

**BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES**

In the Matter of the)	SUMMARY OF FACTS
Complaint Against)	AND
Ed Childers)	STATEMENT OF FINDINGS

Bonnie Gee, Laura Millin, and Lois Herbig filed a complaint against Ed Childers, a 1999 candidate for Ward 6 of the Missoula City Council. The complaint alleges that Childers violated Montana Code Annotated § 13-35-211 by allowing campaign materials to be placed within 200 feet of polling places on election day.

SUMMARY OF FACTS

1. Ed Childers was a successful candidate for the Missoula City Council in Ward 6 in the November 1999 election.

2. Following the election, Bonnie C. Gee, Lois G. Herbig, and Laura J. Millin filed a complaint with the Commissioner of Political Practices (Commissioner), alleging that Childers violated Montana Code Annotated § 13-35-211 when he failed to remove campaign signs that were located within 200 feet of various polling places on election day.

3. Complainant Herbig was also a successful candidate for the Missoula City Council. Herbig stated that she saw “six or seven Childers signs” on election day that were “probably within 100 feet” of a polling place. Herbig, however, did not take any actual measurements of the signs nor did she complain about the signs to Childers, the Missoula County Elections Office, or the Commissioner. Herbig based her decision to sign the complaint on statements made to her by Gee and poll watchers Paula Hoffman and Gail Gutsche.

4. Complainant Millin stated that, while she saw some Childers signs on election day, she does not know whether they were in violation of the statute. Although

she has no evidence or personal knowledge that would support a conclusion that Childers violated the law, she signed the complaint after reading and discussing with Gee the allegations in the complaint.

5. On election day Paula Hoffman was working as a poll watcher for the Naomi DeMarinis campaign (DeMarinis was Childers' opponent). She noticed some Childers signs that she thought might be too close to Franklin School, a polling place. The day after the election she discussed the matter with Gee and described a sign on a street corner near Franklin School. Hoffman never took any measurements of the signs she observed near Franklin School.

6. Gee stated that she carefully measured the distances from several Childers campaign signs to adjacent polling places on election day and determined that they were in violation of the statute. The next day she went out and took photographs based on her recollection of where the allegedly offending signs had been located. By that time the signs had been taken down. Gee did not take or submit any photographs of the actual signs that she claims were in violation of the statute on election day.

7. Gee stated she used a 50-foot "standard carpenters' tape" to make the measurements on election day. She measured the distances from the signs to the nearest part of the buildings containing the polling places. Gee described the procedure as somewhat difficult since there were fences and other obstacles that she had to compensate for when making the measurements. She did not use a chalk line or any other device to ensure that she was measuring on a straight line between the signs and the polling places, nor did she have any assistance when she made the measurements. She nevertheless insists that she was very careful when making the measurements and that the results of her measurements are accurate.

8. Six photographs were submitted with the complaint. All of the photographs were taken by complainant Bonnie Gee on the day after the election, after

the signs had been removed. Consequently there are no signs visible in any of the photographs.

9. Photographs 1 through 3 depict areas where Gee contends she personally observed signs she believes were in violation of the statute.

10. Photograph 1 depicts an area on the corner of Stephens and Beckwith where Gee claims a Childers sign was placed within 137 feet of Roosevelt School, a polling place.

11. Photograph 2 depicts an area near Beckwith and Edith, across from Roosevelt School. Gee contends that a Childers sign was placed within 114 feet of the polling place.

12. Photograph 3 depicts an area on Curtis Street, across from Emma Dickenson School, a polling place. Gee contends that two Childers signs were placed within 105 feet of the school.

13. Photograph 4 represents a location on 10th Street where, according to Gee, a Childers sign was placed within 100 feet of Franklin School. Although Gee took this photograph, she did not actually observe a Childers sign at this location on election day. Rather, she bases this contention on what poll-watcher Paula Hoffman told her the day after the election. (See Fact Summary 5).

14. Photographs 5 and 6 depict an area on Reserve and North, near C.S. Porter School, a polling place. These photographs were not intended by Gee to represent the location of Childers signs that were allegedly in violation of the statute. Rather, they were submitted to support the complainants' contention that the placement of Childers signs constituted a "pervasive election day strategy to get as close as physically possible to polling places."

15. On election day Kim Cox, who works in the Missoula County Elections Office, received two telephone calls from Gee, who complained that two Childers signs were too close to polling places. Cox later received an anonymous call from someone

complaining about the same signs. Cox telephoned Childers and requested that he remove the signs.

16. During the telephone conversation, Childers attempted to engage Cox in a discussion regarding case law pertaining to the statute. Cox advised Childers that she is not an attorney and did not feel comfortable discussing case law. She suggested that Childers discuss his concerns with the County Attorney's Office, but she also requested that Childers take down the signs. Cox said that as far as she knows Childers promptly removed both signs that Gee complained about after Cox requested that he do so. Cox also recalls that later that day Deputy County Attorney Mike Sehested advised her that Childers' signs could remain where they were. Apparently, however, the signs had already been taken down.

17. According to notes maintained at the Commissioner's office, the Commissioner received a telephone call from the Missoula County Elections Office on election day advising that the Elections Office had received a complaint regarding a Childers sign placed within 200 feet of Roosevelt School. The Commissioner's notes reflect that later that same day Childers telephoned the Commissioner's office and advised that he had received two anonymous telephone calls regarding some of his signs that were allegedly too close to various polling places. Childers stated that he would check his signs and remove any that were within 200 feet of any polling places.

18. Childers recalls receiving one telephone call from Gee complaining about one of his signs, and he promptly removed that sign. He also recalls a telephone conversation with Kim Cox of the Missoula Elections Office regarding the complaint by Gee concerning that same sign. In addition, Childers recalls a telephone conversation with the Commissioner's office, again relating to the one sign that Gee had complained about. After his telephone conversation with the Commissioner's office, Childers contacted the Missoula County Attorney's Office and spoke with Deputy County Attorney Mike Sehested. According to Childers, Sehested advised him that the signs

that had been complained about were not in violation of the statute. Nevertheless, when Childers later received another call from the Elections Office complaining about a second sign, he promptly removed that sign as well.

19. Deputy County Attorney Sehested recalls that Childers spoke with him sometime during the morning on election day. Sehested told Childers that he was not going to make Childers take the signs down, and he questioned whether he even had the authority to do so. When he discussed the matter with Childers, Sehested was under the impression that the statute did not apply to campaign signs. Sehested has also expressed concerns regarding the constitutionality of the statute, since he feels it may violate the First Amendment.

20. Childers also questions whether the statute prohibits the placement of signs near polling places. He stated that he did not measure the distances of any of his signs from polling places, but he also did not make a conscious decision to strategically place signs as close to polling places as possible. While he disagrees with the complainants' contention that campaign signs placed within 200 feet of a polling place are in violation of the statute, he emphasized that he promptly removed the signs that were complained about. Childers does not believe he violated the law.

21. The election results for Ward 6 show that Childers lost in each precinct that contained a polling place where Childers signs were complained about. Childers lost in precinct 11, where Roosevelt School is located, precinct 12, where Franklin School is located, and precinct 43A, where Emma Dickenson School is located.

STATEMENT OF FINDINGS

Montana Code Annotated § 13-35-211(1) provides:

No person may do any electioneering on election day within any polling place or any building in which an election is being held or within 200 feet thereof, which aids or promotes the success or defeat of any candidate or ballot issue to be voted upon at the election.

Violation of Montana Code Annotated § 13-35-211 is a misdemeanor. Montana Code Annotated § 13-35-103. The term “electioneering” is not defined in the law. However, Mont. Admin. R. 44.10.311 provides:

ELECTIONEERING - INTERPRETIVE RULE (1) As used in 13-35-211, MCA, “electioneering” means the solicitation of support or opposition to a candidate or issue to be voted upon at the election or polling place in question, by means of:

(a) Personal persuasion, electronic amplification of the human voice, or the display or distribution of campaign materials.

. . . [Emphasis added].

Under the Commissioner’s administrative rule implementing Montana Code Annotated § 13-35-211, “electioneering” includes display of campaign signs. Thus, the statute prohibits display of campaign signs within 200 feet of a polling place.

Mike Sehested, Deputy Missoula County Attorney, expressed his concern that Montana Code Annotated § 13-35-211 may violate the First Amendment. The Montana Supreme Court has not had an opportunity to consider the constitutionality of the statute. In Burson v. Freeman, 504 U.S. 191 (1992) the United States Supreme Court, in a plurality opinion, determined that a Tennessee statute prohibiting the solicitation of votes and the display of campaign literature within 100 feet of the entrance¹ to a polling place did not violate the First and Fourteenth Amendments. Finding that Tennessee could constitutionally decide that citizens were entitled to approach polling places “as

¹The campaigning restriction in Montana Code Annotated § 13-35-211 is not limited to the area adjacent to the entrance to a polling place. Instead, the statute restricts activities within 200 feet of “any polling place.” Nor does the Commissioner’s rule narrow the applicability of the statute to activities near the entrance to a polling place. Bonnie Gee stated that her measurements were from the sign location to the nearest part of the building in which the polling place was located (see Fact Summary 7), not to the entrance to the polling places.

free from interference as possible,” the Court was nevertheless cautious in its approval of the 100-foot restriction:

At some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden akin to the statute struck down in Mills v. Alabama, [384 U.S. 214 (1966)]. See also Meyer v. Grant, [486 U.S. 414 (1988)] (invalidating absolute bar against the use of paid circulators). In reviewing challenges to specific provisions of a State’s election laws, however, this Court has not employed any “litmus-paper test’ that will separate valid from invalid restrictions.” [Citations omitted]. Accordingly, it is sufficient to say that in establishing a 100-foot boundary, Tennessee is on the constitutional side of the line.

Burson v. Freeman, 504 U.S. at 510-11.

Montana Code Annotated § 13-35-211 is more restrictive than the statute approved in Burson v. Freeman. Unlike the Tennessee statute, which only restricts campaign activities in an area near the entrance to a polling place, Montana’s law arguably restricts campaign activities within a fixed distance radiating from any portion of a building that is being used as a polling place. Moreover, the Montana statute extends the restriction to 200 feet, 100 feet further than the statute approved by the Supreme Court in Burson v. Freeman. Any Montana court considering the constitutionality of Montana Code Annotated § 13-35-211 would obviously closely examine these distinctions and weigh them against First Amendment rights in determining whether Montana’s statute falls “on the constitutional side of the line.”

Montana Code Annotated § 13-35-124(1) requires the Commissioner to notify the county attorney “[w]henver the Commissioner determines that there appears to be sufficient evidence to justify a civil or criminal prosecution under chapters 35, 36, or 37” of Title 13. The determination of whether a prosecution is justified must take into account the law and the particular factual circumstances of each case. A prosecutor can decide not to prosecute whenever he or she in good faith believes that a

prosecution would not be in the best interests of the state, or that, under the circumstances, the case cannot easily be proven in court.

This case would be very difficult to prove in court for several reasons. First, the complainants did not take any photographs of the signs that they allege were in place on election day or of the process of measuring the distances from the signs to the polling places. The photographs were taken the day after the election and were based on Bonnie Gee's best recollection of the location of the signs on election day. While Gee's testimony would be helpful, a jury would likely expect to see photographic evidence depicting the signs and their proximity to the polling places.

Second, only Bonnie Gee could offer any testimony regarding signs that were in violation since she's the only one of the complainants who actually made any measurements. Laura Millin has no personal knowledge or evidence of any kind to offer. While she saw some Childers signs on election day, she does not know whether or not they were in violation of the statute. Lois Herbig recalls seeing some Childers signs that she believed were within 100 feet of a polling place, but she also did not take any measurements to confirm that belief.

Third, when questions concerning Childers' signs arose on election day, Childers consulted with the Missoula County Attorney's Office to inquire about his legal responsibilities. The County Attorney's Office shares enforcement responsibilities for violations of the election laws with the Commissioner. Montana Code Annotated § 13-37-124. Deputy County Attorney Mike Sehested advised Childers that the statute does not apply to campaign signs and that he was not required to remove his signs.

Finally, even though Childers believed he was not legally required to remove the signs, when contacted by the Missoula County Elections Office and the Commissioner's Office Childers voluntarily removed several signs that had been complained about. Moreover, election results in the precincts where signs were complained about appear to support a conclusion that the alleged violations had no discernable effect on the

outcome of the election. (See Fact Summary 21.) While this is not the determinative factor in this case, it is relevant to the policy expressed by the Montana Legislature in Montana Code Annotated § 13-35-102:

It is not the intent of the election laws of this state to criminalize activities involving trivial benefits incidental to the campaign process which involve no substantial risk of undermining the election process.

Consideration of all the factual and legal circumstances in this case leads to the unavoidable conclusion that the case cannot easily be proven in court, and consequently a prosecution would not be in the best interests of the State.

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings, there is insufficient evidence to justify a criminal prosecution based on allegations that Ed Childers violated Montana Code Annotated § 13-35-211.

Dated this _____ day of February, 2000.

Linda L. Vaughey
Commissioner