

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Ponte v. Gallik No. COPP 2014-CFP-009	Finding of Sufficient Facts to Show a Violation of Montana Campaign Practice Laws
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David Gallik is an attorney and resident of Helena, Montana. Mr. Gallik was appointed as Montana’s 9th Commissioner of Political Practices, serving from May 23, 2011 through January 18, 2012. David Ponte is a resident of Bozeman, Montana. On February 24, 2014 Mr. Ponte filed a complaint against Mr. Gallik concerning certain actions of Mr. Gallik taken during the time he served as Commissioner.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this decision is the measure of the public trust restrictions placed on the activities of a person serving as Montana’s Commissioner of Political Practices.

SUMMARY OF RELEVANT FACTS

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: David Gallik was appointed Montana’s Commissioner of Political Practices on May 23, 2011 and served until he

resigned January 18, 2012. (Commissioner's records).

Finding of Fact No. 2: An organization called the Council for a Sustainable America was established in 2008 as a federally recognized '527' (that is, organized under 26 U.S.C. §527 of the Internal Revenue Code) political organization. (Commissioner's records).

Finding of Fact No. 3: On August 15, 2011 Mr. Gallik, as Treasurer, signed the IRS form 990 tax return for Council for a Sustainable America. (Complaint).

INTRODUCTION

The Complaint in this Matter was filed on February 24, 2014. The complaint was filed against David Gallik, a former Commissioner of Political Practices. Mr. Gallik's status as a prior Commissioner potentially implicated §13-37-111(5) MCA, a statute prohibiting a sitting Commissioner from handling a complaint "against the commissioner."

This Commissioner interpreted the statutory prohibition as applying only to complaints filed against his own tenure as Commissioner. The Gallik complaint, however, was referred to the attorney general (following the directive of §13-37-111(5) MCA) so that the attorney general could review that interpretation and, if he disagreed, keep and act on the complaint. In making the referral the Commissioner specified that there were no family, economic or other circumstances creating a conflict for his issuance of a Decision involving Mr. Gallik. The Commissioner further specified that for budget reasons the

COPP in-house staff would prefer to keep and decide the complaint rather than undergo the cost of outside counsel. On April 29, 2014 the Attorney General returned the complaint to the Commissioner for his in-house Decision.

The Commissioner now considers the matters raised in the complaint. Mr. Gallik served as Montana's Commissioner of Political Practices during the second half of 2011 (FOF No. 1). Mr. Gallik's conduct during that time was governed by the 2011 version of Montana Code Annotated. That Code placed certain restrictions, set out at §13-37-108 MCA, on the activities of the person serving as Commissioner. Among those restrictions was the requirement that the Commissioner "may not knowingly....participate in any political activity or in a political campaign..." §13-37-108(2) MCA.

The established facts are that: The Council for a Sustainable America was a political organization (FOF No. 2); Mr. Gallik served as Commissioner during August of 2011 (FOF No. 1); and, that Mr. Gallik signed an IRS tax return as Treasurer of the Council for a Sustainable America in August of 2011 while he was Commissioner (FOF No. 3). Mr. Gallik's response does not deny these facts. Instead, Mr. Gallik's response (with appropriate documentation enclosed) points out that the assets of the Council for a Sustainable America were transferred to another entity in March of 2010. Based on this transfer of assets Mr. Gallik asserts that his signature placed in August of 2011 was nothing more than a ministerial function recognizing action taken in March of 2010, before he became Commissioner.

Mr. Gallik's explanation is accepted and appreciated, but it does not relieve him of improper action. The position of the Commissioner of Political Practices of the State of Montana, upon appointment, is the most highly restricted position in state government. What Mr. Gallik, or any Commissioner, did before appointment is left at the door upon appointment, except as may be applied to a conflict recusal. However, what a Commissioner does after appointment is exceedingly regulated, with a consistent focus on appearance of conflict to the public. Under the 2011 Code¹ a Commissioner may not "make a contribution" or "attend an event" involving fundraising for a candidate or political committee. §13-37-108 MCA. The particular restriction ("participate in") involved in this Matter is likewise focused on appearance of the Commissioner's actions to the public.

While a Commissioner may well have what he or she believes to be a legitimate reason for making a particular contribution, attending a particular fundraising event or engaging in a particular political activity, that reason would not matter. What is prohibited is the appearance and, thus, reasons for the appearance do not matter. Instead, an explanation of a suspect appearance by the Commissioner must focus on the actual nature of the appearance and any "reasons" argued for the legitimacy of the appearance must relate to the nature of the appearance. An event appearance, for example, may be explained and permitted as when the Commissioner is an

¹ The 2013 Legislature added additional restrictions.

invited speaker at an educational focused event even when political participants are also in attendance.

The Commissioner determines that there was and can be no such explanation in regard to Mr. Gallik's activity at issue in this Matter. While limited to issue advocacy actions, a 527 group is created primarily to influence the selection, nomination, election, appointment or defeat of candidates to federal, state or local public office. 26 U.S.C. § 527. The political nature of the Council for a Sustainable America is emphasized by its receipt of \$335,000 from the Democratic Governor's Association. (Commissioner's records).

With this backdrop in mind, there can be no legitimate "other purpose" explanation for the August 11, 2011 placement of Mr. Gallik's signature, under the title "treasurer" of the Council for a Sustainable America, during the time when he also served the people of Montana as Commissioner of Political Practices. Mr. Gallik's signature did not alternatively serve an educational or public purpose and to the extent it was ministerial, it was ministerial solely on behalf of a 527 organization. It is precisely this sort of appearance that the law prohibits as the appearance creates a snapshot of Montana's Commissioner of Political Practices appearing and taking action solely to serve one faction of political interests. The Commissioner accordingly determines that there are sufficient facts to support a finding of violation of Montana's Campaign Practice Act, specifically §13-37-108 MCA, 2011.

ADJUDICATION

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 Commissioner has investigated and issued this Decision. This Decision, however, ends the Matter as there is no avenue of enforcement available in regard to this Decision.

A breach of the restrictions set out in §13-37-108 has consequences. It was a possible basis for impeachment of the Commissioner under §13-37-105 MCA or a misdemeanor prosecution under §13-35-103 MCA. Neither of these statutes apply at this time, however, as Mr. Gallik is not serving as Commissioner and the one-year statute of limitations for enforcement under §13-35-103 is long past.² This leaves only the Commissioner’s general enforcement statute, §13-37-128 MCA. This Matter, however, is not a reporting violation and therefore is not enforceable under §13-37-128 MCA. In short, this Decision ends this Matter. There are sufficient facts to show a violation, but no means to enforce the Decision.

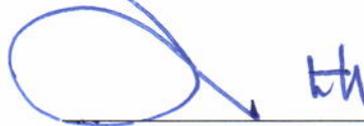
CONCLUSION

Based on the preceding discussion as Commissioner, I find and decide that there is sufficient evidence to show that Mr. Gallik violated Montana’s

² The Commissioner notes that the Complaint in this Matter was not filed until February 24, 2014. While there was a three month delay in issuing this Decision, an earlier Decision would not have saved the statute of limitations. The Complaint was too late, even on the day it was filed.

campaign practices laws, as set out above. This particular law was violated, however lacks an enforcement means for the reasons set out above. The Commissioner will post this Decision so that the public can review and understand the reasoning of the Decision. Mr. Gallik and the public are reminded that this Decision is one that finds sufficient facts to demonstrate that a violation occurred. This Decision is not an adjudicated result coming after a contested (due process) hearing format. Due process would have occurred had this Matter progressed to a trial before a district court judge.

DATED this 30th day of April 2014.



Jonathan R. Motl
Commissioner of Political Practices