BEFORE THE COMMISSIONER OF POLITICAL PRACTICES

STATE OF MONTANA

IN THE MATTER OF THE COMPLAINT OF THE MONTANA REPUBLICAN PARTY CONCERNING GOVERNOR BRIAN SCHWEITZER.	))))	**FINAL ORDER**

Commissioner Jim Murry, recusing himself, appointed the undersigned, James H. Goetz, as Deputy Commissioner to resolve this matter. *See* Notice of Appointment of Deputy Commissioner, February 21, 2012.

I convened a telephone conference on February 27, 2012, to determine whether all evidence has been submitted, and all briefing has been completed. Attorneys Quentin Rhoades and Robert Erickson, of Sullivan, Tabarcci & Rhoades, P.C., Missoula, Montana, representing the Montana Republican Party (MRP), participated for the Complainant. Attorney Peter Michael Meloy, of the Meloy Law Firm, Helena, Montana, participated, representing Governor Schweitzer.

Both parties confirm that all evidence has been presented, and all briefing has been completed. Accordingly, the matter is ripe for decision.

PROCEDURAL BACKGROUND

I. THE COMPLAINT.

This matter was initiated by a complaint filed April 8, 2008, against Governor Brian Schweitzer by Jake Eaton, on behalf of the Montana Republican Party (MRP). The complaint, lodged with the Montana Commissioner of Political Practices, then Dennis Unsworth, accused the Governor of "knowingly and willfully" producing and distributing "illegal public service announcements (PSAs) with public funds after filing a declaration for nomination with the Secretary of State for public office." Letter to Dennis Unsworth from Jake Eaton, April 8, 2008.

More specifically, the Complaint accused the Governor of violating Section 2-2-121(4), MCA, which states:

> A public official who has filed a petition for election or reelection "may not use or permit the use of state funds for any advertisement or public service announcement in a newspaper, on radio, or on television that contains the candidate's name, picture or voice except in the case of a state or national emergency and then only if the announcement is reasonably necessary to the candidate's official functions.

Id. (emphasis added).

The alleged violation stemmed from the information that the Governor, one day after filing for reelection with the Montana Secretary of State on March 4, 2008, had recorded one 30-second and one 60-second radio public service announcement (herewith "PSA") promoting Montana agriculture. From the Complaint Memo, it seems the Montana Republican Party learned of the March 5 PSA recordings from information that Ron Zellar,

the public information officer for the Montana Department of Agriculture, circulated an email on March 7, 2008, to an "unspecified number" of radio stations with the 30-second PSA attached. Complaint Memo, p. 2. In the email, Zellar also offered to send the 60-second radio spot to any station that requested it. *Id.*

In its complaint, the MRP accused the Governor of violating the prohibition on candidate public service announcements – a provision he signed into law in 2005 – as well as violating the public trust. Complaint Memo, pp. 1-2. The MRP alleged that numerous violations had occurred, the first two being the recording of the two ads, followed by a violation for every radio station to which Zellar sent an email containing an ad. Complaint Memo, p. 3. MRP alleged that if a station received both ads, that represents two violations. Further, "any additional use of Mr. Zeller's [sic] time, such as answering phone calls or emails from the stations in response to the ads, is also a violation for each separate response, because these utilized a public employee's time and government phones and computers." Finally, the MRP alleged, "every time one of these ads aired on a station constitutes an additional violation of the law, since the law in question is clearly aimed at prohibiting the kind of illegal campaign activity which occurred here." This could amount to "hundreds or even thousands of additional violations" stemming from the airing of the PSAs. *Id.*

The MRP asked Commissioner Unsworth to issue a Cease and Desist Order to the Governor to stop using public employees, time, equipment and air waves for such "illegal campaign activity;" it also called for an investigation to determine the extent of the

violation, including:

(a) the number of government employee hours used to prepare, record, produce and distribute the ads;

(b) the number of phone calls and emails sent and received by the Governor's office, Department of Agriculture and any other offices associated with the ads;

(c) the number of stations that received the ads;

(d) the total number of times each of the ads was aired on public airwaves; and

(e) determine the "total amount of free campaign advertising Schweitzer received."

The complaint also demanded restitution on a per-violation basis, as required by law; that the Governor repay the total cost to the government for all employee time and the use of the government equipment; and require him to pay for the entire cost of the investigation conducted by the Commissioner. Complaint Memo, pp. 3-4.

II. THE INVESTIGATION, THE "LIABILITY PHASE."

A. Corbett's Findings.

On April 15, Gov. Schweitzer moved to dismiss the complaint, acknowledging the preparation and distribution of two PSAs but contending that no "state funds" had been used for the PSAs. *See Plaintiff's Memorandum in Support of Motion for Summary Judgment*, February 20, 2009, p. 4. The Governor's motion contended that the use of state equipment and personnel to prepare and distribute the radio spots was not prohibited under subsection (4) of § 2-2-121, MCA. *Id.* Whether the PSAs actually aired on any of the

recipient radio stations remains unclear. No evidence has been presented that they were ever broadcast. *See Proposed Decision and Order – Penalty Phase*, August 31, 2011, pp. 8-9.

In his Motion, the Governor argued that, based on these facts, there was no violation of law (the Governor's argument will be presented in greater detail later), and because the relevant facts are clear and undisputed, there is no reason to hold an evidentiary hearing in the matter. *See Proposal for Decision and Order*, August 18, 2008, p. 1. In response, the MRP argued that the motion should be denied because the relevant facts were not clear, and that a hearing should be held to present the relevant evidence. Additionally, the MRP argued that even based on the undisputed facts, the Governor had still broken the law when he produced and distributed the PSAs. *Id.*

On April 28, the Commissioner appointed a hearings examiner and, following briefing by both parties, an informal contested case hearing was held in the state capitol on August 1, 2008. Based on the submission of affidavits, the Governor's motion was converted to one for summary judgment. *Plaintiff's Memorandum in Support of Motion for Summary Judgment,* February 20, 2009, p. 4. The hearing was held before William Corbett, the appointed Hearings Examiner and a University of Montana law professor.

On August 18, Professor Corbett submitted his *Proposal for Decision* to Commissioner Unsworth. In his proposal, Professor Corbett stated that, as argued by the Governor, the statutory term "state funds," as used in 2-2-121 (4), was ambiguous. Proposal for Decision, p. 6. In Professor Corbett's reasoning, this ambiguity stemmed

from the use of the words "candidate" and "state funds" in subsection 4, whereas the two earlier subsections prohibit "public officers and public employees from using 'public time, facilities, equipment, supplies, personnel or funds. . . .'" *Id.* Consequently, because this was a case of first impression and this particular statute had not been challenged before, Professor Corbett decided that the Legislature's intent needed to be determined from the legislative history of the statute. In his proposal, Professor Corbett noted an amendment that was ultimately rejected by the committee crafting Senate Bill 16:

> During the committee's consideration of SB 16, the Department of Commerce presented a proposed amendment to the bill that would allow a governor, when he was a candidate for public office, to continue to make PSAs using his name, voice or picture to promote Montana travel. This amendment was rejected by the committee.

Id. at 9.

Professor Corbett determined that:

> [C]lear intent of the bill was to prohibit state officials, once they became candidates, from using state resources on PSAs and ads which feature their names, pictures or voices, and also to level the playing field between government officials as candidates and their non-government opponents. The legislature was not drawing fine distinctions between the use of state money as opposed to the use of other state resources on these PSAs and ads.

Id.

He therefore found the Governor had violated the law, and proposed a sanction of $750 (in accordance with statute, which mandates a fine of $50 - $1,000 per violation), but did not recommend assessing the Governor the cost of the proceeding. *Id.* at 10.

A cover letter accompanying Professor Corbett's proposal granted the parties 10

days to notify the Commissioner of whether they intended to appeal the proposal. They were also given 30 days from Aug. 21, 2008 to file exceptions and briefs in support of any appeal. On August 25, the Governor's counsel forwarded to the Commissioner a letter dated Aug. 22 and a $750 personal check signed by the Governor. The letter stated that the Governor "is willing to pay the [$750] fine [recommended in Professor Corbett's Proposal for Decision] and be done with it." *See Order Granting Partial Summary Judgment, Granting Motion to Strike and Prehearing Order*, Nov. 14, 2008, p. 3. The letter stated his disagreement with the Proposal for Decision but "indicated that the check could be 'cashed upon... [the Commissioner's] final decision assuming it does not vary from . . . [Professor Corbett's] decision." The Commissioner returned the check on Aug. 27. *Id.*

The MRP filed a Notice of Exceptions and Brief in Support on Aug. 29, 2008. It asserted, in part: MRP did not make any concessions concerning the appropriateness of a penalty; MRP is entitled to Partial Summary Judgment on the sole issue that the agreed facts establish that the Governor violated the law; and MRP is entitled to conduct discovery in the matter regarding several identified issues. *Order*, pp. 3-4.

The Governor filed his *Notice of Exceptions* on Sept. 2, 2008. He asserted that because the candidate PSA law is ambiguous, then sanctions cannot be imposed "because a person of ordinary intelligence does not have fair notice of forbidden conduct." He filed a Brief in Support of the Governor's Exceptions on Sept. 19, 2008. *Order*, pp. 4-5. There were also additional pleadings filed.

B. Commissioner Unsworth's Order.

By the time Commissioner Unsworth took up Professor Corbett's Proposal, several facts had been established as undisputed. They included, in relevant part (taken from the Order, Nov. 14, 2008):

- In late February or early March of 2008, PIO Zellar had spoken to a representative of KXLO radio station in Lewistown regarding having the Governor produce and distribute PSAs in support of Montana agriculture to be aired during the month of March.

- The two PSAs were recorded at the Governor's office during the normal work day (Wednesday, March 5) for Sarah Elliott, the Governor's communications director, and Ron Zellar, and they were both compensated by the State of Montana for their time. So was the Governor.

- The PSAs were recorded the day after the Governor filed for re-election on March 4.

- State of Montana supplies, equipment and facilities were used in recording the messages and in distributing them.

- The PSAs were not produced or distributed pursuant to a state or national emergency.

Still at issue between the parties was whether the production and distribution of the PSAs constituted the unlawful use of "state funds" under Section 2-2-121(4), M.C.A.

Commissioner Unsworth agreed with Professor Corbett's conclusion that the

Governor had violated the statute. He did not agree with Professor Corbett's determination that the statute was ambiguous. Order, Nov. 14, 2008, p. 11. Rather, he wrote, the language of that section is "clear and unequivocal." *Id.* The only lawful use of "state funds" to make and distribute PSAs would have been in the case of a state or national emergency and if an announcement was "reasonably necessary" to the Governor's "official functions." *Id.* In his Order, Commissioner Unsworth granted partial summary judgment in favor of the MRP, rejecting Professor Corbett's findings that the statute was ambiguous. In his prehearing order, Commissioner Unsworth called for Professor Corbett to resume his duties as hearings examiner and initiate prehearing conferences with counsel for both parties to discuss and establish a schedule for discovery, filing of motions and briefs, and a hearing date to determine penalties. He further ordered that the parties brief the following issues: the number of violations committed by the Governor; whether penalties may be awarded for each violation; the standard to employ for awarding costs; and whether the Commissioner's own legal fees (for his hearings examiner and the other attorneys he consulted) are a cost that can be assessed against the Governor. He reserved Professor Corbett's proposal on penalties for this future time. *Order*, pp. 18-20. On January 30, 2009, Professor Corbett issued a scheduling order directing that discovery be completed by March 31, 2009, authorizing depositions of the Governor, state employees, and third parties (including news and advertising editors, as well as persons in the Governor's reelection campaign and the Democratic Party), and establishing a deadline for the filing of expert witness disclosures, a briefing schedule and hearing dates. *See*

Plaintiff's Memorandum in Support of Summary Judgment, Feb. 20, 2009, p. 6.

III. THE INVESTIGATION, THE "PENALTY PHASE."

A. The Governor's District Court Appeal.

On February 2, 2009, the Governor filed a Motion for Stay of Administrative Proceedings while he filed a complaint in District Court regarding possible errors of law contained in Commissioner Unsworth's decision. In his Feb. 20 complaint against Commissioner Unsworth, in his official capacity, and the MRP, the Governor alleged that that the term "state funds" as used in the statute "is distinguished from and means something different than the terms 'public time, facilities, equipment, supplies, and personnel,' which items, along with 'state funds,' may not be used by public officers or employees for certain private business or political purposes under subsections (2) and (3) of the same section of law." *See Plaintiff's Memorandum in Support of Motion for Summary Judgment*, Feb. 20, 2009, p. 2. He contended that his conduct did not violate § 2-2-121(4), MCA, and that he found the term "state funds" to be ambiguous. He contended that this issue gave rise to his claim that the Commissioner's error of law infringes upon the Governor's "federal and state constitutional rights to due process, which prohibit the imposition of civil penalties against one held to have violated an ambiguous statute . . . ." *Id.*, pp. 6-7. He contended that the statute "was not written as an absolute ban against PSAs and advertisements by a candidate who is also an officeholder. It was written as a prohibition on the use of 'state funds.'" If the Legislature had intended an "absolute" ban of government-related PSAs and ads by officeholders who are also

candidates, it would have said so "clearly and directly." *Id.*, pp. 8-11.

The Governor's complaint contained two counts – one for declaratory relief and one for judicial review of an administrative ruling. Commissioner Unsworth and the MRP both filed motions to dismiss, alleging that the Governor's complaint was not filed timely, based on 2-4-702(2)(a) MCA, which states that proceedings for review must be instituted by filing a petition in district court within 30 days after service of the final written decision of the agency or, if a rehearing is requested, within 30 days after the written decision is rendered. *See Order* issued by Judge Jeffrey Sherlock, December 2, 2009, pp. 3-4. The Court disagreed with the MRP's and the Commissioner's contention that the matter was "voluntarily bifurcated by the parties to consist of the liability phase and a damages phase." Rather, the Commissioner's *Order* said that the parties will comply with the pre-hearing order "so that this matter may be fully submitted for a **final decision**." *Id.*, p. 4 (emphasis added). Judge Sherlock did determine, however, that the Governor had missed the 30-day filing period for his second count, so that count was dismissed. *Id.*, pp. 6-7.

Judge Sherlock ultimately remanded the issue back to the Commissioner, determining that a final hearing should be held on what sanction, if any, should be assessed against the Governor. After the completion of those proceedings, the parties would then have 30 days to file an appeal. *Id.*, pp. 9-10.

B. <u>Present Status</u>.

After the matter was remanded to the Commissioner, the case sat dormant until late 2010. On December 10, 2010, the Governor filed a *Motion to Dismiss or Otherwise*

Resolve the Case. This was precipitated by the fact that Commissioner Unsworth's term was about to expire. Commissioner Unsworth declined to take action on the motion before he left office. *See Governor's Response Brief on Penalty Issue*, June 30, 2011, p. 2.

On February 23, 2011, Commissioner Jennifer Hensley, Unsworth's successor, denied the Governor's motion and sent the matter to Professor Corbett to schedule a hearing for final resolution. On March 11, 2011, Professor Corbett issued an order permitting the MRP to engage in requested discovery, and set a briefing schedule on the issue of "whether and to what extent a penalty should be assessed." *Id.* Meanwhile, Commissioner Hensley was not confirmed by the state Senate, and David Gallik was appointed Commissioner of Political Practices. *Id.*, at p. 3.

In his *Proposed Decision and Order – Penalty Phase*, dated August 31, 2011, Professor Corbett determined that the number of violations should be calculated from the perspective of a prospective voter – who would be most influenced by the PSAs. Proposed Decision, pp. 6-7. Professor Corbett found that on the production side, two violations occurred in the making of each PSA. On the second question – how many were distributed – Professor Corbett found that 41 PSAs were sent to the radio stations (Lewistown received two PSAs; 39 others received one each). "With this calculation, there is no need to look back to also count the number of PSAs produced; the production is relevant if the cost of making the PSA was large, and then that factor is considered in determining the dollar amount, per violation, not the number of violations. . . . Thus, the number of violations stops at 41, the number of times the PSAs were distributed by the

Respondent to the broadcasters." *Id.*, pp. 7-8. Professor Corbett also determined that the Governor should be assessed $100 per violation, for a total fine of $4,100, "because this is a case of first impression, and because there is no evidence they were ever broadcast and very little taxpayer money was spent on producing and distributing the 41 PSAs. . . ." *Id.*, at pp. 8-9. He found $100 per violation – to cover the production and distribution cost to taxpayers and to send "a strong message to other office holders" – was "far more than adequate." *Id.* He found no reason to assess the cost of proceedings.

A scheduling order dated October 11, 2011, followed, after which both parties submitted pleadings regarding MRP's *Notice of Exceptions* to the Aug. 31, 2011 *Proposed Decision and Order*. On November 11, 2011, MRP, in its *Reply Brief in Support of its Notice of Exceptions*, asked that Commissioner Gallik assess the penalties against the Governor and end the briefing. *See Reply Brief*, pp. 2-3. Also on November 11, the Governor filed a *Reply to MRP's Response to His Exceptions*, and maintained that "under the plain words of the statute . . . no violation occurred" and that MRP has not offered evidence that the "purpose of the statute" has ever been violated. The Governor argued that no penalty should be imposed and alleged there is no evidence that the PSAs ever aired. The Governor requested the Commissioner bring this "frivolous and politically motivated proceeding to an end." *See Reply to MRP's Response*, pp. 8-9.

On Nov. 16, 2011, Commissioner Gallik issued a notice for a final decision. Pursuant to § 2-4-623(1)(a), MCA, the case was submitted for a final decision as of November 14, 2011, when each party's written response to the other's exceptions was

received. *See Notice of Submission for Final Decision*, Nov. 16, 2011.

Mr. Gallik has since resigned, and the current Commissioner of Political Practices, Jim Murry, has recused himself from the matter. *See* "New ethics chief recuses self in Schweitzer case," *Billings Gazette,* Feb. 15, 2012.

DECISION

I. THE SCOPE OF THE ISSUES TO BE DETERMINED.

An initial question is whether this Deputized Commissioner may revisit the initial substantive determination of Commissioner Unsworth that the Governor violated § 2-2-121(4)(a), MCA; or whether review is now limited to the extent of the sanctions? It is my conclusion that, because there has not been a final determination, the present review is not limited to the sanctions issue.

Rule 54(b), M.R.Civ.P., confirms the trial Court's (and by analogy the Commissioner's) necessary authority to correct itself. That rule provides that until the court expressly directs entry of final judgment, an order that resolves fewer than all of the claims among all of the parties "... is subject to revision at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all the parties." *See also Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 12 (1983) ("... every order short of a final decree is subject to reopening at the discretion of the district judge."); and *In re the Marriage of Earl E. Adams*, 183 Mont. 26, 28, 598 P.2d 197, 198 (1979). The court held in *Smith v. Foss*, 177 Mont. 443, 447, 582 P.2d 329, 332 (1978):

So long as a court has jurisdiction over an action, it should have plenary

> power over its interlocutory orders and should be able to revise them when it is consonant with justice so to do.

Id.; see also Estate of Pruyn v. Axmen Propane, Inc., 2009 MT 448, ¶¶ 31-35, 354 Mont. 208, 223 P.3d 845.

Nor does it make a difference that the judge making the initial ruling is replaced by a second judge. *Flibotte v. Pennsylvania Truck Lines, Inc.*, 131 F.3d 21, 25 (1st Cir. 1997) (in rejecting the argument that the second court is bound by the rulings of the previous court, the appellate court said "Judge Nelson and Judge Gertner, therefore, play the same institutional role for the purpose of this litigation."); *United States v. Williams*, 728 F.2d 1402, 1406 (11th Cir. 1984) ("... subsequent judge should never be bound by an erroneous ruling of law"); and *Kostiuk v. Town of Riverhead*, 570 F. Supp. 603, 607 (E.D.N.Y. 1983) ("[p]reliminarily, the Court finds no merit in plaintiff's argument that this Court is bound, in deciding the motion at hand, by the previous judge's decision on defendants' motions to dismiss. The law of the case doctrine does not necessarily apply where even the same question is presented to different judges of a single district court. 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, § 4478, at 794-95 (1981).").

There is no law of the case problem. The law of the case doctrine applies only where the Supreme Court has resolved the particular issue. *Calcaterra v. Montana Resources*, 2001 MT 193, ¶ 10, 306 Mont. 249, 32 P.3d 764; *see also Sanders v. State*, 288 Mont. 143, 146, 955 P.2d 1356, 1358 (1998) ("[t]he law of the case doctrine relied upon by Sanders stands for the proposition that 'the final judgment of the highest court is the final

determination of the parties' rights.' *Scott v. Scott* (1997), 283 Mont. 169, 175, 939 P.2d 998, 1002 (quoting *Fiscus v. Beartooth Electric Cooperative, Inc.* (1979), 180 Mont. 434, 436, 591 P.2d 196, 197).").

I have examined the Order of December 2, 2009, entered by District Judge Jeffrey M. Sherlock in Cause No. BDV-2009-7, Montana First Judicial District Court, Lewis and Clark County. There, Judge Sherlock dismissed the appeal, as requested by the MRP, without prejudice to any party, and remanded to the "Montana Commissioner of Political Practices for the completion of the administrative process." *Order*, pp. 10, 11. Judge Sherlock reasoned that the request for declaratory relief was premature because there was no final agency decision on all issues (the law "generally requires parties to exhaust their administrative remedies before filing an action in District Court)." *Id.* Judge Sherlock made it clear that, once the administrative proceedings were finalized, a judicial appeal could encompass all issues:

> After the completion of those proceedings, then any dissatisfied party will have 30 days after the Commissioner's final order is entered to appeal the matter to the court. That appeal can include all issues that have been addressed in the Commissioner's Order of November, 2008, along with the constitutional issue that was addressed in that Order and which is the subject of this particular case.

Order, p. 10.

Accordingly, I conclude that there is no binding ruling by a superior court, and therefore there is no law of the case obstacle.

Because there has been no final determination, I conclude that the scope of review

includes all issues.

I also conclude that I **should** relook at the initial substantive ruling. It is disturbing that various persons have looked at the statute in question and have reached various interpretations. First, Professor Corbett examined the statute and found it ambiguous. He therefore looked at legislative history to determine the intent of the Legislature. Commissioner Unsworth, on the other hand, found that the statute is not ambiguous and determined, based on his reading of the plain meaning, that there was a violation. Public officials, including candidates for office, are entitled to reasonable clarity in statutes which are intended to govern their conduct in carrying out official acts. For that reason, I conclude that it is important to rule on this matter definitively.

II. POSITION OF THE PARTIES.

The position of the parties on the underlying issue of whether there was a violation is set forth in Professor Corbett's *Proposal for Decision* of August 18, 2008:

A. Position of the Charging Party.

> The Charging Party alleges that the Respondent's use of Montana State equipment, supplies, facilities, and employee time in making and distributing the PSAs constituted the use of state funds under Section 2-2-121(4) MCA. It states that the statutory prohibition from using "state funds" reaches the direct expenditure of state money as well as the indirect use of state money by using state equipment, supplies, facilities, employee time, etc.

B. Position of the Respondent.

> The Respondent states that the prohibition in question, Section 2-2-121(4) MCA, only precluded him, as a candidate, from using state money to purchase the PSAs. He argues that there was no violation of law because he did not use state money for this purpose. He states that the statutory

> prohibition does not prohibit public officials, as candidates, from using state owned equipment, supplies, facilities, and employee time to produce and distribute PSAs.
>
> In making this argument, the Respondent states that Montana law prohibits all public officers and public employees from using "public time, facilities, equipment, supplies, personnel, or funds" for any private business purpose (§ 2-2-121(2) MCA) or 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 (§ 2-2-121(2) MCA), but he contends that Montana law does not preclude office holders, as candidates, from using public time, facilities, equipment, supplies, or personnel for advertisements or public service announcements using their names, pictures or voices.
>
> The Respondent states that he is on duty 24/7, that the issuance of press releases, speeches, or his help in communicating matters relating to Montana constituencies, in this case, farmers, is a normal part of his job, and the job of his staff. He states that the scope of the prohibition urged by the Charging Party would unreasonably limit his ability to perform his job and that this was not intended by the Legislature. If the Legislature wanted to prohibit office holder candidates from using state resources other than money, it would have said so.

Id., pp. 4-5.

The position of the MRP regarding the **penalty** is that the Governor violated the statute on 43 separate occasions in order to gain an unlawful and taxpayer-funded political advantage and that "for his illegal efforts, he was awarded a second four-year term." *Montana Republican Party's Reply Brief in Support of Notice of Exception*, November 11, 2011, p. 2. MRP argues that the Governor should be assessed a "meaningful penalty" for "each" of his violations and suggests a $750 per violation penalty as appropriate. *Id.* MRP also argues that the Governor should be assessed the costs of these proceedings.

In response the Governor largely reiterates his substantive position that there was no

violation, but adds that penalties are discretionary with the Commissioner and "there is no evidence that the PSA in question, here, ever aired 'on radio.'" *Governor's Reply to MRP's Response to His Exceptions*, November 11, 2011, p. 7.

The **evidence** which might support MRP's claim that the Governor violated the law on 43 separate occasions is unclear. The Governor denies that there is any evidence that any of the public service announcements in question were ever broadcast on any radio station.

I convened an attorneys' telephone conference on February 27, 2012. Among other things, I inquired as to the status of the evidence. MRP directed me to certain proposed Findings of Fact and Conclusions of Law, an earlier determination of Commissioner Unsworth, and to the Governor's responses to written discovery dated April 8, 2011. It **appears** that the public service announcements were circulated to a number of radio stations on a list maintained by Ron Zellar, public information officer, Montana Department of Agriculture, but that there is no concrete evidence on the number of times public service announcements were aired, if any.

In light of the disposition of this case set forth below, I do not need to resolve this conflict in the evidence.

III. THE QUESTION OF WHETHER THERE IS AN AMBIGUITY IN THE STATUTE.

A. Taking The Statute as a Whole, the Meaning Is Not Ambiguous.

Section 2-2-121(4)(a) provides that a candidate "may not use or permit the use of

state funds" for a public service announcements. The question is, **what does that mean**? **Standing alone**, the term "funds" is not ambiguous and it is uncontested that in this case the Governor did not use public funds to purchase the public service announcements in questions.

I recognize, however, that both former Commissioner Unsworth and Professor Corbett each read the statute in a different way, albeit also differently from each other.

The term "standing alone" above is pregnant because the normal reader would not read subsection (4)(a) "standing alone" if there is additional statutory context. Here there is. As indicated below, established rules of statutory construction hold that a statute is to be read **in its entirety**. In this case, when subsection (4)(a) was adopted in 2005, the then-existing statute, in sections (2)(a) and (3)(a), had language forbidding a public officer to "use public time, facilities, equipment, supplies, personnel or funds ...." Thus, reading the statute in its entire context reveals that "use of state funds" means something different from the "use of public time, facilities, equipment, supplies, personnel, or funds."

Accordingly, based on this straightforward reading of the **entire statute** in existence at the time, there was no violation. My reasoning is explained in more detail below.

B. Was Professor Corbett Correct That the Statute Is Ambiguous?

Professor Corbett determined that the statute is ambiguous. He therefore resorted to various legislative history aids to reach his ultimate interpretation. Differing with Professor Corbett, Commissioner Unsworth found the meaning of the statute clear.

However, his opinion does not provide a cogent explanation as to why he found the statute clear. In fact, he takes three pages to explain why he thinks the statute is clear. *Order Granting Partial Summary Judgment, Granting Motion to Strike, and Prehearing Order*, dated November 14, 2008, pp. 11-13.

Governor Schweitzer is charged by the MRP with the improper use of "state funds" under § 2-2-121(4)(a), MCA. That statute provides:

> (4) (a) A **candidate**, as defined in 13-1-101(6)(a), may not use or permit the use of **state funds** for any advertisement or public service announcement in a newspaper, on radio, or on television that contains the candidate's name, picture, or voice except in the case of a state or national emergency and then only if the announcement is reasonably necessary to the candidate's official functions.

Id. (emphasis added). No definition of "state funds" is provided in the statute.

The ambiguity, discerned by Professor Corbett, is in the meaning of "state funds" because, although the evidence in this case establishes that certain public employees used public time to make the public service announcements, there is no evidence that state funds, in the sense of public "monies," were used to pay for them. *See Affidavit of Sarah Elliott*, Communications Director for Governor Schweitzer, dated April 15, 2008, ¶ 4 ("The State of Montana did not purchase air time to run the radio spots.").

The next subsection of the very statute in question, subsection (b), does not limit its ambit to "state funds," but instead, precludes the "use of public time, facilities, equipment, supplies, personnel, or funds ..." to facilitate certain conduct. Subsection (b) is as follows:

> (b) A state officer may not use or permit the use of **public time, facilities, equipment, supplies, personnel, or funds** to produce, print, or broadcast any advertisement or public service announcement in a newspaper, on radio, or on television that contains the state officer's name, picture, or voice except in the case of a state or national emergency if the announcement is reasonably necessary to the state officer's official functions **or in the case of an announcement directly related to a program or activity under the jurisdiction of the office or position to which the state officer was elected or appointed**.

Section 2-2-121(4)(b), MCA (emphasis added). Subsection (b) also has the additional language (bolded above after the word "functions") not found in subsection (a). This language clearly allows a "state officer" (as opposed to a "candidate") to use public equipment and personnel to do public service announcements directly related to the officer's position.

Subsection (b), however, was not adopted until 2011. The compiler's comments indicate that in 2011 "Chapter 386 inserted (4)(b) providing restrictions for state officers with regard to public service announcements; and made minor changes in style." The enactment of subsection (b) continues the distinction between "state funds" and "public time, facilities, equipment, supplies, personnel or funds" in the same statute. Even though enacted after the Governor's acts complained of in this case, the enactment of § (4)(b) is probative because the language in the newly-adopted § (4)(b) regarding the "use of public time, facilities, equipment, supplies, personnel or funds" is language that is found elsewhere in § 2-2-121, and which predates the enactment of both subsections (a)

and (b) of subsection (4). For example, in the pre-2005 version of § 2-2-121(2)[1] the following language is found:

> (2) A public officer or a public employee may not:
> (a) use public time, facilities, equipment, supplies, personnel or funds for the officer's or employee's private business purposes; . . . .

Id.; see also § 2-2-121(3)(a), MCA, also using the language "public time, facilities, equipment, supplies, personnel or funds. . . ." The same language in subsections (2) and (3) is carried over into today's version of section § 2-2-121(2) and (3). This differing language in the same statute was the basis for Professor Corbett's determination that the statutory term "state funds" is ambiguous. *See Proposal for Decision*, August 18, 2008, pp. 6-7.

If Professor Corbett is correct that the statute was ambiguous at the time the Governor made the public service announcements here at issue, it is now doubly ambiguous with the 2011 amendment.

Former Commissioner Unsworth found no ambiguity but it is difficult to fathom how he reached the result he did, without adding additional words—a process which is not allowed under standard canons of statutory construction. The logic of former Commissioner Unsworth is that the Governor's interpretation would add the words "to purchase" (as in use of state funds "to purchase"). However, how else would state

[1] Subsection 4 (now subsection 4(a)) was enacted in 2005. Montana Session Laws, Ch. No. 145, March 30, 2005.

funds be used, but "to purchase" something? Thus the term "to purchase" is implicit in the term "use." On the other hand, it is former Commissioner Unsworth and MRP who seek to add words. They seek to add the words "to produce," as in a candidate may not use state funds "to produce" public service announcements. However, the **very words** "to produce" are actually used in § (4)(b) of the statute ("a state officer may not use or permit the use of public time, facilities, equipment, supplies, personnel or funds **to produce**, print, or broadcast any . . . public service announcement . . . ." (emphasis added).

Section 1-2-101, MCA, provides:

> "**Role of the judge—preference to construction giving such provision meaning.** In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

IV. THE QUESTION OF HOW THE AMBIGUITY, IF THERE IS ONE, SHOULD BE RESOLVED.

A. Application of Principles of Statutory Construction.

The general rule of statutory construction is that legislative intent controls. Section 1-2-102, MCA. "Legislative intent is to first be determined from the plain meaning of the words used, and if interpretation of the statute can be so determined, the courts may not go further and apply any other means of interpretation." *Boegli v. Glacier Mountain Cheese Co.*, 238 Mont. 426, 429, 77 P.2d 1303, 1305 (1989). Under Professor Corbett's reasoning, the statute is not subject to the plain meaning rule and, as a

result of the ambiguity, aids in construction must be used.

(1) Narrow construction of a penal statute.

Under the well established "rule of lenity" a penal statute which is susceptible to more than one interpretation is to be narrowly construed. This applies both to criminal statutes and administrative codes that are "penal" in nature. The provisions of a penal statute "must be sufficiently definite to give a person of ordinary intelligence fair notice that his conduct is forbidden." *Montana Auto Ass'n. v. Greely*, 193 Mont. 378, 394, 632 P.2d 300, 309 (1981). *See Sutherland's Statutory Construction*, 45th Ed., § 59.03:

> It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed.

Sutherland cites *State v. Cudahy Packing Co.*, 33 Mont. 179, 82 P. 833 (1905), *State v. Bowker*, 63 Mont. 1, 205 P. 961 (1922), and *Shubat v. Glacier County*, 93 Mont. 160, 18 P.2d 614 (1932) as Montana cases that support that rule.

Thus, any "candidate" or "state officer," when faced with a penalty, is entitled to fair notice of the conduct the law proscribes.

It appears the MRP agrees on this point because its letter of complaint asserts a *mens rea* element–it charges that the Governor "knowingly and willfully" violated the statute. Letter from Jake Eaton, Executive Director, MRP to Commissioner Unsworth, April 8, 2008.

(2) Statute is to be construed to salvage constitutionality, where possible.

Only courts, not administrative agencies, have jurisdiction to decide constitutional issues. *Brisendine v. Dep't. of Commerce*, 253 Mont. 361, 366, 833 P.2d 1019, 1021-22 (1992). Nevertheless, here there is an overarching constitutional/free speech issue that cannot be ignored. Established principles of statutory construction require recognition of the potentially serious constitutional problem. If the statute is susceptible to more than one interpretation, it must be interpreted in a manner that would render it constitutional. *See City of Great Falls v. Morris*, 2006 MT 93, ¶ 19, 332 Mont. 85, 134 P.3d 692.

This is particularly true where, as here, the First Amendment and political speech are involved. The court said in *Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S. Ct. 876, 889 (2010):

> Prolix laws chill speech for the same reason that vague laws chill speech. People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application." *Connolly v. General Constr., Co.*, 269 U.S. 385, 391.

(3) *Expressio unius est exclusio alterius* and related canons of construction.

Expressio unius est exclusio alterius is a canon of construction holding that to express or include one thing implies the exclusion of the other. This principle has been applied in Montana. *Dukes v. City of Missoula*, 2005 MT 196, ¶ 15, 328 Mont. 155, 199 P.2d 61. Closely related to this is the canon where different language is used in the same connection in different parts of a statute, it is presumed that the Legislature intended a

different meaning. This is explained below.

B. Resort to Legislative History.

Legislative history can be an important tool in statutory construction. The court held in *Stockman Bank of Montana v. Mon-Kota, Inc.*, 2008 MT 74, ¶ 8, 342 Mont. 115, 180 P.3d 1125:

> When the legislative intent cannot be readily derived from the plain language, or when it is helpful to determine the correct interpretation of the statute, we review look [sic] to legislative history. *Montanans for Justice v. State*, 2006 MT 277, ¶ 60, 334 Mont. 237, . . . 146 P.3d 759, ...

Id., ¶ 17.

The use of legislative history, however, has its limitations. Using legislative history is like "looking over a crowd and picking out your friends." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1991 Supreme Court Term*, 68 Iowa L.Rev. 195, 214 (1983) (quoting Judge Leventhal); *see also* Steven Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845-874 (1992) (characterizing criticisms of the search for legislative intent, "[t]hat searching for 'congressional intent' is a semi-mystical exercise like hunting the snark.").

C. The Difference Between Legislative Intent and the Meaning of the Statute.

If the words of a statute have plain meaning–that meaning should be applied. *Boegli v. Glacier Mount Cheese Co.*, *supra*. It is often said that "legislative intent" is the ultimate quest in determining meaning of a statute. *Id.* Professor Corbett, in attempting to determine legislative intent of § 2-2-121(4), which he found ambiguous,

looked at legislative history. As noted above "legislative history" **is** a permissible tool in interpreting a statute.

However, it is important here, because this is a penal statute, to understand the difference between "**legislative intent**" and the **meaning** of the statute. This is explained in *Sutherland Statutory Construction*, 5th Ed., Singer, at § 45.08:

> Generally when legislative intent is employed as the criterion for interpretation, the primary emphasis is on what the statute meant **to members of the legislature** which enacted it. On the other hand, inquiry into the "meaning of the statute" generally manifests greater concern for **what members of the public to whom it is addressed, understand**.
>
> The choice between these two alternative criteria of interpretation depends on whose is the proper vantage point from which to view a statute to be interpreted.

Id., p. 33 (emphasis added).

Sutherland continues:

> It is possible that the sending and receiving parties in the communication relationship may ascribe different meanings to the same word or words in the text of a communication. The problem which is imminent in the process of interpretation is to determine whether the sender's or the receiver's understanding should be given effect where it appears that they have understood the text of a communication differently.

Id.

Applying this differentiation to the present case, it is quite possible that the "sender" (the Legislature) **intended** that the type of conduct at issue be prohibited by the statute; yet it is also possible that the "receiver" (the Governor), did not **understand** it that way. This is an important distinction because, in resolving the ambiguity, Professor

Corbett looked at legislative history to determine what the Legislature **intended**. However, because this is a penal statute, the paramount consideration is what did the statute impart to the receiver because, in a penal statute, the conduct prohibited "must be sufficiently definite to give a person of ordinary intelligence fair notice that his conduct is forbidden." *Montana Auto Ass'n v. Greeley, supra.* This is consistent with *Sutherland's* approach favoring "meaning" over intent. He states:

> The policy favoring conventional meanings and general understanding over obscurely evidenced intention of the legislators is supported in this oft-repeated premise that intention must be determined **primarily from the language of the statute itself**. (Citing, among other cases, *Keller v. Smith*, 170 Mont. 399, 553 P.2d 1002 (1976)).

Id., p. 35 (emphasis added); *see also* § 1-2-106, MCA ("Construction of words and phrases.").

It is for this reason that, even if the statute is ambiguous, I conclude that the pursuit of legislative intent through the arcane legislative history (*i.e.*, in *Sutherland's* words, the "obscurely evidenced intention of the legislators") is not the appropriate avenue for resolving the ambiguity in the statute. Instead the established canons of construction trump that legislative history.

This approach is the growing trend, as described by *Sutherland*:

> Growing support for the "meaning" criteria is suggested by the assertion in recent court opinions that in the absence of a statutory definition "the general rule is that popular or received import of words furnishes the general rule for the interpretation of public laws."

Id. (citing *Mercantile Bank & Trust Co. v. U. S.*, 441 F.2d 364 (8th Cir. 1971), and *David*

v. Wasco Intermediate Education Dist., 286 Or. 261, 593 P.2d 1152 (1979)).

This approach is also consistent with *Sutherland's* description of the tools available for statutory construction, which he classifies as "intrinsic" and "extrinsic" aids:

> These characterizations refer to the test of the statute. **Intrinsic aids** are those which derive meaning from the internal structure of the text and conventional or dictionary meanings of the terms used in it. **Extrinsic aids**, on the other hand, consist of information which comprise the background of the text, such as legislative history and related statutes.
>
> Extrinsic aids generally are useful to decisions based on the intent of the legislature, while intrinsic aids have greater significance for decisions based on "the meaning of the statute" as understood by people in general.

Sutherland Statutory Construction, 5th Ed., § 45.14 (emphasis added).

In *Schuff v. A. T. Klemens & Son*, 2000 MT 357, ¶ 116, 303 Mont. 274, 16 P.3d 1002, the court considered the use of the canons of statutory construction as part and parcel of the process of "simply reading the statute." The importance of this is that the application of such canons comes **before** resort to legislative history. The *Klemens* court first applied the rule of statutory construction "that those statutes that limit a party's remedy must be strictly construed." *Id.*, ¶ 115. The court continued:

> Therefore, we began our review of § 27-1-307, MCA, by simply reading the statute. **To aid our reading, this Court frequently turns to familiar maxims or canons of statutory construction**, including but not limited to: *ejusdem generis* (general words will be construed according to more specific and particular preceding words); *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), and "a particular intent will control a general one that is inconsistent with it." ... These well-observed rules are followed routinely by this Court. The cases are legion.

In that case, applying these rules of interpretation, the court derived the meaning

of the statute and the parties found it unnecessary to resort to legislative history. *Id.*, ¶ 120.

In sum, while legislative history can be an important extrinsic aid in interpreting the intent of the Legislature, the use of the "intrinsic aids," the canons of statutory construction, are ordinarily applied first to determine if the meaning can be derived from the words of the statute itself.

V. HOLDING

There is no ambiguity. There is also no proof that Governor Schweitzer used state funds to purchase the public service announcements.

Even if there were an ambiguity in § 2-2-121(4) it is resolved by applying standard principles of statutory construction. The Legislature, in enacting the measure that resulted in subsection (4) of § 2-2-121 in 2005, used the specific language "state funds," language that is different from pre-existing language in subsections (2)(a) and (3)(a) of § 2-2-121. Then, in enacting what became subsection (4)(b) in 2011, the Legislature used the pre-existing language from subsections (2)(a) and (3)(a) of § 2-2-121. Thus, this matter is resolved by applying established principles of statutory construction. In *Miskovich v. City of Helena*, 170 Mont. 138, 148, 551 P.2d 995, 1000, the court said:

> In construing a statutory situation such as exists here, this Court in *Adair v. Schnack*, 117 Mont. 377, 386, 161 P.2d 641, quoted with approval from the California case *People v. Campbell*, 110 Cal.App. 783, 291 P. 161, 162:
>
> > It is a **settled rule of statutory construction** that, where different language is used in the same connection in different parts of a statute, it is presumed the Legislature intended a

different meaning and effect.

Id. (emphasis added). Thus, the term "state funds" must have a different meaning from the terms "public time, facilities, equipment, supplies, personnel, or funds."[2]

Put another way, a "candidate" may not use "state funds" to pay for public service announcements. The evidence is uncontested that the Governor did not use "state funds" to pay for the public service ads.

MRP argues that this interpretation would improperly "insert" words ("pay for") where they do not now appear. I do not agree. The term "**use** state funds" ineluctably entails using them to pay for something. How else would one "use" state funds?

The corollary statutory maxim *expressio unius est exclusio alterius* (the expression of one thing [in a statute] implies the exclusion of another) supports this interpretation. *See Dukes v. City of Missoula*, *supra*, ¶ 15. Applied here, there are specific words used in subsections 2(a), 3(a) and 4(b) of § 2-2-121 that are not found in subsection 4(a) of the same statute. These words are "public time, facilities, equipment, supplies, personnel or funds." Thus, under *expressio unius est exclusio alterius*, the use of these specific terms in one section implies their exclusion in the other.[3] Under this

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[2] In *Mosley v. American Express Financial Advisors, Inc.*, 2010 MT 356 Mont. 27, 230 P.3d 479, the court said: "When a general statute and a specific statute are inconsistent the specific statute governs, so that a specific legislative directive will control over an inconsistent general provision. *Mercury Marine v. Monty's Enters., Inc.*, 270 Mont. 413, 417, 892 P.2d 568, 571 (1995). Here we conclude that the specific statute ... controls over the general statute ...." *Id.*, ¶ 20.

[3] The court said in *In Re Adoption of K. P. M.*, 2009 MT 31, ¶¶ 14, 16, 349 Mont.

principle, interpreting subsection (a), a candidate is only prohibited from using "state funds" for public service announcements, and that simply does not include public time, facilities, equipment, supplies or personnel.

This interpretation is consistent with the principle that a penal statute, susceptible to more than one interpretation, must be interpreted strictly, and also with the principle that, where there are potential constitutional problems, a statute susceptible to more than one interpretation must be interpreted in a manner that renders it constitutional.

MRP also raised an allegation that the Governor violated the public trust, but that allegation was not pressed.

Thus, I conclude that MRP's Complaint must be dismissed. Each party should bear its own costs and attorneys' fees.

DATED this 1st day of March, 2012.

James H. Goetz, Deputized Commissioner of Political Practices

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170, 201 P.3d 833, that, "Statutes are not to be read in isolation, but as a whole. In construing statutes, this Court must give effect to all of their provisions if possible." Also, "Reading relevant statutory schemes in their entireties is what allows this Court to give true effect to the will of the Legislature."

CERTIFICATE OF SERVICE

I hereby certify that I have mailed and e-mailed a copy of this *Final Order* to Quentin M. Rhoades and Robert Erickson, counsel for the Montana Republican Party, and to Peter M. Meloy, counsel for Governor Schweitzer. In addition, I have mailed the original to Mary Baker of the office of the Montana Commissioner of Political Practices, Helena, MT, with instructions to file the originally executed copy and to notify all counsel that such filing shall be deemed the official filing date.

DATED this 1st day of March, 2012.

James H. Goetz