

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Essmann v. McCulloch No. COPP 2014-CFP-056	Summary of Facts and Finding of Insufficient Evidence to Show a Violation of Montana’s Campaign Practices Act DISMISSAL OF COMPLAINT
---	--

On November 3, 2014, Billings resident and Montana Legislator, Jeff Essmann filed a complaint with the COPP against Montana Secretary of State (SOS), Linda McCulloch, alleging that SOS improperly used public facilities and personnel to solicit opposition to ballot issue.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this decision is allowed activity of a public entity in regard to a ballot issue.

FINDING OF FACTS

The facts necessary for this Decision are as follows:

1. The 2014 general election date in Montana was November 4, 2014. (Secretary of State (SOS) website).

2. Legislative Referendum 126 (LR-126)¹ a “referendum to end Election Day voter registration” was on the general election ballot where it failed by a vote of 155,153 to 206,584. (SOS Website).

DISCUSSION

The Montana SOS has duties including “interpreting state election laws and overseeing elections.” (SOS website). Accordingly, the SOS was and is responsible for overseeing voter registration in Montana, including election day voter registration allowed by Montana law. The 2013 Montana legislature placed LR 126 on the November 2014 ballot. LR 126, had it passed by an affirmative vote of electors, would have ended election day voter registration in Montana.

Under Montana law once the LR 126 became a ballot issue, the SOS could not use public resources, (including personnel, facilities or equipment) to advocate for or against passage of the LR 126. Mr. Essmann’s complaint alleged that the SOS’s “2014 Summer Edition email/newsletter” (hereafter, “SOS newsletter” Ex. 1, Complaint) was such prohibited advocacy against LR 126.

The Commissioner reviewed the exhibits accompanying the complaint and the text of the complaint. The complaint is fundamentally based on the presentation of the following piece of information in the SOS newsletter:

¹ A legislative referendum is a proposal for a change in law (a “bill”) that is passed by a majority legislative vote, with the bill’s enactment dependent upon a majority vote of the electors voting in the next election. In effect, LR 126 is a ballot issue that is placed on the ballot by the legislature rather than by a petition signed by a sufficient number of electors.

We are lucky to live in a state that allows folks to register to vote right up through the close of polls on Election Day. It's a smart law² that guarantees no voter is denied their right to cast a ballot.

Since 2006, more than 29,000 Montanans have registered and voted on Election Day. We added nearly 1,000 voters to the list this year. If you move, or need to update your voter registration for any reason, know that your right is protected under the current law.

While the complaint alleges placement and coordination issues that will be addressed separately below, the language itself is first discussed.

1. There is No Express Advocacy in the SOS Newsletter Language

Montana law prohibits use of public resources to "...support for or opposition to..." a ballot issue § 2-2-121(3)(a) MCA. A state agency or official can, however, present neutral facts and information to electors related to a ballot issue. § 2-2-121(3)(a)(ii) MCA; *Roberts v. Griffin*, decided November 19, 2009 (Commissioner Unsworth); *Hansen v Billings School District #2*, COPP-2013-CFP-027 (Commissioner Motl).

Mr. Essmann's complaint asserts advocacy in the above listed SOS newsletter language. In order to constitute advocacy the language would need to meet the "functional equivalent of express advocacy" test set out in *McConnell v. FEC*, 540 US 93(2003) and refined in *FEC v. Wis. Right to Life*, 551 US 449 (2007). This "functional equivalent of express advocacy" standard has

² The "smart law" reference is not enough to constitute express advocacy (see this Decision) but it this type of value or opinion based (rather than information based) language, published during a ballot issue campaign, that may lead to complaints like this one.

been discussed and applied by the COPP in a series of sufficiency Decisions.³ The functional equivalent standard, while measured by specific application, begins with the directive that the complained of language must “be susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” before it constitutes advocacy. *FEC v. Wisconsin Right to Life* at pp. 469-470.⁴

There is no need for a review beyond the “no reasonable interpretation” measure. There is no reference to a ballot vote in general or LR 126 in particular in the SOS newsletter language.⁵ There is no exhortation urging a vote for or against anything. While there is a “smart law” reference and reference to voting on election day, these references are consistent with the chief election official role played by the Secretary of State. The Commissioner determines that the SOS newsletter language is more reasonably determined as consistent with the election functions of the Secretary of State than it is with any advocacy regarding LR 126.

The Commissioner notes that the facts of this matter do not remotely rise to the level of advocacy Commissioner Unsworth found to be permissible activity when engaged in by Lewis and Clark County officials. *See, Roberts v. Griffin*. As explained in *Griffin*, Lewis and Clark County placed a county mill levy on the 2006 general election ballot. Lewis and Clark County officials hired

³ *Roberts v. Griffin*, decided November 19, 2009, *Bonogofsky v. NGOA*, COPP-2010-CFP-008 and the Decisions cited therein.

⁴ Please see *Bonogofsky v. NGOA* at pages 8-9 for a detailed discussion of this requirement.

⁵ LR 126, while not in the objected-to language, is listed elsewhere in the SOS newsletter. This LR 126 “placement” issue is dealt with, below this Decision.

a press relations firm and with its assistance prepared and published an advertisement attributed to Eric Griffin, Lewis and Clark County Public Works Director. The advertisement listed the date of the vote, urged readers to vote and presented detailed information regarding the need for the levy. *Roberts v. Griffin* determined that this level of information was presented “to educate the public by presenting various facts and date pertaining to the mill levy” and as such was educational, not advocacy.

Likewise, the Commissioner determines the reference to the *McCulloch v. Stanford* complaint (COPP-2014-CFP-046) is markedly off point. The *McCulloch v. Stanford* matter involves an allegation of misuse of the state seal and, further, the complained-of document has multiple references to specific candidate elections, something not present in the SOS newsletter language at issue in this Matter.

The Commissioner determines that there is no express advocacy and therefore no campaign practice violation in the use of the language used in the SOS newsletter.

2. Placement of SOS Newsletter Language Above the Listing of LR-126

The Complaint attaches a copy of the SOS’s “2014 Summer Edition email/newsletter” (Ex. 1, Complaint). The complaint alleges that the placement of the “Election Day Voter Registration” newsletter discussion directly above the newsletter listing of “2014 State Ballot Issues”, including a specific listing of LR-126, created advocacy.

The Commissioner declines to apply such a strained and inappropriate

determination. The standard set by the US Supreme Court is that the publication must “be susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” before it constitutes advocacy. *FEC v. Wisconsin Right to Life* at pp. 469-470. The Montana Secretary of State has duties, including publication of the official Voter Information Pamphlet, (Ex. 3, Complaint) that require the listing of all ballot issues. It is more reasonable to interpret the entirety of the text and design of the “2014 Summer Edition email/newsletter”, including the listing of LR-126, as being consistent with duty, rather than as advocacy. The Commissioner declines a determination of advocacy based on the placement or design of the content of the document.

3. Advocacy Does Not Result from Language Use by LR-126 Opponents

The Essmann complaint alleges implied advocacy based on the use by others of the information set out in the SOS newsletter. The Commissioner reviewed the documents reciting LR-126 opposition by the designates for the Voter Information Pamphlet, ACLU, MontPIRG, and Montana Conservation Voters (Exs. 3 and 6 to the Complaint). At most the documents show that entities expressly advocating a NO vote on LR-126, did so, in part, by making use of data and information taken from the SOS newsletter. There is nothing wrong with that use as the SOS newsletter information and data is public information and data that may be used by any of these groups. Absent coordination (and coordination is not alleged or shown) the SOS cannot be deemed to expressly advocate based on the advocacy of others.

4. There is No Misuse of Public Time or Resources

The complaint cites to the SOS's use of public time and resources in the production of the "2014 Summer Edition email/newsletter". The complaint asserts that such use is prohibited by § 2-2-121(3)(a) MCA because "...a public officer...may not use public time, equipment supplies....to solicit support for or opposition to ...the passage of a ballot issue..." Title 2 is ethics law but Title 13 campaign practice law incorporates these provisions of Title 2 through § 13-35-226(4) MCA: : "[a] public employee may not solicit support for or opposition to ...the passage of a ballot issue while on the job or at the place of employment."

The Commissioner takes administrative notice that, indeed, public resources were involved when the SOS prepared and published the "2014 Summer Edition email/newsletter". There is nothing wrong, however, with the use of public resources to accomplish a legitimate public purpose task, even if the task leads to information or data that may find its way into discussion in a political campaign. There seems to be some confusion on this point as the Commissioner releases this Decision to be followed shortly by three companion Decisions (*Grabow v. Malone*, COPP-2014-CFP-060; *Nelson v. City of Billings*, COPP-2014-CFP-052 and *Juve v. Roosevelt County Commission*, COPP-2014-CFP-063) dealing with similar complaints filed against public officials.

In this Matter the SOS's use of public funds for the SOS Newsletter served a public purpose and was not prohibited as neither the layout or language of

the newsletter expressly advocated a vote for or against LR126. In fact, given the alarmingly low 2014 voter turnout the SOS should be commended, not criticized, for attempting to increase awareness of voter registration opportunities. Likewise, agencies of government, like the SOS, are the natural repositories of information related to their areas of authority. Accordingly, agencies should be expected to (and commended when they do) provide information and data to the public that is of use to an elector when making an election Decision.

The Commissioner asks that Montanans take this discussion into consideration when assessing the appropriateness of government action such as that addressed in this Decision.

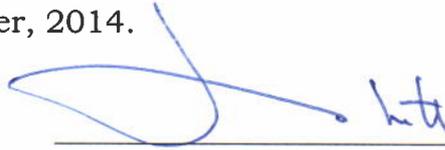
OVERALL DECISION

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must make, a decision as the law mandates that the Commissioner (“shall investigate,” *See*, § 13-37-111(2)(a) MCA) investigate any alleged violation of campaign practices law . The mandate to investigate is followed by a mandate to take action as the law requires that if there is “sufficient evidence” of a violation the Commissioner must (“shall notify”, *See* § 13-37-124 MCA) initiate consideration for prosecution.

This Commissioner, having duly considered the matters raised in the Complaint, and having completed his review and investigation, hereby holds and determines, under the above stated reasoning, that there is insufficient

evidence to justify a civil or criminal prosecution under § 13-35-226(4) MCA and § 13-37-124(1) MCA. Accordingly, the Commissioner dismisses this complaint in full.

DATED this 5th day of December, 2014.



Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana
P. O. Box 202401
1205 8th Avenue
Helena, MT 59620
Phone: (406)-444-4622