

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Nelson v. City of Billings No. COPP 2014-CFP-052	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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On October 30, 2014, Kevin Nelson, a resident of Billings, Montana filed a complaint against the City of Billings and certain Billings business leaders/entities who acted in support of the Public Safety Mill Levy. Mr. Nelson’s complaint alleged that the City of Billings violated Montana campaign finance and practice laws by coordinating with those advocating a vote for the mill levy.

**SUBSTANTIVE ISSUES ADDRESSED**

The substantive area of campaign finance law addressed by this decision is allowed activity of a public entity in regard to a ballot issue.

**FINDING OF FACTS**

The facts necessary for this Decision are as follows:

Finding of Fact No. 1. The 2014 municipal government general election date in Montana was November 4, 2014. (Secretary of State (SOS) website).

Finding of Fact No. 2. The November 4, 2014 municipal election in Yellowstone County, Montana included a vote on the City of Billings Public Safety Mill Levy. (Yellowstone County Website).

Finding of Fact No. 3. The City of Billings Public Safety Levy was rejected by voters through a vote of 18,331 “Against” and 17,345 “For.” *Id.*

## **DISCUSSION**

The Commissioner opens discussion in this Matter with an explanation of how and why jurisdiction of this Matter is properly before the Commissioner. This discussion is necessary because complaints involving levy related ballot issues necessarily trigger both ethics (Title 2) and campaign practices (Title 13) review.<sup>1</sup>

### 1. Title 13 Jurisdiction

Proposals for authorization of a property tax levy, such as the City of Billings Public Safety Mill Levy (hereafter “Levy”) involved in this matter, originate from a government entity and from the work of public employees and officials. A levy, such as involved in this matter, may not be issued unless authorized by electors in an appropriate mill levy election. See §15-10-425 MCA. Accordingly, a complaint involving levy voting issues may address the ethical implications of the actions of the public officers or public officials involved in the levy election, or the complaint may address the election itself, based on the effect of the alleged improper actions. The former type of complaint is an ethics complaint against a public official made under Title 2 of Montana Code. The latter type of complaint is a campaign practice complaint

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<sup>1</sup> COPP enforcement of §2-2-121 MCA ethical standards is made as a campaign practice violation through incorporation into §13-35-226(4) MCA. If enforced solely as an ethical violation, enforcement lies solely with the Yellowstone County Attorney, §2-2-144 MCA.

made against the beneficiary of the election under Title 13 of the Montana Code.

The Commissioner determines that the complaint in this matter was of a Title 13 tenor. Mr. Nelson's complaint in this Matter is focused on the City of Billings, rather than an employee or officer of the City. Further, the complaint references violations of Title 13, Chapter 35, rather than violations of Title 2. Given the specific recitations of the complaint, the Commissioner determined that the complaint triggered Title 13 review, with the review taking place under the authority of § 13-35-226(4) MCA: "[a] public employee may not solicit support for or opposition to ...the passage of a ballot issue while on the job or at the place of employment." This statute incorporates the standards of § 2-2-121 MCA. This Office has applied § 13-35-226(4) to measure the propriety of mill levy related activity engaged in by Lewis and Clark County and a Billings School District. *Roberts v. Griffin*, decided November 19, 2009 (Commissioner Unsworth); *Hansen v. Billings School District #2*, COPP-2013-CFP-027 (Commissioner Motl).

## **DISCUSSION**

The Complaint alleges a number of general violations of election law including and then a more general violation of coordination. Each is dealt with separately below.

### 1. There are No General Violations of Law

The complaint attaches an article making reference to §13-35-227 MCA (prohibited corporate contributions to candidate campaigns) and alleges

violations of §13-35-218 MCA (coercion of voters), and §13-35-503 MCA (level playing field). The Commissioner considers each of these laws.

Section 13-35-227 MCA prohibits corporate monetary contributions to candidate campaigns, but does not apply at all to ballot issue campaigns or to independent expenditures in any campaign. *Montana Chamber of Commerce v. Argenbright*, 226F 3d 1049 (2000); *American Tradition Partnership v. Bullock*, 132 S. Ct. 2490 (2012). Because this Matter concerns a ballot issue vote there can be no application of §13-35-227 MCA.

Section 13-35-218 MCA, in its coercion standard, also cannot and does not apply as an independent measure of wrongdoing in this Matter. There can be no coercion when the entities engage in lawful exercise of electoral speech. Corporate entities are free to participate (*see* this Decision, above). The City of Billings, through its public officers or public employees presented only neutral facts and information to electors related to a ballot issue or candidate (*see* this Decision, below).

Section 13-35-503 MCA cannot be applied as a measure in this Matter. Section 13-35-503 MCA was passed by Montana voters in 2012 through approval of Initiative 166. It was inspired and driven by the “infusion of unlimited corporate money in support of or opposition to a targeted candidate...” §13-35-502(4)(e) MCA. The Commissioner has determined that this policy of disfavor of corporate election funding may be applied only when it can be reconciled with the dominate speech directives of *Citizens United v. Fed. Election Comm.*, 130 S. Ct. 876 (2010). *Landsgaard v. Peterson*, COPP-2014-

CFP-008 at p. 10. In this Matter there is no such application of §13-35-503 MCA possible because corporate ballot issue speech cannot be restricted or prohibited. (*see above*).

## 2. There is No Coordination

Complainant Nelson contends that the close cooperation between the City of Billings public officers/employees and the Billings business community, led by Mr. Buchanan, constituted illegal coordination. The City of Billings contends that its officers and employees only provided information and data, as they were allowed to do under law.<sup>2</sup> Likewise, the business leaders (including corporate entities) were and are free to participate without restriction in the Levy election (*see this Decision, above*).

Because the City officers and employees did not advocate for the Levy (*see this Decision, below*), coordination does not apply unless, somehow, advocacy actions of the Billings business leaders are assigned as actions of the City. Coordination is displayed, for example, when a candidate cooperates with and accepts unreported corporate contributions thereby violating both disclosure laws and the ban on acceptance of corporate contributions to a candidate's campaign.<sup>3</sup> While a corporation may make an independent expenditure in regard to a candidate, coordination makes that expenditure an illegal

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<sup>2</sup> Indeed, the officers and employees involved with providing safety to the residents of the City of Billings have an implied duty to present information and observations as to the policy or infrastructure improvements involved in providing safety to City residents.

<sup>3</sup> *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Clark v. Bannan*, COPP 2010-CFP-023; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; *Bonogofsky v. Wittich*, COPP-2010-CFP-031; *Madin v. Sales*, COPP-2010-CFP-029; *Bonogofsky v. Prouse*, COPP-2010-CFP-033, and *Bonogofsky v. Wagman*, COPP-2010-CFP-035.

contribution by reassigning that independent expenditure as an illegal contribution to the candidate. *Id.*

A. The Actions of the City Officers and Employees

The City of Billings devoted paid time of certain officers and employees to prepare information and data showing the need for the Levy. The use of public resources to provide such information and data is allowed by Montana law.<sup>4</sup> There is no allegation as to impropriety in the actions that the City, including the actions of its officers and employees, took in regard to studying and proposing the new public safety improvements that formed the basis for the Levy. Instead, the complaint claims improper actions of the City, as an entity and through its officers and employees, once the Levy became a ballot issue subject to authorization by a vote of electors.

The Commissioner next examines the actions of the City of Billings' officers and employees once the Levy was placed on the ballot. The Commissioner determines that there are no facts, including the information supplied by the complainant, that show that the officers and employees of the City of Billings went past providing information and advocated a vote for or against the Levy. Consequently, the City of Billings did nothing wrong as Montana law only prohibits use of public resources, including paid work time, to provide "...support for or opposition to...the passage of a ballot issue." § 2-2-121(3)(a) MCA; §13-35-226(4) MCA. Further, a public officer or public employee can

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<sup>4</sup> The City of Billings as an entity, and through its officers and employees, is unquestionably responsible for the general maintenance, management, and progress of the organized municipality of Billings, Montana. (City of Billings website).

present neutral facts and information to electors related to a ballot issue or candidate. § 2-2-121(3)(a)(ii) MCA or §13-35-226(4) MCA, second sentence. *Roberts v. Griffin*, decided November 19, 2009 (Commissioner Unsworth); *Hansen v. Billings School District #2*, COPP-2013-CFP-027 (Commissioner Motl); *Essmann v. McCulloch*, COPP-2014-CFP-056 (Commissioner Motl) and *Grabow v. Malone*, COPP-2014-CFP-060 (Commissioner Motl). Still further, a public officer or public employee may, within the scope of duty, offer facts and information during work time. See 2-2-121(3)(a)(ii) MCA or §13-35-226(4) MCA, second sentence; *Grabow v. Malone*, COPP-2014-CFP-060 (Commissioner Motl).

Lastly, there are no facts showing that City of Billings provided resources, such as travel stipend or a vehicle, to the business leaders who advocated a yes vote on the Levy. City employees and officers did present information and data in public forums with that information then used by business leaders, particularly Mr. Todd Buchanan, as the basis to urge a Yes vote on the Levy. There is nothing wrong, however, with the use of public resources consistent with duty to accomplish a legitimate public purpose task, even if the task leads to information or data that may find its way into immediate discussion in a ballot issue campaign.

**B. Business Leader Role**

Business leaders, particularly Todd Buchanan, assumed the mantle of advocating a Yes vote on the Levy. The complaint alleges that Mr. Buchanan often worked in tandem with City officers and employees at a public

presentation on the Levy with the City officers and employees providing information and data and Mr. Buchanan arguing for a Yes vote.

Coordination, under Montana law, means “an expenditure made in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate or political committee...” 44.10.323(4) ARM.

There is, however, no business leader expenditure that can be coordinated and assigned to the City in this Matter.<sup>5</sup>

Mr. Buchanan, by intent and practice, advocated for the Levy solely as an individual volunteering his time spent in advocating a Yes vote on the Levy.<sup>6</sup> Mr. Buchanan’s volunteer activity is specifically exempted as a contribution or expenditure under Montana law and the US Supreme Court has directed a liberal application of such a volunteer exemption, including expenses. §§13-1-101(7)(b)(i), 11(b)(i) MCA; *Citizens United v. Fed. Election Comm.*, 130 S. Ct. 876 (2010);<sup>1</sup> *Randall v. Sorrell*, 548 U. S. 230 (2006). Had Mr. Buchanan wished to, he could have legally expended any sum he wished in support of the Levy. Those expenditures would have triggered reporting obligations. Mr. Buchanan’s activity however, being volunteer, was not an expenditure and therefore triggered no reporting obligation nor any coordination issues.

Mr. Buchanan’s insistence on volunteer advocacy is mirrored by the actions of the Billings business community. The Billings Chamber of

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<sup>5</sup> The City of Billings is prohibited by law from making an expenditure expressly advocating a vote for or against the Levy. Consequently, the City of Billings did not register as a political committee nor report expenses in regard to the Levy, nor could it.

<sup>6</sup> Mr. Buchanan’s reply to the complaint.

Commerce, for example, secured a letter from the COPP dated August 29, 2014, defining the extent to which it may engage in non-expenditure Levy advocacy within its own membership. (Commissioner's records). There is no evidence that any member of the Billings business community engaged in anything other than membership based advocacy, with accompanying allowed secondary redistribution of that advocacy. *Missoula County Republic Central Committee v. Missoula County Democratic Central Committee* (November 4, 2011), (Commissioner Gallik, at p. 3).<sup>7</sup>

The only remaining possible coordination consideration is whether the City's close cooperation with Mr. Buchanan transformed his volunteer Levy "Yes" advocacy into the City's advocacy and thereby transformed the allowed information and data provided by the City into prohibited advocacy. The Commissioner declines that determination. Such a determination would undermine the volunteer effort of Mr. Buchanan, cast constitutional aspersions on the volunteer exception to Montana's contribution law and make the difficult Levy task of public officers that much harder. A City with public employees and officers with the discipline displayed by the City of Billings personnel and a business community with leaders willing to give their time like Mr. Buchanan did needs to be respected, not impeded.

There seems to be some confusion on this point as the Commissioner releases this Decision as part of a group of three companion Decisions

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<sup>7</sup> The Commissioner's investigator has interviewed the print and electronic media in the Billings area and determined no money was spent on Levy advertisements. These interviews confirmed that the Billings business community deliberately adopted a no-expense, membership oriented advocacy approach for support of the Levy.

(*Essmann v. McCulloch*, COPP-2014-CFP-053; *Grabow v. Malone et. al.*, COPP-2014-CFP-60 and *Juve v. Roosevelt County Commission*, COPP-2014-CFP-063) dealing with similar complaints filed against public officials.

In this Matter the use of public time to provide data and information to the public served a public purpose and was not prohibited as the information and observations was consistent with duty and did not advocate a vote for or against a ballot issue. Agencies of government, like the City of Billings, are the natural repositories of information related to their areas of authority. Accordingly, agencies should be expected to provide data, observations and information to the public that is of use to an elector when making an election decision and commended when they do. The Commissioner asks that Montanans take this discussion into consideration when assessing the appropriateness of government action such as that addressed in this Decision.

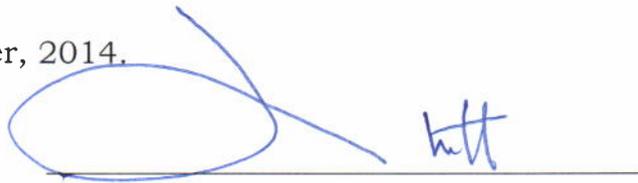
### **OVERALL DECISION**

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the that the Commissioner (“shall investigate,” *See*, § 13-37-111(2)(a) MCA) investigate any alleged violation of campaign practices law.

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 § 13-35-226(4) MCA and § 13-37-124(1) MCA. Accordingly, the Commissioner dismisses this

complaint in full.

DATED this 9<sup>th</sup> day of December, 2014.



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