 Prospect Avenue
Helena, MT 59620
406-444-6169 -desk
406-439-6389 -cell



December 8, 2016

Jon Motl
Commissioner of Political Practices
1205 8th Ave.
PO Box 202401
Helena, MT 59620-2401.

Dear Mr. Motl:

As you know, I am a private practice attorney who has been retained by Brad Johnson. Mr. Johnson is presently the Chairman of the Montana Public Service Commission. I am not an attorney for the State and no state funds have been expended in the preparation by me of this response letter.

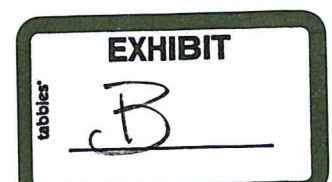
I write now in response to the Administrative/Ethics Complaint filed by Caron Cooper against Mr. Johnson.

As an initial matter, let me communicate my personal disappointment with the fact that Ms. Cooper's Ethics Complaint was not, as is required by law, kept private. *See*, MCA §2-2-136(4). Mr. Johnson has at no time waived, in writing or otherwise, the right of confidentiality and, therefore, the Complaint was required to remain confidential and not open for public inspection. This breach of confidentiality is evidenced by the enclosed *Bozeman Chronicle* article which detailed the filing of the Complaint. *See*, Exhibit "A".

This being said, the following constitutes Mr. Johnson's Response to the Cooper Complaint.

As you well know, Montana law requires you to dismiss an Ethics Complaint when the Complaint fails to state a potential violation of an ethics law, lacks sufficient allegations, and/or the Complaint is frivolous on its face. *See*, MCA §2-2-136(1)(b); *see, also, Tachida v. Bullock and O'Leary*, No. COPP 2016-ETH-005. In the current case, the Cooper Complaint must be dismissed on all three grounds set forth above.

Mr. Johnson readily admits that he drafted the newspaper op-ed upon which Ms. Cooper based her Complaint. A copy of the op-ed at issue is attached as Exhibit "B". Mr. Johnson also admits that he drafted the op-ed at the office he uses at the Public Service Commission and sent the op-ed to the *Montana Standard* and other news outlets using his state email account.



December 6, 2016
Brad Johnson

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As expressly stated in the op-ed, Mr. Johnson wrote the op-ed as a response to Ms. Cooper's repeated public statements regarding the PSC, its members, and electricity rates as well as the Commission's position on renewable energy. As you know, Ms. Cooper was a candidate for the PSC this election cycle. Ms. Cooper's statements were not only factually inaccurate and a clear distortion of the PSC's actions, but called into question the competency of the PSC – the state agency Mr. Johnson is tasked with leading.

Ms. Cooper's only allegation against Mr. Johnson is her unsupported contention that Mr. Johnson violated MCA §2-2-121 because the letter advanced Mr. Johnson's "political agenda" and, thus, constituted unlawful electioneering. A copy of Ms. Cooper's single allegation is attached hereto as Exhibit "C".

Mr. Johnson wrote the op-ed as a commentary piece on Ms. Cooper's inaccurate public statements related to the Commission and its work. Under Montana law, commentary and editorial pieces are not reportable "election communications" or "electioneering communications." See, MCA §13-1-101(14)(b)(iii) & 15(b)(i). Therefore, as a matter of law, Mr. Johnson's op-ed does not constitute "electioneering" as alleged by Ms. Cooper. As such, Ms. Cooper's Complaint fails to state a potential violation of Montana ethics law and must be dismissed as being inadequate on its face. See, MCA §2-2-136(1)(b).

Further, Ms. Cooper's Complaint must be dismissed because it is frivolous on its face. Montana's ethics laws specifically provide that MCA §2-2-121(3) – the statute Mr. Johnson is alleged to have violated – "is not intended to restrict the right of a public officer or public employee to express personal political views." See, MCA §2-2-121(3)(c). Yet, Ms. Cooper's Complaint constitutes exactly that: an improper attempt to restrict Mr. Johnson's personal views on Ms. Cooper's campaign representations. As noted above, Mr. Johnson wrote the op-ed to express his personal views on the factual and policy allegations being leveled by Ms. Cooper against Mr. Johnson and the rest of the PSC commissioners and the Commission itself. Mr. Johnson has a statutory and constitutional right to publicly express his views and, thus, no ethical violation has occurred.

The fact that Ms. Cooper's Complaint is frivolous on its face is further demonstrated by application of the terms of the statute alleged to have been violated. On its face, MCA §2-2-121(3) prohibits a public employee, such as Mr. Johnson, only in the instance where state resources or funds are used "*to solicit support for or opposition to . . . the nomination or election of any person to public office . . .*" (*emphasis added*). As you are well aware, the United States Supreme Court had made clear that the terms "solicit support for or opposition to" are to be given a fixed and definite meaning in order to avoid infringing upon constitutionally protected free speech. See, Buckley v. Valeo, 424 US 1 (1976) (Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

December 6, 2016

Brad Johnson

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Under Buckley, interpretation and application of the terms “solicit support for or opposition to” the nomination or election of any person to public office is limited to the ‘magic words’ enumerated in that legal decision. Under the Buckley ruling, speakers, such as Mr. Johnson, that did not invoke any of the eight specific words and phrases of Buckley, or similar language expressly calling voters to vote for or against a candidate, are considered, as a matter of law, to not have engaged in speech that advocated for or against a particular candidate.

The eight words and phrases appearing in Buckley were "vote for", "elect", "support", "cast your ballot for", "Smith for Congress", "vote against", "defeat", and "reject". The United States Supreme Court held that limiting laws that regulate protected speech with such express advocacy was necessary to avoid a "chilling effect" on speech about candidates for public office, which such speech is protected under the First Amendment to the Constitution.

Applying the Buckley interpretation to the content of Mr. Johnson’s op-ed reveals that Mr. Johnson used no language that expressly advocated for the election or defeat of Ms. Cooper. Therefore, contrary to what Ms. Cooper asserts, Ms. Cooper failed to meet her burden to come forth with a factual allegation that states even a potential violation of Montana ethics laws. *Accord, Tschida v. Bullock (supra)*. Accordingly, the Complaint must be dismissed.

Turning now to the two questions posed in your letter of November 2, 2016, you asked the following:

- 1) Please explain the capacity in which the letter to the editor was written, be specific as to whether public time or public resources (including computer use) was involved in the production of the letter; and
- 2) Please specify whether it was your intention that the letter be seen as advocacy for or against the election of Ms. Cooper to the PSC. If your contention was that it was not advocacy, please explain the timing of the letter.

In answer to the first question posed, the op-ed was drafted by Mr. Johnson personally and was written to express his personal views on the inaccuracy of Ms. Cooper’s claims about the conduct of the PSC and its policies. *See*, MCA §2-2-121(3)(c). The op-ed was not written in conjunction with any other member of the PSC and the op-ed was reviewed by the Commission’s legal counsel to ensure compliance with the law prior to it being remitted to the press. As acknowledged above, the op-ed was drafted on a PSC-owned computer and was emailed using a government email address.

In answer to the second question, the op-ed was not written to oppose Ms. Cooper’s election to the PSC. Rather, as noted, the op-ed was written to address and rebut statements being made by Ms. Cooper as part of her campaign for office and that called into question the reputation, policy positions, and veracity of the PSC and its members, such as Mr. Johnson. As Chairman of the PSC, Mr. Johnson felt it necessary to respond to Ms. Cooper’s inaccurate and misleading public statements about the PSC.

December 6, 2016
Brad Johnson

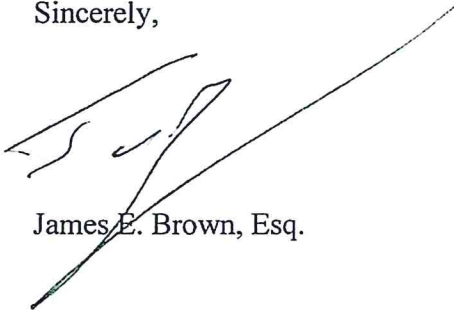
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As to the timing of the letter, it would naturally follow that the letter was submitted at a time immediately after Ms. Cooper made the statement and factual assertions that were rebutted and addressed in Mr. Johnson's op-ed. The timing of Ms. Cooper's statements were made during the course of her campaign. Therefore, as expected, the timing of Mr. Johnson's letter occurred during a period in which the 2016 general election cycle was running. Mr. Johnson, in no way, timed his letter in order to influence the outcome of Ms. Cooper's election.

On behalf of Mr. Johnson, I thank you for the additional time granted to provide this written response. We look forward to your issuing an opinion that dismisses the Cooper Complaint in full both because the Complaint is frivolous on its face as well as the allegations lack any factual and legal support.

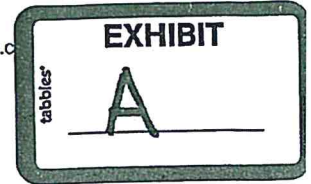
If you have any questions about this missive, please feel free to contact my office at (406) 449-7444. **Mr. Johnson does not waive his right to privacy and confidentiality at this time.**

Sincerely,

A handwritten signature in black ink, appearing to read "James E. Brown", is written over a diagonal line that extends from the bottom left towards the top right of the signature area.

James E. Brown, Esq.

Encl:
cc. Brad Johnson

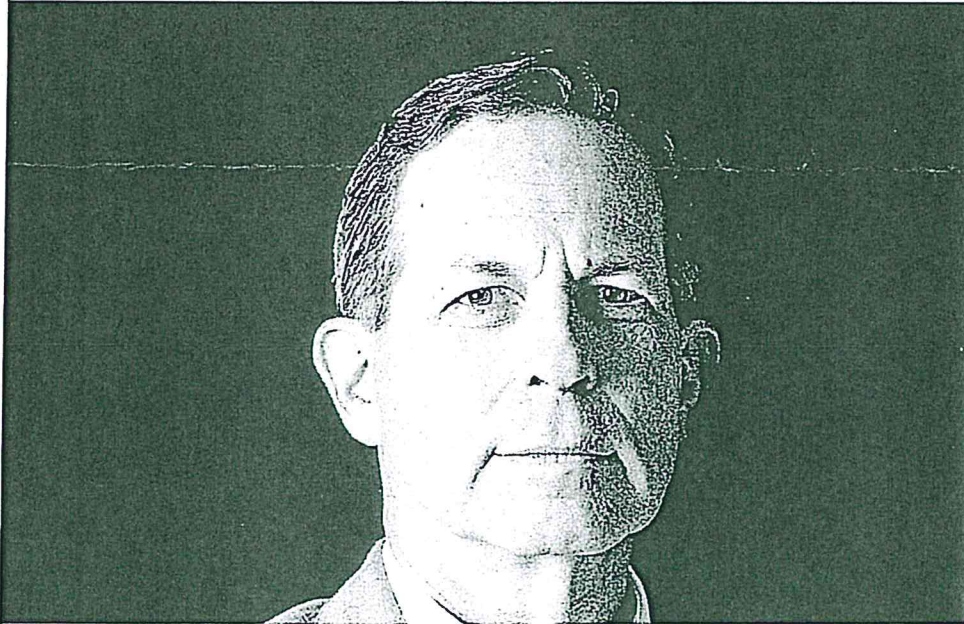


Politics

http://www.bozemandailychronicle.com/news/politics/ethics-complaint-targets-public-service-commission-chairman/article_cea2e2ef-16a9-5cea-839e-8c981bc93d6f.html

Ethics complaint targets Public Service Commission chairman

By Troy Carter Chronicle Staff Writer Nov 28, 2016



Courtesy Brad Johnson

Montana PSC Chairman Brad Johnson is the target of an ethics complaint filed on Nov. 2.

An ethics complaint has been filed against the chairman of Montana's elected utility regulation board.

Most details of ethics complaints are confidential under Montana law, but the commissioner of political practices who processes ethics complaints told the Chronicle on Monday the complaint filed Nov. 2 was against Public Service Commissioner Brad Johnson of East Helena.

"I can provide to the public the specific information that I'm allowed to by statute," Commissioner of Political Practices Jon Motl said Monday. Motl did not reveal who filed the complaint.

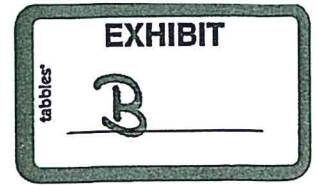
Johnson, 65, said "it would be inappropriate for me to comment until the commissioner makes a decision to accept or deny the complaint."

Johnson was elected to the Public Service Commission on the Republican ticket in 2014. He previously served as Montana's secretary of state from 2004 to 2008. Johnson briefly ran for governor in 2015 but dropped out of the race before the candidate filing deadline.

Motl said he hopes to have an initial decision on whether to accept the complaint by the end of the year. More details of the complaint will be made public then. Most ethics complaints are rejected.

Troy Carter can be reached at 582-2630 or tcarter@dailychronicle.com. He's on Twitter at [@cartertroy](https://twitter.com/cartertroy).

Morning Headlines



Distorting PSC's Record is a Disservice to Consumers

By: Brad Johnson

As the saying goes, everyone is entitled to their own opinions, but they are not entitled to their own facts.

Caron Cooper, the independent candidate for the District 3 seat on the Montana Public Service Commission, apparently thinks it prudent to create her own facts.

Cooper has repeatedly claimed over the past month that residential electricity rates in Montana have increased 15 percent in the last four years. This is false.

According to utility bill data, the average residential electricity rate for NorthWestern Energy's customers in Montana—the vast majority of electricity customers in the state regulated by the PSC—have increased 2.6 percent (adjusted for inflation) since January 2013. This increase was largely due to NorthWestern Energy's acquisition of 11 hydro-electric dams in 2014. The purchase price of the dams was actually higher due to the zero-carbon emitting nature of the generators.

Cooper has also criticized commission action in recent months to prevent consumers from paying for overpriced solar energy. The current commission is very much pro-renewable, but not if ratepayers are harmed in the process.

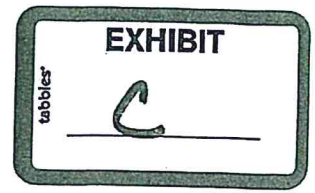
If elected to the commission, Cooper clearly will have a tough time reconciling her "develop renewables at any cost" mentality with her claimed desire to protect ratepayers.

For someone running for the Public Service Commission, Cooper has shown a surprising lack of knowledge of the subject matter she will be working on. She appears driven by an ideological urge to support green energy at any cost to ratepayers; a dangerous characteristic in a PSC commissioner. I encourage Cooper to spend more time researching the subject matter that she will be working on if elected. And if she still feels it necessary to shun objectivity in favor of ideological pursuits, then I encourage her to rethink her fitness to serve on the PSC.

Brad Johnson, R-East Helena, is Chairman of the Montana Public Service Commission

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Brad Johnson
Chairman
Montana Public Service Commission
1701 Prospect Avenue
Helena, MT 59620
406-444-6169 -desk
406-439-6389 -cell



PSC Chairman Brad Johnson has violated MT Code section 2-2-121 by using his State email and his official title in a letter to the editor sent to multiple Montana newspapers which clearly demonstrate electioneering. His LTE was published by the MT Standard and the Livingston Enterprise.

His political agenda is clear throughout his letter, and his concluding sentence says it all: "And if she still feels it necessary to shun objectivity in favor of ideological pursuits, then I encourage her to rethink her fitness to serve on the PSC."

2-2-121. Rules of conduct for public officers and public employees (3) (a) Except as provided in subsection (3)(b), 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 this 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.

Begin forwarded message:

From: "Johnson, Bradley" <BJohnson@mt.gov>
Date: October 24, 2016 2:16:25 PM MDT (CA)
To: Undisclosed recipients;
Subject: LETTER: Distorting PSC's Record is a Disservice to Consumers