

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the Complaints)
Against Kendall Van Dyk)

**SUMMARY OF FACTS AND
STATEMENT OF FINDINGS**

Jennifer Olsen and Jake Eaton, in separate complaints filed against Kendall Van Dyk, allege that he violated Montana campaign finance and practices laws.

SUMMARY OF FACTS

1. In 2010, Kendall Van Dyk was a candidate in the primary election for Senate District 25. Van Dyk won the primary in June 2010, becoming the Democratic nominee for the seat. Van Dyk went on to defeat Roy Brown in the November 2010 general election.

2. Van Dyk voted by absentee ballot in the primary and general elections in 2010.

3. Van Dyk photographed his filled-in absentee ballots for both the primary and general elections, with the photographs showing the portion of the ballots where he had voted for himself. He then posted the photos on his Facebook page: once in May 2010 (before the primary election) and again in October 2010 (before the general election).

4. Both complainants allege that Van Dyk violated § 13-35-201, MCA, by photographing his marked ballots and posting them on Facebook.

STATEMENT OF FINDINGS

§ 13-35-201, MCA, provides:

Electors and ballots. (1) An elector may not show the contents of the elector's ballot to anyone after it is marked. An elector may not place any mark upon the ballot by which it may be identified as the one voted by the elector.

(2) An elector may not receive a ballot from any person other than an election judge and may not vote any ballot except one received from an election judge. A person other than an election judge may not deliver a ballot to an elector.

(3) A person may not solicit an elector to show the elector's ballot after it is marked.

(4) An elector who does not vote a ballot delivered to the elector shall, before leaving the polling place, return the ballot to an election judge.

The Montana Constitution provides that elections shall be by secret ballot. Mont. Const. art. IV, § 1. The secret ballot requirement is designed to preserve the integrity of elections and election results by avoiding potential intimidation or undue influence of voters before a vote is cast and possible retribution after a vote is cast. See 26 Am. Jur. 2d *Elections* § 307; State of Ohio v. Jackson, 811 N.E.2d 68, 74 (Ohio 2004).

An absentee ballot fits within the definition of the term "ballot" in § 13-1-101(5), MCA. Thus, were one to read just the *first sentence* of § 13-35-201(1), MCA, in isolation, one might be tempted to conclude that Van Dyk had violated the statute by disclosing his ballot to others when he

posted it on Facebook. To find legislative intent, however, a statute must be read and considered in its entirety. Legislative intent may not be determined from the wording of any particular section or sentence of a statute alone, but only from a consideration of the statute as a whole. State ex rel. Cashmore v. Anderson, 160 Mont. 175, 184, 500 P.2d 921, 926-27 (1972), cert denied, 410 U.S. 931 (1973). Two other subsections of § 13-35-201, MCA, make it clear that the statute governs conduct at a polling place. Subsection (2) provides that an elector may obtain a ballot only from an election judge. Subsection (4) states that if an elector does not vote a ballot received from an election judge, the elector must return the ballot to the election judge before leaving the polling place.

Article IV, Section 3 of the Montana Constitution states that the legislature “shall provide by law the requirements for residence, registration, absentee voting, and administration of elections,” and “shall insure the purity of elections and guard against abuses of the electoral process.” § 13-13-201, MCA, establishes specific procedures for voting by absentee ballot. Subsection (2) describes a procedure whereby an elector marks the absentee ballot, places it in a secrecy envelope, places the secrecy envelope in a return envelope, which is signed by the elector, and mails or delivers the return envelope to the local election administrator. The statute does not prohibit an

elector from disclosing his or her marked absentee ballot to others, photographing it, or making public a photograph of the marked ballot before mailing or delivering it to the election administrator.

California has a similar state constitutional provision requiring voting to be “secret.” However, California’s Supreme Court has stated that the constitutional provision “does not mean that every ballot including absentee and mailed ballots must actually be cast in secret,” noting that the secrecy provision “was never intended to preclude reasonable measures to facilitate and increase exercise of the right to vote such as absentee and mail ballot voting.” Wilks v. Mouton, 722 P.2d 187, 193 (Cal. 1986). Another California court made the following observations regarding voting by absentee ballot:

[I]f a voter wishes to disclose his marked ballot to someone else, be it a family member, friend or a candidate’s representative, he should be permitted to do so. To hold otherwise would cast a pall on absentee voting. We suspect that many absentee voters disclose their marked ballots to other persons before placing them in the identification envelope for return to the election official or the polling place. Such voluntary disclosure cannot be deemed to violate the constitutional mandate.

Beatie v. Davila, 183 Cal. Rptr. 179, 183 (Cal. Ct. App. 1982).

Pursuant to the constitutional directive in Article IV, Section 3 of the Montana Constitution, the Montana Legislature has formulated a procedure

establishing specific requirements for absentee voting. As noted above, that procedure does not prohibit an elector from disclosing his or her marked absentee ballot before transmitting it to an election administrator. Van Dyk did not violate the law when he posted a photograph of a portion of his marked absentee ballots on Facebook.

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings, there is no evidence to conclude that Kendall Van Dyk violated § 13-35-201, MCA.

Dated this 30th day of June, 2011.



Dolores Colburg
Deputy Commissioner of Political Practices