

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Hope v Busby Voters Precinct 26(alleged 28) Big Horn County  No. COPP 2012-CFP-46	Summary of Facts and Finding of Insufficient Evidence to Show a Violation of Montana's Campaign Practices Act  DISMISSAL OF COMPLAINT
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In the 2012 elections Big Horn County, Montana, sited its precinct No. 26 voting site at Busby School, Busby, Montana.

On November 29, 2012, Busby resident Nona Hope filed a complaint against the Busby voting precinct in Big Horn County alleging that on the day of the November 2012 elections certain illegal election activity took place at the Precinct No. 26.

**SUBSTANTIVE ISSUES ADDRESSED**

The substantive area of campaign finance law addressed by this decision is electioneering at a voting site on the day of an election.

**FINDING OF FACTS**

The facts necessary for this Decision are as follows:

1. The 2012 general election in Montana was held on November 6, 2012. Secretary of State (SOS) website.
2. The November 6, 2012 election in Busby, Montana was precinct No.

- 26, Big Horn County, Montana with the site of election being Busby School. SOS website, Commissioner's records.
3. Ms. Hope's complaint lists the Busby site as that of precinct No. 28 but that precinct number is not correct. The correct precinct number is No. 26.
  4. On November 6, 2012 Ms. Hope served as an election judge for Precinct No. 26. Verified Complaint.
  5. In her capacity as election judge Ms. Hope found and removed numerous copies of the Montana Native Vote "I Vote" voting guide [hereinafter Voting Guide] from polling booths in Precinct No. 26. Verified Complaint. A copy of this Voting Guide is attached to Ms. Hope's complaint and to this Decision as Exhibit 1.
  6. Montana Native Vote is duly registered as a Montana public benefit corporation [SOS records] and as a political committee with the Commissioner [Commissioner's records]. Montana Native Vote duly reported printing expenditures associated with the November 6, 2012 election. [Commissioner's records]. Montana Native Vote set out a proper and complete attribution on the Voting Guide. See Exhibit 1 and §13-35-225 MCA.
  7. Ms. Hope's complaint alleges that the Voting Guide "was given out outside the door where we had the voting booths set up."
  8. The investigation conducted by this Office, including a response from Montana Native Vote, determines the following:

- a. A representative of Montana Native Vote, Maria George, was present in the vicinity of precinct No. 26 on November 6, 2012.
  - b. Montana Native Vote, through Maria George, gave copies of the Voting Guide to electors entering precinct No. 26.
  - c. Maria George gave out the Voting Guide while seated on a chair in the parking lot next to the sidewalk outside of but leading to the door in the Busby school building that gave entrance to the Busby polling site inside of the building. Maria George, through Montana Native Vote attorney Karl Englund, told this Office that she determined the location of her chair by pacing off a distance of 100 feet from the door of the Busby school that electors were entering in order to vote.
9. On November 6, 2012 there was no challenge by any election judge made to the location of chair in the parking lot next to the sidewalk, as selected by Maria George. Commissioner's Records.
  10. Busby, Montana, is located within the boundaries of the Northern Cheyenne Indian Reservation. [Northern Cheyenne website]. There are approximately 10,000 enrolled Tribal members, with 5,000 living within the boundaries of the Reservation. Id.
  11. Busby high school is the Northern Cheyenne Tribal school operating under the authority of the Bureau of Indian Education. Bureau of Indian Education, Montana website.
  12. The entity responsible for the Voting Guide at issue in this matter is

Montana Native Vote, not Busby Precinct 26.

### **DISCUSSION**

Montana Native Vote was duly registered as a corporation and as a political committee. FF No 6. As such, Montana Native Vote was properly positioned to engage in election activity. The Voting Guide distributed by Montana Native Vote listed preferred candidates and ballot positions. As such, the Voting Guide constituted electioneering and therefore Montana Native Vote engaged in electioneering with the Voting Guide. See 44.10.311 ARM.

In turn, Montana law prohibits "...electioneering on election day within any polling place or any building in which an election is being held or within 100 feet of any entrance to the building..." §13-35-211(1) MCA. Montana Native Vote's direct voting day electioneering activity consisted of handing its Voting Guide to electors. The Commissioner determines that Montana Native Vote was well aware of the 100 foot "no electioneering" zone and positioned the distribution of the Voting Guide so as to keep its direct electioneering at the edge of the 100 foot legal boundary. **See** FF No. 8. Having so acted to keep its direct electioneering activity out of disallowed zone, the direct electioneering activity of Montana Native Vote did not violate Montana law.

This Commissioner notes that deference to speech rights has caused past Commissioners to be cautious when making a determination of whether voting day electioneering occurred. **See** *Gee v Childers* decided 2-17-2000 and *Butorovich v Walsh* decided 11-02-2000. In that regard, the Montana Election Judge Handbook for 2012, at page 14, [Secretary of State website] gives

instructions to election judges as to how to deal with polling place electioneering on election day, including a clear description of the 100 foot zone. The 2012 voting day, polling place electioneering of Montana Native Vote at Precinct 26 was highly visible and easily accessible to an election judge. Had Montana Native Vote electioneering crossed into the prohibited 100 foot zone on election day it should have been dealt by fiat on election day, not later by complaint.

The next issue to consider is whether Montana Native Vote engaged in indirect electioneering because copies of its Voting Guide were carried by electors into a voting booth. In that regard it is noted that Busby is within the boundaries of the Northern Cheyenne Reservation [FF No. 10]. Further, Busby school is a Tribal school. [FF No. 11]. Given that a largely Native population was voting at Big Horn County Precinct No. 26 it is not surprising that many electors took a copy of the Voting Guide from Montana Native Vote.

Once the elector took the Voting Guide then it became the elector's document, not the document of Montana Native Vote. No electioneering occurs when an elector does nothing more than carry a voting guide into a polling place or voting booth. An elector votes in private, in the voting booth and has a right to bring a voting guide in to assist them in voting. It makes no difference whether the Voting Guide came into the elector's possession 100 miles or 100 feet from the voting booth. Either distance is legal and the Voting Guide was transported into the 100 foot zone and the voting booth by the elector, not by Montana Native Vote. This Commissioner finds that Montana

Native Vote did not engage in indirect electioneering because an elector chose to bring its Voting Guide into a voting booth.

Finally, there is the issue of the Voting Guide being left in the voting booth by the elector when he or she finished voting. The Montana Election Judge Handbook for 2012, at page 43, directs election judges to: "check from time to time to see there are no stickers or campaign materials stuck on or in the voting booth or device." Ms. Hope acted appropriately and responsibly by checking for and removing the copies of the Voting Guide left behind by electors. Once the elector carrying the Voting Guide used it and left the voting booth, the Voting Guide, if left behind by the elector, became campaign material and needed to be removed.

#### 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 §13-37-124(1) MCA.

The Commissioner hereby dismisses this complaint in full.

DATED this 25<sup>th</sup> day of July, 2013.



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