

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES
STATE OF MONTANA

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| In the Matter of the Complaint of |) | FINDINGS OF FACT |
| L. David Frasier Against |) | AND |
| Barb Charlton and Mark Simonich |) | CONCLUSIONS OF LAW |

I. BACKGROUND

On December 3, 2004, Mr. L. David Frasier (Frasier) filed a complaint alleging that Ms. Barb Charlton and Mr. Mark Simonich (Charlton and Simonich) violated Montana Code Annotated §§ 2-2-103 and 2-2-104 of the Montana Code of Ethics (Montana Code Annotated §§ 2-2-101, *et seq.*).¹ The Code prescribes ethical standards for public sector employees. In this matter, the terms “public employee” and “state officer” defined in Montana Code Annotated § 2-2-102(7) and (11), respectively, include Charlton and Simonich.

Pursuant to Montana Code Annotated § 2-2-136, an informal contested case hearing was held on March 31, 2005, to consider evidence and testimony regarding the alleged violations of Montana Code Annotated §§ 2-2-103 and 2-2-104. Frasier appeared without counsel in this matter and he was advised at all times that he had the burden of proving that Charlton and Simonich had violated the Code of Ethics. Frasier called only himself to testify during his case-in-chief. Following Frasier's testimony and cross-examination by counsel for Charlton and Simonich, Charlton's and Simonich's motion for entry of judgment was granted.

II. FINDINGS OF FACT

1. Charlton and Simonich, as the Management Services Division Administrator and former Director of the Department of Commerce, respectively, are public

¹ Frasier's Pre-Hearing Order added an allegation to the original complaint by stating that Charlton and Simonich violated Montana Code Annotated § 2-2-104(1)(b). In Frasier's initial complaint, he alleged only that Charlton and Simonich misused state resources for personal or private business gain.

employees or state officers subject to the provisions of Montana Code Annotated §§ 2-2-103 and 2-2-104.²

2. The second sentence of Montana Code Annotated § 2-2-103(1), states that “[a] public officer, legislator, or public employee shall carry out the individual’s duties for the benefit of the people of the state.”
3. Montana Code Annotated § 2-2-104(1) provides:

Rules of conduct for public officers, legislators, and public

employees. (1) Proof of commission of any act enumerated in this section is proof that the actor has breached the actor's public duty. A public officer, legislator, or public employee may not:

(a) disclose or use confidential information acquired in the course of official duties in order to further substantially the individual's personal economic interests; or

(b) accept a gift of substantial value or a substantial economic benefit tantamount to a gift:

(i) that would tend improperly to influence a reasonable person in the person's position to depart from the faithful and impartial discharge of the person's public duties; or

(ii) that the person knows or that a reasonable person in that position should know under the circumstances is primarily for the purpose of rewarding the person for official action taken.

4. Charlton and Simonich brought personal computers to their workplace where a Department of Commerce employee performed various updating and troubleshooting activities.³
5. Frasier used his state computer for personal matters during work hours while employed by the Department of Commerce. Frasier used his state computer during work hours to purchase books from "Amazon.com," to purchase a vehicle on "ebay," to discuss possible auto loan financing, to discuss the possible purchase of a bike, and to purchase golf clubs.
6. Frasier does not believe that his use of his state computer during work hours for personal matters violates the Montana Code of Ethics.
7. The State of Montana's official policy concerning the use of state computers for personal use expressly allows such personal use under limited and defined

² Mark Simonich was the Director of the Department of Commerce at the time the complaint was filed. Following the 2004 general election, Simonich took employment with a different state government agency.

³ Respondent's Proposed Pre-Hearing Order.

circumstances. The State of Montana Employee Handbook, April 2005 , Electronic Mail Policy, No. ENT-NET-042, November 2002, and the Internet Acceptable Use Policy, No. ENT-INT-011, August 2001, all contain a provision stating “[t]he State provided Internet, intranet and related services are not to be used for: 1)"for-profit" activities, 2) "non-profit" or public, professional or service organization activities that aren't related to an employee's job duties, or 3) *for extensive use for private, recreational, or personal activities*” (emphasis added).

7. “Extensive use for private, recreational, or personal activities” is not defined in the Montana Code Annotated, Administrative Rules of Montana, the Montana Operating Manual, the State Employee Handbook, or the Information Technology Enterprise policies.

III. DISCUSSION

Montana Code Annotated §2-2-103

Montana Code Annotated §2-2-103(1) contains the legislature's broad public policy statement that public servants have a duty to perform their day-to-day activities for the benefit of the public and that engaging in certain prohibited activities results in a violation of the public trust. Montana Code Annotated § 2-2-104 and other sections of the Code then establish specific rules of conduct for legislators, state employees, public officials, and employees of local governments. The specific rules of conduct in the Code reflect the legislature’s decision to urge the avoidance of conflicts of interest or the performance of an official act (issuing a permit or approving a contract or program) that would allow a public official or public employee to benefit personally. The prohibitions in the Code of Ethics are primarily designed to prevent a public employee or public official from receiving a personal financial benefit as a result of being in a position of authority, engaging in activity that would cause economic or personal harm to others as a result of some official action while benefiting the public official or employee, or using public resources for political purposes or for personal business purposes.

Frasier asserts that 2-2-103(1) must be literally applied as a rule of conduct to all public employees and officials. The practical and legal effect of Frasier's assertion is that every act by a public employee or a public official while on the job or at the place of public employment must benefit the people of the state. Any act of a personal nature

would be a violation of 2-2-103(1). Such a sweeping interpretation and application of Montana Code Annotated §2-2-103(1) cannot be upheld under the Code as presently written.

Montana Code Annotated §2-2-103(1) is a broad statement of general principles but it does not contain specific rules defining prohibited conduct that would constitute a violation of the general "public trust" and "benefit of the people" statements. Montana Code Annotated § 2-2-104, 105, 111, 112, 121 and 131 contain the specific rules describing conduct that violates the Code of Ethics. Each of these sections, unlike 2-2-103(1), begins with language declaring that the particular Code of Ethics statute is either a "rule of conduct" or that violations of the particular Code section constitute a breach of a public official's or public employee's "public duty" or "public trust" obligations.

Frasier asserts that Montana Code Annotated §2-2-103(2) supports his contention that the general statement of principles in 2-2-103(1) are enforceable rules of conduct. Section 2-2-103(2) provides that a public employee or public official is liable to the people of Montana and subject to the Code's penalties "provided in **this part** for abuse of the public's trust" (emphasis added). The reference to "this part" rather than "this section" supports the interpretation in the preceding paragraph and is consistent with the legislative history of the Code of Ethics. Moreover, subsection (3) of the statute provides:

This part sets forth various rules of conduct, the transgression of any of which is a violation of public duty, and various ethical principles, the transgression of which must be avoided.

Like subsection (2), subsection (3) of the statute clearly reflects the legislature's intent that other statutes in Title 2, chapter 2, part 1 must be examined to identify the specific standards and ethical principles that govern the conduct of state officers and employees.

Frasier's sweeping interpretation of Montana Code Annotated §2-2-103(1) must also be rejected because it would create serious constitutional questions about the Code. Simply stated, every past and current public official and public employee would be a law breaker under Frasier's interpretation if they ever dealt with any personal

matter (non-government matters) while on the job or while using equipment, office space, or supplies purchased or leased with public funds.⁴ The State of Montana has clearly chosen to regulate and prohibit certain activity by public employees and public officials under the Code of Ethics. However, the exercise of that regulatory power cannot unduly infringe on protected freedoms or be so indefinite that a person of ordinary intelligence does not have fair notice that his or her conduct is forbidden. *Montana Automobile Association v. Greely*, 193 Mont. 378, 387 & 393, 632 P.2d 300 (1981).

Public employees and public officials do not forfeit all of their constitutional rights at their place of public employment or while on the job as a government employee. The State of Montana's computer use policies authorize state employees to use state-owned computers for limited personal use. The Information Technology Service Division has established several policy statements identifying appropriate and inappropriate use of state information technology resources, including the User Responsibility Policy, No. ENT-SEC-081, the Electronic Mail Policy, No. ENT-NET-042, and the Internet Acceptable Use Policy, No. ENT-INT-011. Each document addresses a specific area of information technology, but they are designed to be complementary. For the purposes of this matter, the principal language in policy statements ENT-INT-011 and ENT-NET-042 is that information technology resources may not be used for "extensive use for private, recreational, or personal activities."

The User Responsibility Policy provides some additional guidance by stating that users of State information technology resources must recognize the importance the resource has on the effective operation of state government. That realization brings with it an obligation to use the resource in an acceptable, responsible, and ethical manner. The existence of such state computer use policies and the evidence introduced at the hearing illustrate the over-breadth of Frasier's interpretation of Montana Code Annotated §2-2-103(1).

⁴ Under Frasier's literal interpretation of 2-2-103(1), a public employee would violate the Code of Ethics if the employee placed or received a phone call using publicly-owned telephones to deal with child care problems, the scheduling of a dental appointment, medical or family emergencies, school issues, or any other personal matter not involving a public employee's official public duties.

Frasier asserts that Simonich and Charlton violated 2-2-103(1) by having another state employee work on their personal computers at their place of public employment even though the employee was providing the computer services after taking comp time for the time spent providing the services. Conversely, Frasier testified that he does not believe that his use of his state computer to purchase a vehicle or golf clubs for his personal use while at his place of public employment was a violation of 2-2-103(1). There is no statutory language in Montana Code Annotated §2-2-103(1) that would enable me to distinguish between Frasier's use of his state-owned computer for personal matters while punishing Simonich and Charlton for using state resources to correct problems on their personal computers. Other specific rules of conduct in the Ethics Code would have allowed me to find that Simonich and Charlton violated prohibitions against using public resources to benefit the public employee's personal economic interests (2-2-104), private business interests (2-2-221), or for political purposes (*Id.*) if Frasier had made such allegations and presented evidence to substantiate such charges. Frasier made no such allegations in his ethics complaint and presented no evidence relating to those matters.

My interpretation of Montana Code Annotated §2-2-103(1) in the preceding paragraphs does not give me personal satisfaction. I am personally disappointed by the conduct of all parties in this matter. Despite my determination that their conduct in this matter did not violate the Code of Ethics, Simonich and Charlton should never have asked or allowed Department of Commerce employees to work on their personal computers in the Department's offices or use public resources in performing such computer services. As state government managers and leaders, Simonich and Charlton have an elevated responsibility to model ethical behaviors that represent a high level of integrity. Conduct like what was exhibited at the Department of Commerce does nothing but reinforce the public's jaded perpetuation of the myths surrounding public employees. This heightened level of scrutiny, deserved or not, should be expected by all public employees, especially public employees in positions of significant authority. Occasionally, "appropriate ethical standards" means something more than that which the Montana Legislature found to be worthy of codification.⁵ Similarly, I am

⁵ State of Montana, User Responsibility Policy, No. ENT-SEC-081, August 2, 2001.

frustrated by Frasier's inconsistent interpretation of 2-2-103 and his willingness to overlook his use of public resources for personal matters.

This opinion illustrates the need for the Montana Legislature to take a hard look at and specifically define when the use of public resources by a public servant for personal matters constitutes a violation of the Montana Code of Ethics. It is essential that a well-defined and consistent "personal use of public resources" rule be adopted under the Code of Ethics if the legislature and the public want an enforceable policy and one that accomplishes the purposes of the Ethics Code -- preventing conflicts between public duty and private interest (2-2-101), maintaining public confidence in the integrity of public servants, and ensuring that public employees and public officials carry out their duties for the benefit of the people (2-2-103).

Montana Code Annotated § 2-2-104

Frasier alleges that Charlton and Simonich gave themselves a gift in violation of Montana Code Annotated § 2-2-104(1)(b)(i) and (ii) when they asked for and received personal computer services from agency employees. This allegation cannot be sustained under the Code of Ethics for two reasons:

First, my predecessor, Commissioner Linda Vaughey, has correctly determined that the term "gift" used in 2-2-104(1) means that "something [is] voluntarily transferred by one to another without compensation" or for value that is far less than the item or service received. See Commissioner Vaughey's September 25, 2002 Decision *In the Matter of the Complaint of the Montana Democratic Party Against Judy Martz*, pp. 16 & 17. The gift giving prohibited by Montana Code Annotated § 2-2-104(1)(b)(i) and (ii) requires that someone other than the public servant who received the gift has given a gift that violates the express provisions of 2-2-104(1).

Second, Frasier did not allege and he offered no proof that Simonich and Charlton asked for or accepted the computer services provided by the Department of Commerce employees in violation of Montana Code Annotated § 2-2-104(1)(b)(i) and (ii). These Code provisions require Frasier to prove that Simonich and Charlton asked for or accepted the computer services knowing that the services were provided to

influence them "to depart from the faithful and impartial discharge of ...[their] public duties" or as a reward for official action taken. Frasier did not allege and he offered no evidence to substantiate that the employees who provided the personal computer services to Simonich and Charlton expected to be rewarded (i.e., a job promotion, salary increase, or an office with a view) or were rewarded for providing such services. Frasier's only allegation was that Simonich and Charlton gave a gift to themselves.

Montana Code Annotated § 2-2-136(1)(b)

Montana Code Annotated § 2-2-136(1)(b) states that the Commissioner may dismiss a complaint that is frivolous, does not state a potential violation of the Code of Ethics, or does not contain sufficient information to enable the Commissioner to determine whether a potential violation exists. The Commissioner's acceptance of a complaint and the scheduling of a hearing is simply a determination that the complaint is in proper form and appears to state a matter within the Commissioner's jurisdiction. Under the Ethics Code, the complainant then has the burden of proving in a contested case hearing that the violations alleged in the complaint did, in fact, occur. Frasier failed to meet his burden of proof in this matter.

IV. CONCLUSION

Based on the preceding, Frasier's December 3, 2004 complaint against Mark Simonich and Barbara Charlton is hereby dismissed with prejudice.

Montana Code Annotated § 2-2-136(2), provides that the Commissioner may assess the cost of bringing the proceeding against the person alleging a violation if the Commissioner finds that the violation did not occur. The purpose of this provision is not to dissuade individuals from filing complaints in good faith, but to reduce the likelihood of frivolous complaints being lodged for retaliatory purposes. The complaint offered an opportunity to clarify the scope of the Code of Ethics and address, for the first time, an alleged violation of Montana Code Annotated §2-2-103(1). Therefore, the costs of this proceeding will not be assessed against the complainant.

Dated this _____ day of May, 2005.

Gordon Higgins
Commissioner

NOTICE: This is a final decision in a contested case. The parties have the right to seek judicial review of this decision pursuant to the provisions of Montana Code Annotated §§ 2-4-701 through 2-4-711.