

4. Part IV of the L-5 requires the principal to list "lobbying expenditures by category" for the reporting period. Included as categories of expenditures are "salaries or part thereof" and "office expenses related to lobbying". Seven-Up Pete listed no lobbying expenditures on the L-5.

5. Part V of the L-5 requires the principal to "list each official action on which an effort was exerted to support, oppose, or modify." Seven-Up Pete listed the following legislative bills which it supported: House Bill (HB) 413, HB 338, HB 410, HB 501, HB 263, Senate Bill (SB) 330, SB 331, SB 115.

6. Seven-Up Pete's L-5 is signed by Charles M. Rose, and dated May 30, 1995. It was filed with the Commissioner on May 31, 1995.

7. James D. Jensen, Executive Director of the Montana Environmental Information Center (MEIC), filed the complaint against Seven-Up Pete on July 7, 1995. Mr. Jensen and MEIC allege that Seven-Up Pete failed to report lobbying expenditures on the L-5 dated May 30, 1995. The complaint states that Mr. Jensen witnessed employees of Seven-Up Pete testifying on legislation, and that he does not believe they were volunteering their time. Mr. Jensen alleges that Seven-Up Pete violated Mont. Code Ann. §§ 5-7-208 and 5-7-209 by failing to report expenditures for lobbying. He also claims that Seven-Up Pete knowingly filed a false report, which constitutes the criminal offense of unsworn falsification to authorities.

8. Seven-Up Pete filed another L-5 on July 10, 1995, which it designated as a "supplement" to its May 30, 1995 L-5. The supplement contains only one change from the May 30, 1995 L-5, listing the following lobbying expenditures in Part IV of the report: \$195.19 for salaries and \$20.00 for office expenses related to lobbying. The total of lobbying expenditures claimed on the July 10, 1995 L-5 is \$215.19. The July 10, 1995 L-5 is signed by Charles M. Rose.

9. Charles M. "Chuck" Rose is the Manager of Regulatory Affairs for Seven-Up Pete. He is responsible for acquiring the necessary permits to explore and develop the gold mine west of Lincoln. He also disseminates public information and deals with government agencies involved in the permitting process. He is a full-time employee of Seven-Up Pete, and his annual salary is \$58,000. He has been registered as a lobbyist for the company since 1993.

10. During the 1995 legislative session Mr. Rose sat in on hearings regarding SB 330 and SB 331, which dealt with water quality. He did not testify and did not conduct any lobbying with respect to those bills. He stated that he attended the hearings to learn about the potential changes in the law, and to determine whether any changes would affect the permitting process as it relates to the mine for which Seven-Up Pete was formed.

11. Mr. Rose offered less than one hour of testimony in support of HB 501, which dealt with civil actions challenging decisions of the Board of Land Commissioners.

12. Mr. Rose offered less than one hour of testimony in support of SB 115, which dealt with ethics for public officials and employees.

13. Mr. Rose also had brief hallway meetings with Representatives John Cobb and Chase Hibbard, which he estimated lasted less than three minutes apiece. He also attempted to speak with Representative Rick Jore concerning a bill, but Rep. Jore was on his way to a hearing and did not have time to talk.

14. Mr. Rose stated that he did not claim any lobbying expenses on Seven-Up Pete's May 30, 1995 L-5 because he did not realize that testifying on bills was considered lobbying. He stated that he believed lobbying involved more direct contact with legislators, such as lunches, entertaining, etc. He stated he first became aware that testifying and other contact with legislators could be lobbying when he learned of the complaint filed by Mr. Jensen and MEIC. Mr. Rose insisted that he did not knowingly submit a false report; he simply did not realize that his activities and any associated expenses were reportable lobbying expenditures.

15. E. Michael Schern is the Project Manager at the Seven-Up Pete's mine west of Lincoln. When first hired by Phelps Dodge Mining Company he had no lobbying duties. More recently, however, the company has registered its top managers as lobbyists. Although he is registered as a lobbyist for Seven-Up Pete, he stated that he has not done any lobbying in 1995. His primary contact with the Montana Legislature in 1995 has come from speaking with Mr. Rose.

16. Mr. Schern stated that he, like Mr. Rose, did not realize that testifying on a bill was lobbying. He believed anyone could testify on a bill without being considered to be lobbying. He thought lobbying involved more direct personal contact with legislators, such as buying them meals or gifts, or entertaining them. Mr. Schern stated that Seven-Up Pete did not intentionally fail to disclose lobbying expenditures. He stated that the company made a mistake, and corrected it as soon as it became aware of the mistake.

17. Upon learning that the May 30, 1995 L-5 was inaccurate, following the filing of the complaint by Mr. Jensen and MEIC, Mr. Schern and Mr. Rose made the necessary calculations to enable them to file a revised L-5. They calculated an hour for each bill on which Mr. Rose either sat in or testified at the hearing, and an hour for each contact or attempt at contact with a legislator. They made these calculations even though each activity only took a fraction of an hour. They computed the reported amount by allocating seven hours of Mr. Rose's annual salary to the lobbying activities. They then added \$20.00 under the "office expenses" category, for copying charges. The revised L-5 was signed on July 10, 1995 by Mr. Rose, and filed on that date with the Commissioner's office.

18. The July 10, 1995 L-5 filed by Seven-Up Pete appears to accurately report the lobbying expenditures of Seven-Up Pete for the reporting period covered by the report. Since Mr. Rose's annual salary is \$58,000, his hourly salary (in a 2,080-hour work

year) would be \$27.884615. Seven hours multiplied by \$27.884615 equals \$195.19. No evidence of additional lobbying expenditures by Seven-Up Pete during the time period in question has been disclosed by this investigation.

19. Richard Lambert is the Chief Mine Engineer on Seven-Up Pete. He is responsible for the planning and design of the mine and facility layout. Although he is registered as a lobbyist for Seven-Up Pete, he has done no lobbying in 1995.

20. James Volberding is the Chief Geologist for Seven-Up Pete. Although he is registered as a lobbyist for Seven-Up Pete, he has done no lobbying in 1995.

21. Although Mr. Jensen's complaint letter alleges that he "witnessed employees who are registered lobbyists of [Seven-Up Pete] testifying on legislation", he stated that he only saw Mr. Rose testify on bills.

STATEMENT OF FINDINGS

A "principal" is a "person who employs a lobbyist." Mont. Code Ann. § 5-7-102(12). A "lobbyist" is a person "who engages in the practice of lobbying for hire." Mont. Code Ann. § 5-7-102(8)(a). "Lobbying for hire" is defined as including:

activities of the officers, agents, attorneys, or employees of a principal who are paid, reimbursed, or retained by the principal and whose duties include lobbying.

Mont. Code Ann. § 5-7-102(6)(a) defines "lobbying" as:

the practice of promoting or opposing the introduction or enactment of legislation before the legislature or the members of the legislature by a person other than a member of the legislature or a public official.

Mont. Code Ann. § 5-7-208 requires principals to file with the Commissioner periodic reports of payments made for the purpose of lobbying. Each report must list all payments for lobbying in certain specified categories, including "salaries and fees" and "other office expenses." Mont. Code Ann. §§ 5-7-208(5)(a)(v) and (viii). The Commissioner has, by administrative rule, clarified reporting requirements for principals whose employees engage in lobbying activities:

(1) Pursuant to § 5-7-208(5)(a), MCA, reports filed by principals shall disclose fees and salaries, paid to lobbyists, in the following manner:

. . . .

(b) If the lobbyist is a full-time employee or officer of the principal, and his duties include lobbying, the salary may be allocated on a daily basis or on an hourly basis. If computed on an hourly basis, a fraction of an hour shall be counted as an hour.

Mont. Admin. R. 44.12.203.

When the above statutory and regulatory provisions are considered it is apparent that testimony before a legislative committee in support of legislation, by an employee whose duties include lobbying, is a lobbying activity for which expenditures must be reported by the principal. The L-5 report dated May 30, 1995, filed by Seven-Up Pete, should have disclosed the portion of the salary paid to Mr. Rose allocated to his lobbying activities before the 1995 Montana Legislature.

Mont. Code Ann. § 5-7-209 states that a principal "who knowingly files a false, erroneous, or incomplete statement commits the offense of unsworn falsification to authorities." There is

insufficient evidence that Seven-Up Pete knowingly filed a false report. Unsworn falsification to authorities is a misdemeanor criminal offense defined by Mont. Code Ann. § 45-7-203. Under Mont. Code Ann. § 5-7-209 the offense must be committed "knowingly." Mont. Code Ann. § 45-2-101(33) defines "knowingly" as follows:

. . . [A] person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence. Equivalent terms, such as "knowing" or "with knowledge", have the same meaning.

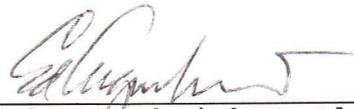
Applying this definition, to establish a violation in this case it would be necessary to prove beyond a reasonable doubt that Seven-Up Pete was "aware of a high probability" that the May 30, 1995 L-5 contained false, erroneous, or incomplete statements. The investigation has disclosed insufficient evidence that Charles Rose, Michael Schern, or any other Seven-Up Pete officials were aware of a high probability that the information contained in the initial report was incorrect.

Mont. Code Ann. § 5-7-305 also provides that violation of the provisions of title 5, chapter 7, Montana Code Annotated may be a misdemeanor, or may subject the offender to civil monetary penalties. As noted, the investigation has not revealed sufficient evidence of an intentional violation of the statutes by Seven-Up Pete. Nevertheless, there is evidence that Seven-Up Pete

negligently violated Mont. Code Ann. § 5-7-208 by failing to report the lobbying expenditures in its May 30, 1995 report. Reasonable inquiry would have disclosed the above-cited statutes and rules, which require reporting of the expenditures.

Based on the facts and these findings, I will confer with the Attorney General and the County Attorney concerning what enforcement action, if any, should be undertaken. Mont. Code Ann. § 5-7-305.

DATED this 9th day of August, 1995.



Ed Argenbright, Ed.D.
Commissioner of Political Practices