

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

IN THE MATTER OF THE)	SUMMARY OF FACTS AND
COMPLAINT AGAINST)	STATEMENT OF FINDINGS
ROBERT R. MARTINEK)	

Warren J. Becker, a candidate for mayor of Forsyth in 1993, filed a complaint with the Commissioner of Political Practices on December 8, 1993, alleging that Robert R. Martinek, his opponent in the general election, violated section 13-35-234, Montana Code Annotated (MCA). That statute prohibits a person from making or publishing any false statement or charge reflecting on any candidate's character or morality or to knowingly misrepresent the voting record or position on public issues of any candidate. A person making such a statement or representation with knowledge of its falsity or with a reckless disregard as to whether it is true or not is guilty of a misdemeanor. In addition, a successful candidate who is adjudicated guilty of violating this statute may be removed from office.

The results of an investigation conducted between December 8, 1993 and March 30, 1994, are set forth in the Summary of Facts that follows.

SUMMARY OF FACTS

1. Warren J. Becker and Robert R. Martinek were candidates for Mayor of Forsyth in the November 2, 1993 election. Becker was the incumbent seeking re-election.

2. Martinek ran an advertisement in the Independent Enterprise of Forsyth on October 27, 1993, six days before the

election and the last issue of the paper to be published before election day. (Ex. A)

3. A flier advocating the candidacy of Martinek was mailed on or about October 26, 1993. (Ex. B)

4. Becker's complaint alleges 19 violations of section 13-35-234, MCA, Political Criminal Libel, by Martinek. All twelve issues delineated in the October 27, 1993, mailing piece were alleged by Becker to be either misleading, blatantly false, totally false, distorted, or argumentative; the complaint lists a response for each issue. Seven of nine items in the newspaper advertisement are characterized by Becker as being false, false and/or misleading, or knowingly false.

5. Becker's campaign ads, one starting with "Now Let's Look to the Future. . ." and the other, "Look at the Record, Then Compare" both ran in the October 27, 1993, issue of the Independent Enterprise. (Exhibits C and D)

6. Thirty-five radio ads with KIKC were aired by Becker during the five days prior to election day. (Ex. E#1, 2, 3, and 4)

7. Martinek defeated Becker in the November 1993 general election and is currently serving as Mayor of Forsyth.

8. Martinek, in a written response to a request from the Commissioner of Political Practices, provided his view that he did not make false statements about Becker's morality, character, or voting record but merely reported incidents as he saw them and his own plan to apply certain procedures if elected to the office of mayor.

9. Upon review of the approximately 160 pages of the proffered complaint and supporting material, it was determined that an investigation was warranted regarding the false statement allegations in five of the issues only, the others being judged as frank differences of opinion typical of contested elections decided by electors through the voting process.

10. The first of these issues is the trust fund and statements about saving and retaining it according to the original intent, with 50 percent of the earnings from the trust fund going back into the principal and 50 percent of the earnings used for city operations as appropriated. The City Council did establish a secondary account, on the recommendation of Mayor Becker, whereby approximately 20 percent of the balance is eligible for the account because it is other than the 1981 issue fee and earnings. On April 27, 1992, the revised agreement was approved to receive the authorizing signatures. From the foregoing it is clear that a special fund was established with First Trust Company of Montana.

In the two Martinek comments on campaign materials related to this special contingency fund, he states his fears that the money might be spent for short-term spending planned by the current administration (Ex. A, item 1B) or in a contingency for possible unnecessary spending (Ex. B, item 2B). While these conjectures appear to Becker to be false, they rely on the words "planned" or "possible unnecessary spending" to express the view that the funds should have been placed in the trust according to its terms and thereby be unavailable for current spending. The original vote

establishing the fund represents, in Martinek's mind, the will of the people and he has pledged not to invade this special fund which, in his view, is contrary to that vote.

Martinek did submit a proposed ballot issue to Geri Nile, Election Administrator. Subsequent questions surrounding wording of the ballot issue caused a variety of actions by the city. Martinek's perception that there was an intent to either alter the original trust terms or deny a vote on renewing the trust led to his filing a court action, a writ of mandamus on October 8, 1991. Given the complexity of the process and his reactions, it is clear that Martinek believed he was saving the trust for the future.

11. "More city money is spent on the pool than is used for law enforcement, fire protection, and street repair. All possible options must be examined to justify pool expenditures that currently benefit only a few city residents." (Ex. B, item 2G) This statement is based on the notion that pool expense in 1990 was \$121,800.00 and that this amount exceeded the reported amounts spent for the following in 1990: \$117,985.00 for law enforcement, \$24,680.91 for fire protection, and \$118,954.78 for street repair expenditures. These figures justify, in Martinek's mind, his statement which did not mention dollar amounts. While his intent was to indicate pool expenditures were larger than the other categories, use of the word "and" can be construed to indicate a total and thereby mislead a reader. In 1991 the pool expense was \$179,363.18. This compares with \$122,000.00 for law enforcement, \$20,483.29 for fire protection, and \$107,994.70 for street repair,

showing that in both years (1990 and 1991) the pool expense exceeded each of the other categories. These figures were verified by Dan Watson, Forsyth City Clerk/Treasurer, in a telephone interview on February 8, 1994.

12. Under the Effective Budgeting and Planning Statement, Mr. Martinek stated his belief that "budgets should not be overspent as has occurred under the current administration." (Ex. B, item 2E) The basis for this statement was the notice of an audit conducted by the Montana Department of Commerce, Local Government Services Bureau for the fiscal years ending June 30, 1991 and 1992. The audit publication "Introduction" posted in the U. S. Post Office in Forsyth on September 21, 1993, listed under the summary of significant findings, included #3, Independent Auditor's Report on Other Compliance, Financial, and Internal Accounting Control Matters. This report contained findings on the following matters:

- a. Cash and Investments
- b. Capital Lease - Unrecorded
- c. Budget Overdrafts
- d. Employee benefits.

This notice supports the contention that budgets should be adhered to and not overspent as was charged as having occurred under the current administration. Budget overdrafts were listed in this official notice.

13. A Coal Board grant proposal for fire hydrant replacement was initially tabled on February 14, 1992, and tabled again on September 19, 1992, by the Montana Coal Board. On February 2, 1994 Murdo Campbell, Administrative Officer of the Montana Coal Board, indicated that conversations with Karl Heberlie and Gary Fjeldstad

did substantiate the system problems as outlined in a letter requesting reconsideration on the basis of an emergency need. This November 6, 1992 letter was signed by Karl Heberlie, Forsyth Fire Chief. Three days after receiving the letter the proposal was removed from the table by the Coal Board and approved for a \$20,000 project. Forsyth was not represented at this meeting and Campbell stated that this was not unusual and may have been advised by him since there was no way of knowing whether or not the Board would reconsider the tabled request. Given the timing for the Coal Board's reconsideration and approval, it is understandable that the efforts of Herberlie and Fjeldstad were believed to be a precipitating factor in the hydrant grant. (Ex. A, item 1E)

14. The final issue deemed worthy of investigation was the Martinek assertion that "Light District #2 boundaries were increased by the current administration without proper notice given to property owners affected, in violation of state statute." (Ex. A, item 1G) This charge appears to fall within the category of a knowingly false statement because a resolution expanding the street lighting district was adopted by the council at the July 13, 1992 regular meeting. A public hearing was called for and held at a regular meeting of the City Council on Monday, August 10, 1992, at 8 p.m. On August 24, 1992, the council voted 4-0 to adopt the Lighting District #2 extension. Further interviews with Don Seliski, former council member, and Otto Bendewold, property owner, revealed that pole installation started before the hearing. Dan Watson stated that poles and fixtures were purchased in October of

1991 and paid for in February of 1992. These replacement poles were used to extend the district and work on their installation commenced prior to the resolution and the original May 11, 1992 scheduled hearing. The timing of the work gives a measure of credence to the statement that proper notice was not given.

STATEMENT OF FINDINGS

Section 13-35-234(1), MCA, prohibits a person from "knowingly" misrepresenting the voting record or position on public issues of any candidate. As discussed in the Summary of Facts, the issues investigated were limited to those five determined as potentially false statements made with knowledge of their falsity or with a reckless disregard as to whether they were true or not. Within the context of the complaint Becker asserts that most of the Martinek campaign statements are false. The issue of pool expenditures borders on a false statement because of the use of the word "and" which leads a reader to conclude that pool expenditures exceeded expenditures for law enforcement, fire protection and street repair. On a total combined basis, more city money is not spent on the pool than is used for law enforcement, fire protection and street repair. The issue, therefore, is whether Martinek made this representation with the requisite mental state set forth in the statute.

Prior to its amendment in 1983, section 13-35-234(1), MCA, provided:

It is unlawful for any person to make or publish any false statement or charge reflecting on any candidate's character or morality. A person making such a statement with knowledge of its falsity or with a reckless

disregard as to whether it is true or not is guilty of a misdemeanor.

The statute was then amended to add the following underlined language:

It is unlawful for any person to make or publish any false statement or charge reflecting on any candidate's character or morality or to knowingly misrepresent the voting record or position on public issues of any candidate. A person making such a statement or representation with knowledge of its falsity or with a reckless disregard as to whether it is true or not is guilty of a misdemeanor.

Thus, the amendment adopted in 1983 effected an additional prohibition under the statute, a violation of which can be established through proof of alternative mental states. The statute requires proof of either "knowledge" or "reckless disregard" on the part of the person alleged to have violated the statute.

Section 13-35-101(1), MCA, states that the "penalty provisions of the election laws of this state are intended to supplement and not to supersede the provisions of the Montana Criminal Code." Section 45-2-101(33), MCA, in the Criminal Code of 1973, provides as follows:

"Knowingly"--a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

Section 13-35-234, MCA, prohibits a misrepresentation made "with knowledge of its falsity." In making a determination whether a misrepresentation was made "knowingly" or "with knowledge," in violation of section 13-35-234, MCA, the second-to-last sentence of the above definition would apply. To prove that a person made a representation about a candidate's voting record or position on public issues with knowledge of the representation's falsity, it would be necessary to prove that the person who made such a representation was "aware of a high probability" that the representation was false. Section 45-2-101(33), MCA.

A violation of the statute also can be proved if there is evidence that a person acted with "reckless disregard." The Compiler's Comments to section 13-35-234, MCA, note that the source of the "standard" in subsection (1) of the statute is "apparently drawn from New York Times Co. v. Sullivan, 376 U.S. 254 (1964)." That case involved a civil libel action filed by a public official against a newspaper. The Supreme Court held that recovery would be allowed only if the public official could prove that the alleged libelous statement had been made with "actual malice"; that is, with "knowledge that it was false or with reckless disregard of whether it was false or not." Sullivan, 376 U.S. at 279-80. In a later case, Herbert v. Lando, 441 U.S. 153 (1979), the Supreme Court, citing Sullivan, stated that "reckless disregard for truth" means that the defendant "in fact entertained serious doubts as to the truth of his publications." The Court noted that such "subjective awareness of probable falsity" may be found if "there

are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Herbert, 441 U.S. at 156-57. Other cases have held that "reckless disregard" is "more than mere negligence," Major v. Drapeau, 507 A.2d 938, 941 (R.I. 1986), and that "a failure to investigate is not sufficient in itself to establish reckless disregard," Bartimo v. Horsemen's Benevolent and Protective Association, 771 F.2d 894, 898 (5th Cir. 1985). In Green v. Northern Publishing Co., Inc., 655 P.2d 736, 742 (Alaska 1982), the Court observed:

"Reckless disregard", for these purposes, means conduct that is heedless and shows a wanton indifference to consequences; it is conduct which is far more than negligent. [citation omitted] There must be sufficient evidence to permit the inference that the defendant must have, in fact, subjectively entertained serious doubts as to the truth of his statement. (Italics in original.)

Applying these principles to the facts established during the investigation of this matter, the evidence does not support a finding that Robert R. Martinek acted with the requisite knowledge or reckless disregard when he compared the pool expenditures with those in law enforcement, fire protection, and street repairs. In his view, he believed that by not mentioning any figures, or a total figure of law enforcement, fire protection and street repair, as compared to the amount spent on the pool, he was accurately reflecting the figures for the fiscal years 1990, 1991, 1992, and 1993. The pool expenditures did exceed law enforcement expenditures in 1990 and 1991, the fire protection expenditures in 1990, 1991, 1992, and 1993 and street repairs in 1990, 1991, and 1992. Given the various comparisons, one of which uses the totals,

it can be misleading, but I do not find that Martinek knowingly or with reckless disregard misrepresented the pool expenditures.

The other issues in question, when viewed in the light of the criteria of section 13-35-234, MCA, do not include sufficient evidence to conclude that there was intentional misrepresentation. Evidence examined did provide a basis for statements made even though varying interpretations are possible. It is these conflicting notions that are properly decided by the voters in a free election.

CONCLUSION

Based on the facts and these findings, I conclude that Robert R. Martinek, former candidate and currently Mayor of Forsyth, did not violate the penal campaign practice statute that prohibits a person from making or publishing any false statement or charge reflecting on any candidate's character or morality or to knowingly misrepresent the voting record or position on public issues of any candidate.

Based on the facts and these findings, I conclude that no further action is warranted against Robert R. Martinek.

DATED this 5th day of April, 1994.



ED ARGENBRIGHT, Ed.D.
Commissioner of Political Practices