

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Buttrey v. Montana Democratic Party No. COPP 2014-CFP-050	<u>Partial Decision</u>
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On October 29, 2014, F. Edward Buttrey, a resident of Great Falls, Montana filed a complaint against the Montana Democratic Party alleging a campaign practice violation. Mr. Buttrey is the Republican nominee for election to the Montana legislature from Senate District 11 (SD11). Mr. Buttrey is opposed by Vonnie Brown, the Democratic nominee for election to the Montana legislature from Senate District 11.

Mr. Buttrey's complaint alleges that two flyers attacking his candidacy (*see* attachments to Complaint) were received by SD 11 voters on or after October 27, 2014.¹ Mr. Buttrey's complaint states he received no notice of the flyers

¹ Candidate Buttrey did not include several additional such Flyers in his complaint as those Flyers came before the 10 day notice deadline discussed below in this partial Decision.

and cites to the provisions of Montana's "Clean Campaign Act", requiring notice for any campaign related Flyers delivered in the 10 days prior to an election.

The necessary foundational facts are as follows:

Finding of Fact No. 1. Ed Buttrey is the Republican nominee for election to the Montana legislature from Senate District 11. Mr. Buttrey is opposed by Vonnie Brown, the Democratic nominee for election to the Montana legislature from Senate District 11. (Secretary of State Website)

Finding of Fact No. 2. The Montana Democratic Party sent a certain two Flyers op Candidate Buttrey. (See attribution of Flyers attached to complaint)

Finding of Fact No. 3. The Flyers arrived in SD 11 voters' mailboxes on or after October 27, 2014. (Complaint and Commissioner interviews)

Finding of Fact No. 4. October 27, 2014 is within 10 days of the November 4, 2014 election. (Administrative Notice)

Finding of Fact No. 5. Mr. Buttrey was provided with no notice of the Flyers, first learning of them after October 27 when a copy was provided by SD 11 voter. (Complaint and Commissioner interview).

Montana law requires that in the last 10 days before an election a candidate must be provided with a copy of any Flyer or other campaign advertising. §13-35-402 MCA. In the circumstance of a direct mail advertisement the candidate must be provided a copy of the piece "on the date of the postmark..." §13-35-402(3)(b) MCA. The Flyers involved in this Matter are such a direct mail form of campaign advertisement.²

The Democratic Party does not contest the above listed facts or law.³

The Democratic Party, however, asserts that it engaged a commercial mail

² There is no postmark on the Flyers but that date does not matter since no notice was provided.

³ The Commissioner notes and appreciates the prompt response of Democratic Party counsel and staff to the Complaint.

house for the purpose of delivering the two Flyers on October 22 and October 24, 2014 (Commissioner's interview). A Flyer delivered on either date would fall outside of the ten day reach of §13-35-402 MCA. The Democratic Party asserts that its intentions as to the date of delivery control over any independent and insubordinate actions of the mail house that resulted in a late-delivered Flyer. The Democratic Party cites to enabling language of §13-35-402 MCA showing that the statute applies to "...campaign advertising ...that is intended for public distribution in the 10 days prior to an election...." (Emphasis added by Commissioner). The Democratic Party asserts that the statutory language dictates that its intentions of date of delivery prevail over the actual date of delivery.

Section 13-35-402 MCA is designed to provide some measure of candidate civility within an increasingly polarized candidate election system. It requires, in the last days of an election, the sort of notice most Montanans customarily provide, as a matter of courtesy, before we take action that might affect another human being. Under the current directive of the US Supreme Court, however, the Commissioner must interpret §13-35-402 MCA in a manner that does not inhibit political speech beyond a narrow reading of the statute. *Citizens United v. Fed. Election Comm*, 130 S. Ct. 876 (2010). Accordingly, the Commissioner must take into consideration in any final Decision the facts, now unknown, demonstrating (or not demonstrating) the intention of the Democratic Party as to the planned date of SD 11 voter receipt of the Flyers.

The Democratic Party vigorously insists that it will be able to show such proof of intention of earlier delivery, given reasonable time to do so. The Commissioner does not disagree with that request, but is also committed to releasing as much information as possible on complaints within the same election cycle in which they are filed. This is particularly true if the complaint addresses an issue involved in a contested election. The SD 11 race is such a contested election.

Accordingly, the Commissioner issues this Partial Decision. This Partial Decision finds that there are sufficient facts to show that a Flyer attributed by the Democratic Party and opposing Candidate Buttrey arrived in SD 11 voter mailboxes within 10 days of an election and without notice to Candidate Buttrey. These facts are sufficient to show a violation of §13-35-402 MCA unless the Democratic Party can show by sufficient facts that it intended public distribution of the document (that is arrival in SD 11 voter mailboxes) on or before October 24, 2014.

The Commissioner hereby affords the Democratic Party until November 27, 2014 to produce proof of intent of planned earlier delivery. The Democratic Party is further directed to immediately provide the Commissioner's investigator the name and address of the mail house used for mailing the document.

The Commissioner will issue a further and final Decision in this Matter.

DATED this 30th day of October, 2014.

A handwritten signature in blue ink, consisting of a large, sweeping loop followed by a vertical line and a horizontal crossbar, resembling the letters 'JM'.

Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana