BEFORE THE COMMISSIONER OF

POLITICAL PRACTICES

In the Matter of the)
Complaint Against PETER TALBOT)

SUMMARY OF FACTS AND STATEMENT OF FINDINGS

Michael J. Kiedrowski, complainant, resides in Missoula, Montana. Complainant filed a complaint against Peter Talbot, campaign manager for the Lois Herbig campaign. The complaint alleges that Peter Talbot violated Mont. Code Ann. §13-35-233 when he made numerous telephone calls on election day. Complainant alleges that respondent's conduct constituted unlawful solicitation of votes on election day.

Summary of Facts

1. Peter Talbot, respondent, was the campaign manager for Lois Herbig, city council candidate for the Ward 1 seat.

2. Respondent is also the head of a political action committee, entitled the "New Party."

3. On election day, Tuesday, November 7, 1995, respondent made approximately 100 phone calls to registered voters in Missoula. Three other campaign volunteers also made between 50-75 telephone calls in relation to the campaign. Respondent designed a script to guide the callers in their conversations with the voters. The script utilized by the volunteers follows:

> GET-OUT-THE-VOTE PHONE CALLS/ELECTION DAY 1995
> Herbig for Council and Open Space
>
> "Hi, this is _____(your name) from the Lois Herbig for Council AND Open Space Campaigns, reminding you that today is Election Day. The polls are open 'til eight... and I know it's crummy weather out, but there are a couple of tight races and every vote will count. Thanks."

4. Respondent indicated that a total of approximately 300-400 telephone calls were made. The involved callers indicate that the purpose of the telephone calls was to "get out the vote." Ren Essene, a campaign volunteer stated that she simply read the script. She stated that the only time that she varied from the script was to shorten the message, when leaving a message on an answering machine. Essene further stated that she wanted everyone to be involved in the process. Additionally, a large effort to register student voters had been made and she felt it necessary to remind citizens to vote. Essene stated that it was never her intention to persuade any citizen one way or another.

5. Respondent admits that the telephone calls were made, and he further admits that they were made on election day. He stated that the purpose of the calls was to "get out the vote." Respondent also maintains that a member of the campaign organization contacted the county election office to inquire as to the appropriate nature of "get out the vote" calls. Respondent adamantly maintains that it was not ever his intention to persuade voters to vote one way or another.

6. Complainant states that he did not answer his telephone, rather the message was left on his answering machine. Complainant submitted a cassette with the recorded message with the complaint. The message left on the machine was as follows:

> "Hi Mark and Mike, this is Pete Talbot calling from the Lois Herbig for Council and Open Space Campaigns, reminding you that today is election day. Uh, polls are open til eight, I believe you vote up on the third floor of the UC. Uh, couple of tight races, where every vote counts. Uh, thanks for your support. Bye-bye."

7. The Missoula County election office called the Commissioner and confirmed that a member of the Lois Herbig campaign had inquired as to the appropriateness of calls made in relation to a "get out the vote" effort. The election office indicated that stating the name of the individual calling as well as the campaign or ballot issue which the caller represents is acceptable.

8. After reading the local newspaper, Bill Shay called the Commissioner and indicated that he had also received a call from one of the volunteers of the Lois Herbig/Open Space campaigns on election day. Bill Shay had run an unsuccessful race in the primary election. He stated that while he could not remember the wording in the call, he felt that it was a tactic to influence voters.

9. Complainant alleges that the comment "thank you for your support" amounted to solicitation of votes as described in §13-35-233, MCA.

Statement of Findings

Complainant alleges that respondent violated Mont. Code Ann. §13-35-233 which provides:

> **Solicitation of votes on election day.** (1) It is unlawful for a person or a political committee to place an advertisement supporting or opposing a candidate or a ballot issue for use on election day. Failure to remove billboards, yard signs, or posters on election day is not considered a violation.

Violation of this statute is a misdemeanor and may result in imprisonment of up to six months or a fine up to $1,000.00 or both.

To establish a violation of this statute, it is first necessary to prove that the facts of this case involve placement of advertisement for use on election day. The facts in this case indicate that respondent made numerous telephone calls on election day. Respondent has stated that the purpose of the telephone calls was not to express advocacy of any particular issue or candidate, but rather to urge registered voters to go to the polls and exercise their right to vote. The telephone calls were what has traditionally been called, "Get out the vote" calls.

Complainant alleges that these phone calls were "solicitation" in violation of the statute. Complainant did not answer the telephone, and respondent left a message on the answering machine. The threshold issue in this case is whether or not the telephone calls made by respondent is placing an advertisement. The statute clearly prohibits the placement of an advertisement for use on election day. Title 13, Montana Code Annotated fails to provide a definition of "advertisement." However, dictionaries reveal that advertisement is defined as "the act of or process of advertising." Advertising is defined as "the action of calling something to the attention of the public especially by paid announcements." Webster's New Collegiate Dictionary (1981). Solicitation is defined as "a moving or drawing force", "incitement."

Definitions of advertisement and solicitation can also be found in Black's Law Dictionary. Advertisement is defined as "notice given in a manner designed to attract public attention. Information communicated to the public, or to an individual concerned, as by handbills, newspaper, television, billboards, radio." The Black's legal definition of solicitation includes, "Asking, enticing, urgent request." Black's Law Dictionary, Abridged sixth edition, (1991).

Respondent's conduct did not amount to advertising or solicitation of votes. First, respondent's act of calling on the telephone cannot be considered advertisement. Neither the message, nor the individuals who made the telephone calls were paid. Second, the message which was given during the course of the call was not solicitation. It is common practice for "get out the vote" callers to identify themselves, indeed it is expected. Further, the statement "thank you for your support" does not rise to the level of solicitation. That phrase does not include urgent requests, nor did respondent ask for a vote. The phrase was inserted at the end of the conversation, in much the same manner as any farewell comment.

The facts in this case are not disputed. Respondent, as well as three other campaign volunteers made numerous telephone calls, as is the tradition, to "get out the vote." Complainant did not speak to respondent, rather respondent left a message on complainant's answering machine. A review of the tape indicates that respondent did not urge complainant to vote for any particular candidate. After defining the terms within the statute, it is clear that telephone calls of this nature do not constitute advertisement, nor could they be considered solicitation.

Montana voters expect to exercise their right to vote without harassment and intimidation. The purpose for many existing campaign statutes, including the electioneering statute which prohibits certain campaign activities within 200 feet of a polling place, is to protect Montana voters from unnecessary and troublesome solicitation and electioneering. Mont. Code Ann. §13-35-211 (1995). Historically, the vast majority of candidates have adhered to these principles diligently. This case represents a slight deviation from that tradition, however, it is not an unlawful deviation. While this case does not contain facts which violate existing statutes, extreme deviations may give rise to unlawful solicitation which could result in criminal liability. Therefore, candidates should be especially mindful of the spirit and intent of the campaign finance and practice statutes as election day dawns and make every effort to conform with the law.

Conclusion

The evidence in this case does not support a finding of liability. Therefore, based on the facts and findings presented, I conclude that no action is warranted against respondent.

DATED this 29th day of November, 1995.

ED ARGENBRIGHT
Commissioner of Political Practices