

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

IN THE MATTER OF THE
COMPLAINT AGAINST
TERRY KLAMPE

) SUMMARY OF FACTS AND
) STATEMENT OF FINDINGS
)

Former state senator Bill Farrell, of Missoula, Montana, in a complaint filed with this office on October 27, 1992, alleges that candidate Terry Klampe's campaign statements and advertisements violated the provisions of the political criminal libel statute, section 13-35-234, MCA. That statute provides as follows:

(1) 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.

(2) In addition to the misdemeanor penalty of subsection (1), a successful candidate who is adjudicated guilty of violating this section may be removed from office as provided in 13-35-106 and 13-35-107.

The results of an investigation of the alleged violation are set forth in the summary of facts that follows.

SUMMARY OF FACTS

1. Terry Klampe and Bill Farrell were candidates competing for the office of state senator in Senate District 31 in the 1992 general election.

2. Farrell was an incumbent state senator running for re-election in 1992.

3. Farrell complains that a radio campaign advertisement prepared by Klampe is "slanderous" because it implies that Farrell is a liar, a cheat and a thief. *He also complains that a campaign brochure prepared by Klampe contained several misrepresentations concerning Farrell's record.*

4. The radio advertisement placed by Klampe contained the following language:

[First voice]:

Hi, this is Hoyt Axton. I just want to say a couple words about my buddy Terry Klampe who's running for senate in my district. Friends, Terry won't lie to you, won't cheat you, won't steal from you. Isn't that what we're looking for in a politician? Think about it. Look at the other old boy. See what his record is. It might make you cry, you might want to hold some Kleenex when you read it. But Terry will treat you right. A vote for Terry Klampe is a vote for you and your folks. Check it out. Thanks.

[Next voice]:

Thanks Hoyt, and from all the people in the Klampe for Senate Committee.

5. The campaign brochure prepared by Klampe contained several representations concerning Farrell's legislative voting and attendance records during the 1991 regular legislative session. It stated that Farrell voted "no" on Senate Bill 366, which would have required health insurers to provide coverage for minimum mammography examinations. The official Senate Journal for the 1991 Montana legislative session shows that Farrell voted "yes" on the bill on second reading in the Senate, and "no" on third reading.

The bill was returned to the Senate with amendments, and Farrell voted "yes".

The brochure stated that Farrell voted "no" on Senate Bill 371, which would have required health insurers to provide coverage for "well child" health services for children from birth through five years of age. Farrell was absent during the vote on second reading and voted "no" on third reading.

The brochure stated that Farrell "voted against" House Bill 160, which concerned management of solid waste. Farrell voted "no" on second and third reading on the bill.

The brochure stated that Farrell "voted against" House Bill 660, another bill which concerned management of solid waste. Farrell voted "no" on second reading but voted "yes" on third reading.

The brochure stated that Farrell "voted against" House Bill 671, which would have revised the Montana Subdivision and Platting Act. When the bill came before the Senate on second reading, a number of amendments were proposed by motion. Farrell voted for three amendments, but then voted against the bill when it was moved that it be concurred in as amended. Farrell then voted in favor of a motion to indefinitely postpone action on the bill, which carried. Farrell next voted "no" on a motion to reconsider the Senate's vote to indefinitely postpone action on the bill, and the motion failed.

The brochure stated that Farrell voted "no" on House Bill 996, which, according to the brochure, "would have reduced taxes for

seniors and low-income people." When the bill came before the Senate, Farrell voted for two proposed amendments, the first of which failed and the second of which was adopted. He then voted against a motion that the bill, as amended, be concurred in. The motion carried. Farrell voted against the bill on third reading in the Senate.

6. The brochure stated that Farrell "has one of the worst attendance records in the Senate." When interviewed for this investigation, Klampe stated that Dave Hunter, who was Secretary of the Senate in 1991, gave him the information regarding Farrell's attendance record. Dave Hunter was interviewed, and he stated that he talked to Klampe about Farrell's attendance record in the Legislature. Hunter stated that, based on a small sampling of senators' voting records during the 1991 session, Farrell was one of the five or six senators with the worst attendance records at times when votes were taken. In addition, Hunter stated that Farrell did not attend the Legislature on Saturdays during the first eleven or twelve weeks of the 1991 regular session.

7. Farrell complained about the wording in the brochure which stated that House Bill 996 "would have reduced taxes for seniors and low-income people." He claims that Klampe misrepresented the substance of the bill. Klampe stated that he spoke with the author of House Bill 996, and with Brad Simshaw and Bob Hartman of the Department of Revenue. Simshaw was interviewed for this investigation. He stated that he had telephone conversations with Klampe concerning House Bill 996. Simshaw told

Klampe that the bill would have helped low income people by possibly dropping some of them from the tax rolls. He did not recall telling Klampe that the bill would have helped senior citizens.

8. Klampe stated that the brochure was prepared based mainly on voting record information compiled by the Montana Alliance for Progressive Policy. He stated that he trusted the information that he received, and that he approved the contents of the brochure and takes full responsibility it.

9. The Montana Alliance for Progressive Policy (MAPP) compiled and published a booklet entitled "1991 Legislative Voting Record". The booklet contains voting records of house and senate members on bills that MAPP and associated groups deemed significant. The MAPP booklet indicated that Farrell voted "wrong" on Senate Bill 366, because he voted against it on third reading in the Senate. The booklet indicated that Farrell voted "wrong" on House Bill 660, because he voted against it on second reading in the Senate.

STATEMENT OF FINDINGS

Section 13-35-234, MCA, quoted in full on page one, is Montana's political criminal libel statute. A violation can be established through proof of alternative mental states. The statute requires proof that a person made a false statement or charge or misrepresented a candidate's voting record or position on public issues either "knowingly" or "with reckless disregard"

for the truth of the statement or representation. Matter of the Complaint Against Jack Rea, Summary of Facts and Statement of Findings, May 10, 1991, at 13-14. In general, to establish a violation it would be necessary to prove either that the person who made the statement or representation was "aware of a high probability" that the statement or representation was false, or that the person in fact "entertained serious doubts as to the truth" of the statement or representation. Id. at 13-16.

The radio ad approved by Klampe, while it did not contain any direct statements or charges concerning Farrell, could be construed as containing the thinly veiled implication that Farrell would lie, cheat or steal. Section 13-35-234, MCA, however, prohibits a person from making or publishing "any false statement or charge reflecting on any candidate's character or morality". [Emphasis added.] I find nothing in the language of the ad which constitutes an express "false statement or charge" reflecting on candidate Farrell's character or morality. While the ad unquestionably contains innuendo, the Legislature has determined that an express false statement or charge is required to support a finding that the statute was violated. Section 13-35-234, MCA, is a criminal statute, which must be strictly construed and may not be extended by construction. Montana Automobile Association v. Greely, 193 Mont. 378, 389, 632 P.2d 300, 306 (1981); Shipman v. Todd, 131 Mont. 365, 368, 310 P.2d 300, 302 (1957).

The brochure's representations concerning Farrell's voting records could be characterized as incomplete in some respects.

Specifically, the brochure stated that Farrell voted "no" on Senate Bill 366. While Farrell did vote "no" on third reading in the Senate, he voted "yes" when the bill was returned to the Senate from the House with amendments. Although the statement that Farrell voted "no" on Senate Bill 366 is correct, it obviously does not present the reader with the entire picture of Farrell's voting record on the bill. Similarly, the brochure stated that Farrell "voted against" House Bill 660. Farrell did vote "no" on second reading in the Senate, but then voted "yes" on third reading. Again, while the brochure is technically correct, it presents only half of the story. However, notwithstanding these criticisms of the brochure, there is insufficient evidence that Klampe knowingly or with reckless disregard misrepresented Farrell's voting record in the brochure.

As noted, the claims in the brochure are technically correct; Farrell did vote against each bill at specific stages of the bills' progress through the Legislature. And, section 13-35-234, MCA, does not define what a candidate's "voting record" is. There is certainly nothing in title 13, chapter 35, MCA, indicating a legislative intent that a candidate's voting record must be construed as consisting of all votes on a particular bill. Thus, while the content of the brochure may be viewed as incomplete in some respects, the Legislature has determined that such a deficiency is not sufficient to establish a violation of the statute.

Moreover, the evidence does not support a finding of the requisite mental state to conclude that the statute was violated. As previously noted, section 13-35-234, MCA, requires proof of either "knowledge" or "reckless disregard" on the part of the person alleged to have violated the statute.

To prove that a person made a representation about a candidate's voting record with knowledge of its falsity, it would be necessary to prove that the person was "aware of a high probability" that the representation was false. §§ 13-35-101(1) and 45-2-101(33), MCA. There is insufficient evidence that Klampe was "aware of a high probability" that the representations concerning Farrell's voting record were false. As previously discussed, the representations are technically correct, although they do not present the complete picture of Farrell's voting record. My investigation disclosed no evidence, moreover, that Klampe was aware of a high probability that the representations in the brochure were false.

A violation of the statute can also be proved if there is evidence that a person acted with "reckless disregard". The United States Supreme Court has stated that "reckless disregard for truth" means that the defendant "in fact entertained serious doubts as to the truth of his publications." Herbert v. Lando, 441 U.S. 153, 156 (1979). 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." Id., 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).

Applying these principles to the facts established during the investigation of this matter, the evidence does not support a finding that Klampe in fact "entertained serious doubts as to the truth" of the representations in the brochure he approved. In fact, as previously noted, the representations concerning the voting record were arguably not false, thus not misrepresentations at all. Nor does the evidence establish that Klampe had any "obvious reason to doubt the veracity of his informant [MAPP] or the accuracy of [its] reports" to him. The MAPP booklet that Klampe relied on stated that Farrell voted "wrong" on both Senate Bill 366 and House Bill 660, because he voted "no" on the bill when it was before the Senate. Although, as previously noted, Klampe could have provided more information concerning the stages of the legislation at the time the votes were cast by Farrell, the evidence remains insufficient to establish the requisite mental state to support a conclusion that the statute was violated.

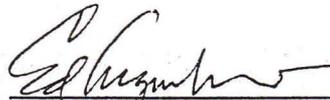
As to Klampe's statement that House Bill 996 "would have reduced taxes for seniors and low-income people", he may have drawn some conclusions about the projected effect of the bill that were not necessarily warranted by the facts. Again, however, as previously discussed, there is insufficient evidence to support a

conclusion that he intentionally misrepresented Farrell's voting record on this bill.

Klampe's representation concerning Farrell's legislative attendance record was based on information provided by Dave Hunter, who was Secretary of the Senate during the 1991 regular session. This particular representation by Klampe does not fall within the proscriptive language of section 13-35-234, MCA. It is not a false statement or charge reflecting on Farrell's character or morality, and it is not a misrepresentation of Farrell's voting record.

Based on the facts and these findings, I conclude that no further action is warranted against Terry Klampe.

DATED this 16th day of April, 1993.



ED ARGENBRIGHT
Commissioner of Political Practices