

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

O'Neill v. Hansen No. COPP 2014-CFP-048	Dismissal of Campaign Practice Complaint, Including Dismissal of One Claim as Frivolous
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On October 27, 2014 Patrick O'Neill, a resident of Dillon, Montana filed a Campaign Finances and Practices Complaint against Jay Hansen and Jed Fitch, also residents of Dillon, Montana. Jay Hansen and Jed Fitch were public officials/employees (see Findings of Fact, below) at the time that the complaint was filed.

Mr. O'Neill's complaint alleged that the two public officials/employees violated Montana campaign practice laws by use of their titles of office while engaged in candidate electoral campaign activity.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this Decision are the allowed electoral activity of public employees and the relationship of the laws governing public employee electoral campaign activity with the laws providing an ethical measure of the actions of public employees.

FINDING OF FACTS

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: The town of Dillon, Montana is the county seat of Beaverhead County, Montana. A single public building located in Dillon houses the Dillon Police Department, the Beaverhead County Sheriff's Department and the Beaverhead County Attorney's office. (Beaverhead County Website).

Finding of Fact No. 2: The Beaverhead County Sheriff position is a partisan, elected position with a 4 year term. Jay Hansen was elected Beaverhead County Sheriff in 2006 and reelected (unopposed) in 2010. In 2014, two candidates ran for Sheriff of Beaverhead County in the 2014 general election: incumbent Sheriff Jay Hansen (Republican) and Frank Kluesner (Independent). Mr. Kluesner won the election by 18 votes (20 votes after a recount). (Beaverhead County Election's Office, Montana Secretary of State (SOS) website, Dillonite Daily Newspaper).

Finding of Fact No. 3: The Beaverhead County Attorney is a partisan elected position with a term of four years. Jed Fitch was appointed to the position in May of 2008 and was elected in 2010. In 2014, Mr. Fitch ran unopposed as an Independent candidate for reelection in 2014. (The Montana Standard article, May 1, 2008, Nick Gevock, SOS website, Dillonite Daily Newspaper).

Finding of Fact No. 4: Bill Knox was the Undersheriff during the tenure of Sheriff Jay Hansen. (Commissioner's records).

DISCUSSION

The complaint alleges that two county officials/employees improperly used their titles and symbols of office in support of the candidacy of Jay Hansen.

1. Title 13 Jurisdiction

The complaint is made against two public employees/officials based on their actions in making use of a job related "title" in campaign advertisements.

The complaint further asserts abuse of position and authority associated with solicitation of employee names for inclusion on a support letter for Candidate Hansen.

The complaint lists several laws as implicated by above abuse of “title” and “position” claims. The laws are discussed further in this Decision, below. In general, though, a COPP complaint may address the ethical implications of the actions of the public officers or public officials involved in a candidate 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 made against the beneficiary of the election under Title 13 of the Montana Code.

The complaint does not specifically reference either Title 2 or Title 13 but the Commissioner determines that the complaint in this matter was of a Title 13 tenor. The complaint in this Matter is focused on the electoral actions of an employee or officer of the County. The Commissioner therefore determines that the complaint triggered Title 13 review, with the review taking place under the authority of:

. §13-35-226(3) MCA: “[a] person may not coerce, command, or require a public employee to support or oppose...the nomination or election of any person to public office...”

. §13-35-226(4) MCA: “[a] public employee may not solicit support for or opposition to ...the nomination or election or any person to public office ... while on the job or at the place of employment.”

This Office has regularly applied §13-35-226(4) to measure the propriety of

election related activity engaged in by county and state level officials and entities. *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-053 (Commissioner Motl); *Nelson v. City of Billings*, COPP-2014-CFP-052 (Commissioner Motl); *Grabow v. Malone*, COPP-2014-CFP-060 (Commissioner Motl) and *Juve v. Roosevelt County Commission*, COPP-2014-CFP-063 (Commissioner Motl).

2. There is No Violation For Use of Title in a Campaign Advertisement

The complaint alleges (and the respondents do not deny) that titles of county officers or employees were used in 2014 campaign advertisements in support of Candidate Hansen. Such campaign advertisements include the following.

Finding of Fact No. 5: Dillon, Montana is served by two local newspapers, the Dillon Tribune, which is published once a week on Wednesdays and the Dillonite Daily, which is published five days a week, Monday through Friday. (Investigative notes, Dillon Tribune and Dillonite Daily/Womack's Printing Place).

Finding of Fact No. 6: A general election was held in Montana, including Dillon, Montana, on November 6, 2014.

Finding of Fact No. 7: During the month of October 2014, campaign advertisements (in the form of an "endorsement letter") were published in the Dillon Tribune and Dillonite Daily Newspapers. The endorsement letter supported Candidate Hansen's campaign for reelection and was attributed as: "*Paid for by Jay Hansen for Sheriff 449 Laknar Lane Dillon MT*". The endorsement letter listed the names and official work title of 18 county employees.

(Dillonite Daily Newspaper Oct. 8, 2014 and Dillon Tribune Newspaper, Oct. 15, 2014).

Finding of Fact No. 8: On October 8, 2014, the Dillon Tribune published a Letter to the Editor titled, “Deputies Support Jay Hansen.” The letter was signed by 5 full-time Beaverhead County Deputies, all using their titles. The letter asked readers for their “*vote to reelect Sheriff Jay Hansen!*” (Dillon Tribune Newspaper online, Oct. 8, 2014).

Finding of Fact No. 9: On October 15, 2015, the Dillon Tribune published a Letter to the Editor submitted by Jed Fitch, titled “Voting for Hansen.” The letter begins: “*As the Beaverhead County Attorney these past six-plus years, I have had the distinct opportunity of working closely with Sheriff Jay Hansen.*”..... The letter ends: “*I strongly encourage you to vote Jay Hansen for Sheriff this November. Jed C. Fitch, Dillon.*” (Dillon Tribune Newspaper, Wednesday, Oct. 15, 2014).

The complaint specifically claims impropriety based on the above listed election campaign use of official work title by the several public employees or officials. This particular claim is without merit as this issue has been definitively resolved since 2005 when the Attorney General of the State of Montana issued Attorney General Opinion Volume 51, No. 1 that stated, in part, that Montana law allows “a public official to sign a letter to the editor, expressing personal political beliefs, with his official title, so long as public resources were not used to create the letter.”

AG Opinion Vol. 51, No. 1 was based on the personal political belief rights afforded public employees in Montana, as recognized by §2-2-121(3)(c) MCA: “[Montana law] is not intended to restrict the right of a public officer or public employee to express personal political views.” AG Opinion Vol. 51, No. 1 has been published on the COPP website under “frequently asked questions” since

2005. AG Opinion Vol. 51, No. 1 has not been modified or changed since 2005.¹

Montana law therefore affords each public employee or official the right to make his or her own choice as to whether or not to use their official work title when making an expression of “personal political views.” The Commissioner determines that a claim that a Dillon area public employee cannot exercise this choice is without any support in law such that this portion of the complaint is dismissed as frivolous under ARM.10.307(3)(a) and *Landsgaard v. Peterson*, COPP-2014-CFP-008. Because the improper election related use of official work title is the only complaint made against County Attorney Jed Fitch, the entire complaint against Jed Fitch is dismissed as frivolous.

3. There is No Violation Based on Coercion

The complaint further claims “fear and payback” concerns among county employees stemming from solicitation of employee signatures on the letters described in FOF Nos. 7 and 8. The complaint alleges that the solicitation leading to the candidate support letters constituted a violation of the “secrecy of ballot” protected by Article IV, Section 1 of the Montana constitution. This section, however, applies to and protects the actual act of voting, not the necessarily robust campaign process leading to the secret vote.

The Commissioner instead looks to and applies the anti-coercion standards of §13-35-226(3) MCA: “[a] person may not coerce, command, or

¹ The 2013 Montana legislature restricted a Montana Highway Patrol officer from appearing in uniform incidental to a candidate’s campaign for elected public office. §2-2-121(3)(d)MCA.

require a public employee to support or oppose...the nomination or election of any person to public office..." The thrust of the complaint is coercion was applied to county employees in an effort to secure their name and title on a letter in support of Candidate Hansen.

The Commissioner's investigator conducted a thorough investigation as to these allegations of coercion, following the several leads provided her through the county employees who did and did not sign the Hansen letter of support. The following findings of fact apply as background for determination of this issue:

Finding of Fact No. 10: The effort to prepare a Hansen letter of support began on or about October 1, 2014. On October 1, 2014, the Dillon Tribune published a letter written by Steven Doner, a former Beaverhead County Sheriff's Deputy and former Dillon Police Officer. Mr. Doner's letter supported Frank Kluesner's campaign for Sheriff over Sheriff Hansen's reelection. (Dillon Tribune article Oct. 1 and Oct. 8, 2014.).

Finding of Fact No. 5: That same day (October 1, 2014) a monthly squad meeting was held at the Beaverhead County Sheriff's Office. At the end of the meeting Sheriff Hansen left the room and Undersheriff Bill Knox asked the deputies to meet at Mr. Knox's home for another "meeting". The meeting at Mr. Knox's home introduced the idea of employees signing an endorsement letter for candidate Hansen. (Investigative notes).

The Commissioner's investigator found that Mr. Knox and another public employee (Don Guiberson, Assistant Chief of Police, Dillon) wrote the endorsement letter and contacted other employees for endorsement signatures. Messers. Knox and Guiberson emphatically stated that they knew the parameters of the endorsement effort and, consequently, did not perform any

work on public time and did not pressure other employees to sign the letter. The Commissioner's investigator pursued interviews with any employee reported or thought to be pressured and found no employee who claimed he or she was personally pressured or coerced. Instead, each employee stated that the contacts by Mr. Knox or Mr. Guiberson were courteous and that they were informed that they were free to sign or not to sign.

Based on the investigation the Commissioner determines that there is a lack of sufficient facts to show that coercion occurred in regard to the Candidate Hansen endorsement letter and therefore there is no basis to pursue a violation of §13-35-226(3) MCA.

4. Any Use of Public Resources Was De Minimis

While the complaint did not allege illegal use of public resources, the Commissioner exercises the discretion provided at §13-37-111 MCA and discusses this issue as well. Because there were strong (and still lingering) sentiments over this particular election the Commissioner wishes to provide a thorough record of discussion to the Dillon community.

The endorsement letter expressly advocated a vote for ("re-elect") Candidate Hansen. As such, the Ads were campaign expenditures under Title 13: "...anything of value made for the purpose of influencing the results of an election." §13-1-101(11)(a) MCA. The Hansen campaign, however, paid for and reported the cost of the endorsement letter ads so there is no impropriety associated with the cost of publication.

What remains for discussion is the whether there was improper use of

public resources incidental to preparation of the endorsement letter. A public employee or official is free to "... express personal political views..." in support of or in opposition to Candidate Hansen. (§2-2-121(3)(c) MCA and this Decision, above). However, in expressing those views, a public official or employee cannot "use public time, facilities, equipment, supplies..." §2-2-121(3)(a) MCA. The Commissioner's investigator found general awareness of and adherence to this restriction, particularly with Messers. Knox and Guiberson. It is possible, however, that a deputy or other public employee might have inadvertently engaged in limited endorsement discussion while on shift without taking that time off his or her reported time. The Commissioner determines that any such occurrence, however, would be a matter of oversight, not intention.

Having decided that this is a matter of oversight, not intention, the issue the Commissioner next addresses is whether any such oversight can be excused as *de minimis*. *De minimis* is an established concept of law meaning that "the law does not care for, or take notice of, very small or trifling matters." Black's Law Dictionary 4th Edition. The COPP began to regularly apply a *de minimis* exception to civil enforcement of a technical or minor violation of Montana's campaign practice, when directed to do so by the 9th circuit court of appeals in that Matter of *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F. 3d 1021, 1028-29 (9th Cir. 2009). The *de minimis* actions in *Canyon Ferry* were the limited use of staff and copying expenditures by a party involved in a ballot issue campaign.

While not always identifying it as *de minimis*, Commissioners have long used the concept to dismiss prosecution of technical violations: no prosecution for lack of address, *Shannon v. Andrews*, COPP-2012-CFP-035 (Commissioner Murry); no prosecution for failure to list political party affiliation or funding source on a candidate website display, *Fitzpatrick v. Zook*, COPP-2011-CFP-014 (Commissioner Gallik); and no prosecution when full name of committee treasurer omitted, *Ellis v. Yes on CI-97*, April 15, 2008 (Commissioner Unsworth). This Commissioner has applied *de minimis* to excuse technical violations for: omitting a 'paid for by' attribution, *Ulvestad v. Brown*, COPP-2013-CFR-025; accepting a contribution of \$40 over the allowed amount, *Rodda v. Bennett*, COPP-2014-CFR-013; failing to register/attribute as a political committee, *Royston v. Crosby*, COPP-2012-CFP-041; failure to fully attribute on a candidate letter, *Ponte v. Buttrey*, COPP-2014-CFP-007 and *Brastrup v. Ravndal*, COPP-2014-CFP-040; failure to properly apportion total allowed amount of contribution between husband and wife, *Kenat v. Van Dyk*, COPP-2014-CFP-004; and failure to list political party, *Strizich v. Loney*, COPP 2014-CFP-034 and *Cohenour v. Dooling*, COPP-2014-CFP-043.

Further, this Commissioner, in a January 31, 2014 advisory opinion to Emilie Boyles, generally placed the *de minimis* principle in Montana campaign practice law as follows:

Second, there is a *de minimis* exception to Montana's definition of campaign contribution. This means that costs, fees or charges associated with a minor amount of campaign speech need not be reported. The *de minimis* principle holds that robust election speech is favored such that minimal election speech

actions cannot be burdened with any requirements. This principle would apply to except small cost amounts (such as one time electronic campaigning costs) from disclosure or reporting requirements. COPP-2014-AO-003 - Boyles.

The constitutional considerations inherent in the “robust election speech issue” raised in the advisory opinion are discussed in *Landsgaard v. Peterson*, COPP-2014-CFP-008.

Turning now to any potential improper activity in this Matter, the Commissioner notes that any such violation would be very small in scope. With a limited application and the above considerations in mind, the Commissioner finds that any potential violations in this Matter are dismissed under the *de minimis* principle.

DISMISSAL OF COMPLAINT

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.

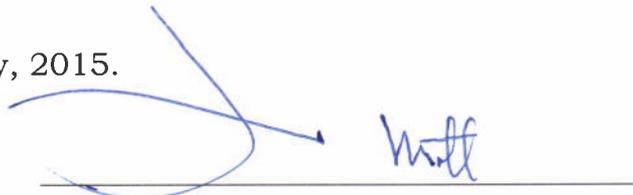
This Commissioner, having been charged to investigate and decide, hereby determines that matters alleged in this Matter are dismissed as frivolous, lacking sufficient facts or as *de minimis* for the reasons set out above.

The Commissioner hereby dismisses this entire matter from prosecution.

In dismissing this Complaint the Commissioner notes that this Matter illustrates two election related considerations for candidates and the communities they serve. First, voters need to carefully weigh, and perhaps ignore, the electoral effect of last minute election related complaints such as this one. Here there were two Sheriff candidates, each with local ties and relevant experience. The Dillon community was equally split between the two candidates. The complaint in this Matter was filed on October 27, 2014 (8 days before the November 4 election) and it was not resolved until the date of this Decision, three months after the election. When resolved the complaint was dismissed in its entirety.

Second, candidates and their allies need to be circumspect when asking a public officer or employee for an endorsement. This Matter illustrates that the process of seeking such an endorsement, while legally permissible, may cause discomfort for some employees or some members of the community and thereby expose a candidate to a possible campaign practice complaint.

DATED this 4th day of February, 2015.



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