

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

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| Toyne v. Real Bird No. COPP 2014-CFP-038 | <u>Dismissal of Complaint</u> |
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On September 24, 2014, Hardin, Montana, resident George Toyne filed a complaint with the COPP against George Real Bird, III, a resident of Lodge Grass, Montana, alleging Mr. Real Bird III violated Montana campaign finance and practice laws during his 2014 campaign for election as a County Commissioner of Big Horn County, Montana.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this decision is that of the anonymous actor exception to attribution of political signs, as required by Montana’s campaign practice laws.

FINDING OF FACTS

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: The Big Horn County Commission Office consists of 3 commissioners who are elected at large for 3 districts of Big Horn County, called District #1, District #2 and District #3. County commission seats are non-partisan. The county commission seat up for election in 2014 was for Big Horn County commissioner, District #1. John Pretty on Top is the current commissioner for District #1. Commissioner Pretty on Top did not run for reelection in 2014. (Big Horn County Commission Website).

Finding of Fact No. 2: On January 17, 2014, George Real Bird III filed a C-1-A Statement of Candidate form with the Commissioner of Political Practices Office (COPP). Mr. Real Bird III ran as a non-partisan candidate for a seat on the Big Horn County commission, District #1. There were 4 other candidates that submitted C-1-A forms for Big Horn County commissioner and were on the primary ballot: Marshall Lefthand, Phillip Miller, Angela Russell and George Toyne. (Commissioner's records).

Finding of Fact No. 3: On June 3, 2014, a primary election was held. Candidate Real Bird III won the primary election with 346 votes. Candidate Lefthand received 199 votes, Candidate Toyne received 183 votes, Candidate Miller received 177 votes and Candidate Russell received 149 votes. Candidates Real Bird III and Lefthand will continue on to the general election on the November 2014 ballot. (Montana Secretary of State (SOS) Website).

DISCUSSION

Complainant Toyne alleges that Candidate Real Bird, III has engaged in unattributed campaigning. Under section 13-35-225 MCA an attribution is required for "all communications advocating the success or defeat of a candidate". Section 13-35-225(1) MCA requires that there be "the attribution 'paid for by' followed by the name and address of the person who made or financed the expenditure..." on any campaign literature.

The Toyne complaint included photos of three campaign signs advocating a vote for George Real Bird, III. The photos showed no attribution of any sort as

to who made or financed the sign. The Commissioner's investigator made the following determinations in regard to the signs:

Finding of Fact No. 4: The 3 signs were posted in the vicinity of Hardin, Montana. The signs each displayed a variation of "Vote. June 3. George Real Bird III for County Commissioner. Vote." The 3 signs appear to be homemade and painted by hand. (Commissioner's records).

Finding of Fact No. 5: The 3 signs lacked any attribution of any sort. (Commissioner's records).

Finding of Fact No. 6: On September 24, 2014, the Commissioner's investigator contacted Candidate Real Bird III by telephone. Candidate Real Bird III told the investigator the campaign signs were not his and that he did not know who had made or posted the signs. Candidate Real Bird III told the investigator his campaign had purchased commercially made "yard signs" and that these signs had proper attribution. The Commissioner's investigator verified this fact with the business in Billings, MT that sold Candidate Real Bird III the signs. (Commissioner's records).

Finding of Fact No. 7: Mr. Toyne did not provide the name of any person who might have made the 3 signs and Candidate Real Bird, III was unable to provide the name of any such person. (Commissioner's records).

The 3 signs advocate a position "for" a candidate (FOF No. 4). The signs are homemade on what looks like reused pieces of plywood. (FOF No. 4). There is no attribution of any sort on the signs. (FOF No. 5).

The determination of attribution as to these particular signs is nuanced. The signs constitute candidate advocacy and therefore attribution is required under §13-35-225 MCA. The signs, however, are anonymous and therefore require that enforcement of §13-35-225 MCA be limited by the measure of the first amendment speech principles applicable to anonymous leaflets, as defined

in the case of *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995): “[u]nder our Constitution, anonymous pamphleteering is not a pernicious fraudulent practice, but an honorable tradition of advocacy and dissent.”

Commissioners have examined and measured the application of §13-35-225 MCA against the *McIntyre* principles in previous Decisions. First, there is an examination as to whether anonymity was surrendered by other information in the publication. See *Bixler v. Suprock*, COPP-2013-CFP-013 (Commissioner Motl) and *Olsen v. Valance*, November 17, 2009 (Commissioner Unsworth). There is no surrender of anonymity in markings or words set out in the 3 signs and, in fact, the most interested party (Candidate Real Bird, III) does not know who made the signs.

There being no surrender of anonymity, the *McIntyre* principles must be applied to measure whether attribution is required under §13-35-225 MCA because, whenever possible, statutes should be construed narrowly to avoid constitutional difficulties. (*State v. Nye*, 283 Mont. 505, 510, 943 P.2d 96, 99 (1997); *State v. Lilburn*, 265 Mont. 258, 266, 875 P.2d 1036, 1041 (1994), *cert. denied*, 513 U.S. 1078 (1995).)

Past Montana Commissioners, citing *McIntyre*, have determined that the 1st Amendment protects written displays (leaflets, pamphlets, signs) of anonymous speech: *Vanmeter v. asksheriffluckylarson*, November 10, 2011 (Commissioner Gallik), *Wittich v. Campbell*, November 17, 2009 (Commissioner Unsworth), *McAllister v Gardiner School District*, April 2003 (Commissioner Vaughey) and *Harmon v. Sweet*, December 31, 1997 (Commissioner

Argenbright).

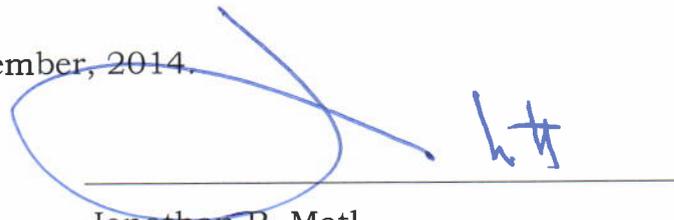
Consistent with past Decisions the Commissioner applies the *McIntyre* principles to the 3 signs at issue in this Matter. Attribution is not required of Candidate Real Bird, III for the anonymous sign posting acts of a third party. *McIntyre v. Ohio Elections Commission*. The third party posting the signs in this Matter did so anonymously and no attribution is required. *Id.*

DECISION

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 a lack of sufficient facts to show any campaign practice act violation by Candidate Real Bird, III.

The Commissioner hereby dismisses this complaint.

DATED this 26th day of September, 2014.



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