

**BEFORE THE COMMISSIONER OF POLITICAL PRACTICES
STATE OF MONTANA**

MARY JO FOX,)
)
 Charging Party,)
 vs.)
)
BRAD MOLNAR,)
)
 Respondent.)

DECISION ON RESPONDENT’S MOTION TO DISMISS

I. Background

The Commissioner of Political Practices of the State of Montana, hereinafter referred to as “the Commissioner,” has appointed the undersigned as the Hearings Examiner in this case. Mary Jo Fox, hereafter referred to as “the Charging Party,” has filed a series of complaints with the Commissioner against Montana Public Service Commissioner, Brad Molnar, hereinafter referred to as “the Respondent.”

On January 24, 2009, the Respondent filed a motion to dismiss all of the Charging Party’s complaints against him. This Hearings Examiner has received briefs from both parties. Oral argument has been waived by both parties, and the matter is now ready for decision.

The Respondent argues that the Charging Party lacks standing to pursue the matters set forth in the Complaints. The Charging Party responds and alleges that the State law under which the complaints are filed allows any “person” to file a complaint with the Commissioner, and that the Charging Party is such a “person.” Additionally, the Charging Party argues that the rules on standing, announced by the Montana Supreme Court, while applicable to lawsuits filed in Court, do not apply to this administrative proceeding. Finally, the Charging Party argues that if judicial standing requirements are applicable to this administrative case, she has the proper standing to pursue the matters set forth in the complaints.

Without necessarily adopting all of the United States Supreme Court doctrine on standing, the Montana Supreme Court has relied on the U.S. Court’s standing interpretations. See *Druffel v. Board of Adjustment*, 339 Mont. 57, 168 P.3d 640, 643 (2007) (citing and relying on *Sierra Club v. Morton*, 405 U.S. 727 (1972)). Both Courts recognize that standing is premised on “two different doctrines: first, constitutional doctrines drawn from Article III of the United

States Constitution, and second, discretionary doctrines intended to manage judicial review of legislative enactments. Id.

II. Standing as a Constitutional Doctrine

The first portion of the judicial doctrine of “standing to sue” is based on the Article III¹ Constitutional directive that authorizes courts to hear and resolve only “cases” and “controversies.”² Because courts are limited to address only actual cases and controversies, the United States Supreme Court and the Montana Supreme Court have developed standards to determine whether a matter brought to it for consideration is an actual “case” or “controversy.” Without addressing all of these constitutional standards, it is clear that for a federal court or a Montana state court to address a matter, the person bringing the action must have suffered an “injury” that was “caused” by the challenged action, and the challenged action can be “redressed” by the decision of the court.³ Again, both the United States Supreme Court and the Montana

¹ Article III of the United States Constitution creates and authorizes the Federal Courts as a branch of the federal Government and determines the jurisdiction of those courts.

² *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (“The judicial power, Art. III, §1 (of the Constitution)limits the jurisdiction of federal courts to “cases” and “controversies....”.

³ In federal court:

Plaintiff must have suffered an “injury-in-fact” ----and invasion of a legally-protected interest which is (a) concrete and particularized,... and (b) “actual or imminent, not ‘conjectural’ or hypothetical.” Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be “fairly ...trace[able] to the challenged action of the defendant, and not ...th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely “speculative,” that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61.

In Montana state court:

To establish standing ... the complaining party must (1) clearly allege past, present, or threatened injury, and (2) allege an injury that is distinguishable from the injury to the public generally, though the injury need not be exclusive to the complaining party. [However,] persons who fail to allege any personal interest or injury, beyond that common interest of all citizens and taxpayers lack standing. [Thus, the] injury alleged must be personal to the plaintiff distinguished from the community in general [and] result in a ‘concrete adverseness’ personal to the party staking a claim in the outcome. *Fleenor v. Darby School*

Supreme Court have defined and provided standards to determine whether the person bringing the court action has suffered an “injury.”

For actions initiated in federal court, the United States Supreme Court requires that an “injury” must be concrete, particularized and present a past or imminent injury. The Montana Supreme Court has required similar standards. For a Montana court to have standing, the injury presented for adjudication must not only have occurred, or be imminent, to the person bringing the action, but the injury must, in some way, be unique or particularized to that person. Thus, to have standing, the person bringing the action must be able to demonstrate that her injury was in some way particular to her, of a kind or magnitude not suffered by the public at-large. See *Fleenor v. Darby School District*, 331 Mont 124, 127, 128 P.3d 1048, 1050 (2006).

However, the Article III Constitutional requirements for standing are applicable only to judicial proceedings, not administrative proceedings. In this case the authority of the Commissioner, a Montana State administrative official, is conferred by the Montana state legislature, not the Constitution, and jurisdiction is conferred upon him, by the legislature, as an administrative officer of the State of Montana. Article III, considerations--applicable only to courts--do not apply in this case.

III. Standing as a Matter of Statutory Interpretation

Apart from Article III, constitutional considerations, a person bringing any action in court, based on an alleged violation of a statute, must demonstrate that the interest he asserts is recognized by the statute itself. See *Air Courier Conference v. Postal Workers Union*, 498 U.S. 517 (1991). In *Air Courier Conference*, the plaintiff, the Postal Workers Union, brought a federal court suit challenging a action of the United States Postal Service. The Court stated the standing issue was whether the Union was asserting an interest—protection of jobs—which was recognized by the specific Congressional enactment that formed the basis of the suit. The Court determined that the federal postal statute was not enacted for the purpose of protecting jobs, nor was job protection an interest recognized by the statute. Consequently, the Court held that there was no “statutory” standing to bring the jobs issue. This issue of “statutory” standing is often stated as whether the plaintiff is asserting an interest arguably within “zone of interests” protected or regulated by the statute.

Since legislative bodies have the power to create legally-cognizable rights and interests by enactments of law, they have the power to determine the nature and extent of the interests created or protected. In *Air Courier Conference*, the Court determined that Congress did not intended that its enactment was to protect jobs. In this context, what has been referred to as “statutory standing,” is in reality asking whether a plaintiff’s cause of action or claim for relief is

District, 331 Mont. 124, 127 P.3d 1048, 1051 (2006).

recognizable (within the zone of interests) by the statute, and thus, involves determining legislative intent.

IV. Application of the Standing Doctrine to this Case

Again, like the constitutional standing issue, legislative standing (the zone of interests test) is used by **courts** to determine whether **they** should interject themselves into a controversy. Whether a court has standing to interject itself, is a much different question than the issue presented here. Here the Respondent alleges that the administrative body created by the legislature to police and enforce “public trust duties” may not hear a matter brought by the Charging Party, a Montana citizen, against the Respondent, a Montana public office holder.

The Montana legislature provided that Montana public office holders and public employees have a duty of public trust to the people of the state. Section 2-2-103, MCA. The legislature provided that “a person” alleging a breach of this duty may bring a “complaint with the Commissioner of Political Practices.....” Section 2-2-136 MCA. The issue that the Respondent raises is whether the Charging Party is a proper “person” to bring a complaint against the Respondent, and whether the interests the Charging Party asserts are within the interests recognized by the legislature. It is determined that she is a proper party and the interests she asserts are recognized by the statute in question.

The Montana legislature did not define the term “person,” but it is determined that it intended that the term be broadly construed so as to assure proper enforcement of the public trust duty. However, it is possible that the legislature did not intend that any person in the state may properly bring a complaint against any and all state public officials or employees. For example, could a person residing in Libby successfully bring such a complaint against a state officer, legislator or state employee in far-off Carter County absent a showing of some particularized interest in the matter and that her interest was recognized by the statute. The issue would be one of statutory interpretation, i.e. whether she was a proper “person” to bring the complaint. While this question may arise in some future proceeding, and is not determined here, the instant case does not appear to present the issue. The Charging Party alleges that she lives in the political district represented by the Respondent and has a particularized interest in her complaints against the Respondent; she is a constituent of his, and a prominent supporter of his opponent in the last election.

At the hearing to address the substance of the Charging Party’s allegations against the Respondent, she will be afforded the opportunity to present evidence of her interest in this matter, and Respondent will be allowed to challenge. If at that time, the Charging Party’s interest appears too remote to be cognizable under the statute, the Respondent will be given the opportunity to renew his motion to dismiss based on the proper interpretation of a “person” authorized to bring to the Commissioner a breach of “public trust” action under Section 2-2-136 MCA.

RESPONDENT'S MOTION TO DISMISS IS DENIED.

Dated: April 2, 2009

Wm L. Corbett

William L. Corbett, Hearings Examiner