

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

IN THE MATTER OF THE)	
COMPLAINT AGAINST)	SUMMARY OF FACTS AND
JIM SOUTHWORTH, Candidate in)	STATEMENT OF FINDINGS
House District 86)	

Representative Randy Vogel, a candidate in Montana House District 86 in 1990, filed a complaint with this office on November 1, 1990, alleging that Jim Southworth, his opponent in the general election, had violated certain election laws. One issue in his complaint was the reproduction and distribution of a sample ballot by Southworth as part of a campaign mailing that Vogel alleged is a violation of sections 13-35-211 and 13-35-104, Montana Code Annotated (MCA). I found no violation of either statute and so stated in letters to Vogel and Southworth dated November 1, 1990.

The second issue about which Vogel complained is a more serious matter in that he alleges violation of the political criminal libel statute, section 13-35-234, MCA. That statute prohibits a person from knowingly misrepresenting the voting record or position on public issues of any candidate.

The results of an investigation conducted between January 4 and 11, 1991, are set forth in the summary of facts that follows.

SUMMARY OF FACTS

1. Randy Vogel and Jim Southworth were candidates for state representative in House District 86 in the November, 1990, general election. Vogel ran as an incumbent in the district, having been appointed to the vacant house seat in 1989 from which former Representative Tom Hannah had resigned earlier that year.

2. In support of his complaint, Vogel filed a copy of the Southworth campaign piece that included the reproduction of a sample ballot for voting in House District 86. At the top of the piece, Southworth set out his and Vogel's positions on selected issues, the entire text of which follows:

THE BALLOT ISSUES ARE NOT YOUR ONLY CHOICE

You Have More Than Ballot Issues To Decide On November 6th

	SOUTHWORTH	VOGEL
The right to vote on a sales tax	FOR	AGAINST
The issue of choice	FOR	AGAINST
The right to work (for less)	AGAINST	FOR
A SALES TAX	AGAINST	FOR
DUI a felony (These people need treatment not prison)	AGAINST	FOR (Loss of voting and hunting rights)

At the bottom of this list of positions, just before a dashed line across the page separating this portion from the sample ballot, appeared this attribution: "Paid for by the Southworth for State Representative Committee, Tom Posey - Treasurer, 17 West Meadow, Billings, MT 59102."

3. Vogel's complaint alleges certain misrepresentations of his positions in the Southworth campaign piece quoted above. First, Vogel contends that "I have made it clear that a third offense or injury accident would be considered a felony DUI, not all DUI's as the implications would lead you to believe." Second, he states that "I do not favor the loss of voting and hunting rights as he [Southworth] expresses either." Third, Vogel asserts that "I have never stated that voters should not have the right to vote on a sales tax, in contrast it has been reported that I am in favor of the citizens controlling such a tax."

4. In support of his assertions of misrepresentation of his positions in the Southworth campaign material, Vogel also provided photocopies of portions of two news articles that he labeled "Billings Gazette articles." One of the incomplete news articles shows a hand-written date of "5-9-90." The other incomplete article is undated.

5. In substantial part, the incomplete news article dated May 9, 1990, reads as follows:

Vogel said that any person after a second DUI conviction would be charged with a felony for a third offense. Secondly, any injury accident involving a DUI would be charged with a felony if they [sic] had a blood alcohol of .10 or were impaired because of alcohol or drugs.

Vogel said that if a person was faced with a felony charge, they would think about giving up drinking and driving. He said he would not seek the bill during the upcoming special session May 21.

6. With respect to the sales tax issue, the other incomplete and undated news article submitted by Vogel, in support of his complaint alleging Southworth's misrepresentation, reads in pertinent part as follows:

Vogel said he would support a sales tax, but "there should be a cap on the rate and a referendum vote to increase it. It should be a replacement . . . [portion of article blurred and unreadable in photocopy at this point] sales tax as increasing overall revenue. He said there was a need to reduce personal property tax in order to get new business.

7. Southworth was interviewed on January 4, 1991. Additionally, he brought a hand-written statement setting forth the bases for his determination of Vogel's positions with respect to DUI's and a sales tax. Southworth also provided with his statement photocopies of news articles from the Billings Gazette dated October 11, 1989, February 1, 1990, May 9, 1990, and October 18, 1990.

8. When interviewed on January 4, 1991, Southworth said that he first learned of Vogel's favorable stance on a sales tax from reading an October 11, 1989, Billings Gazette article written by Jim Gransbery about the interviews of Vogel and two others by the Yellowstone County Commissioners, who would be making the appointment to the vacant house seat in district 86. Southworth stated that he also relied on Vogel's statements surrounding a sales tax, as Vogel was quoted, in a subsequent article in the Billings Gazette on February 1, 1990, also written by Jim Gransbery.

9. The October 11, 1989, news article about candidate interviews with the Yellowstone County Commissioners, provided in its entirety by Southworth, is the piece from which Vogel photocopied a portion and submitted it, undated, with his complaint. The complete portion of Vogel's statement concerning a sales tax, as reported in the October 11, 1989, Billings Gazette news article, reads as follows:

Vogel said he would support a sales tax, but "there should be a cap on the rate and a referendum vote to increase it. It should be a replacement for property tax." Vogel indicated that he saw a sales tax as increasing overall revenue. He said there was a need to reduce personal property tax in order to get new business.

10. Relying on the portion of the news article quoted above, Southworth, in his statement, gave his interpretation of Vogel's position on a sales tax as follows:

I said that Vogel was against the publics [sic] right to vote on a sales tax. I would quote, Billings Gazette Oct 11 1989, He said he would "support a sales tax," Now I take that to mean that should he be elected to the House he would support a sales tax passed in the House of Reps and then if there was a need to increase the sales tax passed, that a referendum would be required to increase it, a vote of the people after it was the law.

11. A second news article on which Southworth said he relied concerning Vogel's stance on a sales tax, appearing in the Billings Gazette on February 1, 1990, in conjunction with Vogel's announcement that he would seek election to the house seat to which he had been appointed, reads in pertinent part as follows:

He [Vogel] added that a sales tax would provide "some continuity rather than a catch-all surcharge on income tax. A sales tax would be more fair and more broad-based."

He emphasized that a sales tax should be used only as a "replacement" rather than another tax. "There must be a limit to a sales tax too," he said. "I-105 told us that people don't want more taxes."

12. The third news article mentioned by Southworth as indicative of Vogel's support for a sales tax, which appeared in the Billings Gazette on October 18, 1990, reads in pertinent part as follows:

Vogel said he is opposed to any new tax increases. He said that if after state government was operating at a minimum, and income and property taxes were reduced, and there was a need for added revenue, he would support a general retail sales tax.

13. In the November 3, 1990, edition of the Billings Gazette, in a news article disclosing that Vogel had filed a formal complaint against Southworth with this office and describing the allegations in his complaint, reporter Jim Gransbery wrote that "[Vogel] concedes to being for a sales tax, but 'under conditions' that he has explained publicly."

14. When interviewed on January 4, 1991, about his representation of Vogel's position on DUI and in his written statement, Southworth said that, again, he relied on a newspaper account for Vogel's stance on this issue. In particular, he cited a May 9, 1990, article in the Billings Gazette, carried under a column titled "MONTANA BRIEFS," with the heading "Vogel wants DUI felony law." This news article is cited in and quoted from in paragraph 5. above.

15. In the same interview, Southworth also stated that he was not implying in his campaign flier that Vogel advocates the

loss of voting and hunting rights for felony conviction of DUI; rather, said Southworth, he understood in talking with some Billings city police on the matter that such loss of rights is automatic for a person convicted of a felony.

16. When asked if he had seen any of Vogel's campaign materials prior to producing his campaign piece setting out his and Vogel's positions on various issues, Southworth said he recalled seeing perhaps a couple. On further questioning, he indicated that neither, to the best of his recollection, addressed a sales tax or DUI specifically; he said that they were generalized kinds of campaign materials. Again, Southworth said his sources for deciding Vogel's positions on a sales tax and DUI felony conviction were the news accounts he cited.

17. In the same November 3, 1990, news article cited above in paragraph 13., concerning the filing of the Vogel complaint, reporter Gransbery wrote that

Southworth said he would stand by printed statements that his opponent has made in the Gazette and that he has never deliberately misrepresented Vogel's positions.

18. P. Russell Brown, a field worker with the Montana Democratic Party who worked in the Billings area during the 1990 election cycle, was interviewed on January 8, 1991. When asked to describe his involvement, if any, with the production of the offending Southworth flier, Brown stated that Southworth had come to him with a draft of issues that Southworth wished to address and to compare with Vogel's positions on those issues. Brown

said that he did not do any research on Vogel's positions on issues; however, Brown said that he did read the news articles already cited and agreed with Southworth's interpretation of Vogel's position on the sales tax as evidenced in the newspaper articles.

19. When asked about providing any assistance to Southworth regarding the DUI issue, Brown again said that he merely had read the May 9, 1990, newspaper article cited above and concurred with Southworth's assessment of Vogel's position as it would be stated on the campaign flier. Brown indicated that he had nothing really to do in composing the campaign piece, but he said that he did agree with Southworth's assessment of Vogel's positions as they would be set forth on the flier.

20. When asked if he had seen any Vogel campaign literature or materials prior to the time that the Southworth piece went to the printers, Brown said that "no doubt" he had seen something from the Vogel campaign since he saw most candidates' materials of the opposition party. He said that he would have remembered, however, if he had seen any Vogel material at variance with the positions Southworth ascribed to Vogel on the flier.

21. Brown on January 10, 1991, provided further information surrounding the printing of the Southworth sample ballot campaign piece. He said that it was submitted to Artcraft Printers on October 10, 1990, and that the "turnaround" was about October 16, 1990.

STATEMENT OF FINDINGS

As the facts show, both complainant Randy Vogel and alleged violator Jim Southworth rely on news articles setting out Vogel's positions on a sales tax and on when a DUI should carry a felony conviction to make their cases about Southworth's depiction on his campaign piece of Vogel's stances on these two issues.

Vogel sent with his complaint photocopies of portions of two news articles, which appeared in the Billings Gazette on October 11, 1989, and on May 9, 1990, in which his views on the two issues are stated. Apparently, Vogel's transmittal of the pertinent portions of these news articles was meant to buttress his contention that his views were misrepresented by Southworth. He provided nothing else in the way of evidentiary material when he filed his written complaint; moreover, when asked, Vogel said that he had nothing more to say or to provide in support of his complaint other than what he had already provided.

Southworth, as the facts show, relied on the same two news articles in learning and then in stating Vogel's positions on the issues under contention. In fact, Southworth relied exclusively on the May 9, 1990, news article to depict Vogel's position about DUI as a felony offense. As to the sales tax issue, Southworth relied principally on the October 11, 1989, news article for Vogel's position on this issue. He also cited a subsequent article appearing in the February 1, 1990, issue of the Billings Gazette as showing Vogel's support for a sales tax.

Clearly, Vogel contends that the news accounts support his complaint that Southworth misrepresented his positions; at the same time, Southworth cites the same news accounts as his justification for presenting Vogel's positions as he did on the campaign flier. Two questions then arise: (1) Which of the two interpretations of the cited news accounts, Southworth's or Vogel's, is accurate? (2) If any misrepresentation on the part of Southworth is found, was it knowingly done by him?

As the May 9, 1990, newspaper article shows, Vogel's position with respect to DUI is twofold. First, his position is that a person should be charged with a felony for a third offense DUI. Second, his position is that in ". . . any injury accident involving DUI [persons] would be charged with a felony if they had a blood alcohol of .01 or were impaired because of alcohol or drugs."

Southworth, in his campaign flier, presented Vogel's position and his own on the DUI issue in the following manner:

	SOUTHWORTH	VOGEL
DUI a felony (These people need treatment not prison)	AGAINST	FOR (Loss of voting and hunting rights)

Vogel's position, as set forth above, is a severely condensed version of the newspaper article. While the article itself is headed "Vogel wants DUI felony law," it goes on to describe the conditions under which Vogel believes a felony charge should be

made. Southworth obviously did not include an explanation of the circumstances in which Vogel advocated a felony charge for DUI; he simply reduced Vogel's stance on this issue to Vogel's being for "DUI a felony." That statement is a simplification; but it is not a false statement nor reductio ad absurdum. I therefore do not find a clear misrepresentation of Vogel's position with respect to felony charge for DUI.

In his complaint, Vogel also asserts that Southworth pictured Vogel as favoring the loss of voting and hunting rights. As the facts show, Southworth's parenthetical comment about such losses is not meant to define Vogel's position; rather, it is a statement of the automatic loss of privileges on any felony conviction as Southworth understood would be the case in talking with law officers. A reasonable reader would conclude that the parenthetical comment is just such an explanation and was provided by Southworth as his own commentary in much the same way that he made the parenthetical comment that "[t]hese people need treatment not prison."

On the sales tax issue, Vogel does not complain that Southworth misrepresented his stance by indicating on the flier that Vogel is for a sales tax; rather, Vogel contends that Southworth's flier misrepresented his position in stating that Vogel is against the "right to vote on a sales tax."

As indicated previously, both Vogel and Southworth rely on the October 11, 1989, Billings Gazette news article to support their differing views concerning a public vote on a sales tax.

Vogel is quoted as saying that ". . . he would support a sales tax, but 'there should be a cap on the rate and a referendum vote to increase it. . . .'" Southworth in his statement took this to mean that Vogel, as a state representative, would vote to enact a sales tax by the legislature but favored any proposed increase of an enacted sales tax be submitted to the people for a vote. I do not find Southworth's interpretation to be inconsistent with the news account; nor do I believe that a reasonable reader would conclude otherwise.

Southworth's depiction on his campaign flier of Vogel's stance again may be considered a simplification; it is not, however, an untrue statement. Vogel's own words, as quoted in the news article, clearly indicate that a referendum vote be on a proposed increase in a sales tax, not to enact one. In a subsequent newspaper article dated February 1, 1990, when Vogel again made statements in support of a sales tax, he gave no indication that such support was conditioned on a public vote on the matter. For the reasons stated above, I do not find any clear misrepresentation on the sales tax issue.

Based on the facts and these findings, I have determined that evidence is insufficient to conclude that Representative Jim Southworth may have violated section 13-35-234, MCA; therefore, no further action is warranted.

DATED this 23rd day of December, 1991



DOLORES COLBURG
Commissioner of Political Practices