

**BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES
STATE OF MONTANA**

In the Matter of the Complaint of the the Montana Republican Party Concerning Governor Brian Schweitzer)))))	ORDER GRANTING PARTIAL SUMMARY JUDGMENT, GRANTING MOTION TO STRIKE, AND PREHEARING ORDER
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Hearing Examiner William Corbett issued a Proposal for Decision in this matter on August 18, 2008. Based on the record in this matter and the exceptions, supporting briefs, and arguments of the parties to the Proposal for Decision, the following decision is issued pursuant to Section 2-4-623, MCA.

Mr. Corbett’s Proposal for Decision is adopted in part and modified in part as hereinafter set forth:

- Reference to the parties has been changed from the “Charging Party” to “MRP” and from the “Respondent” to the “Governor” throughout this decision;
- The Governor’s Motion for Summary Judgment is denied and partial summary judgment is entered in favor of MRP;
- The Governor’s Motion to Strike MRP’s October 3, 2008 Brief in Support of Exceptions and Reply Brief (MRP’s Reply Exceptions) is granted; and
- The parties shall comply with the Prehearing Order in Part X of this decision to resolve the remaining issues in this proceeding.

I. BACKGROUND

The Background Summary in the Proposal for Decision has been expanded to include the arguments made by the parties in multiple pleadings filed after the issuance of the Proposal for Decision.

The following background is relevant to this decision. The Commissioner of Political Practices for the State of Montana is authorized by law to receive and decide ethics violation complaints against Montana public officials and employees. On April 8, 2008, Jacob Eaton, the Montana Republican Party's Executive Director, filed an ethics complaint with the Commissioner against the Governor. The complaint alleges that the Governor violated an ethics statute (2-2-121(4), MCA) by preparing and distributing two public service announcements (PSAs) that aired on several Montana radio stations after the Governor became a candidate for re-election.

A. The Governor's Motion for Summary Judgment

In response to MRP's complaint, the Governor filed a "Motion for Summary Judgment" (Governor's Motion) acknowledging the preparation and distribution of two PSAs that were ultimately aired by several Montana radio stations. In his Motion, the Governor argued that, based on these facts, there was no violation of law, and because the relevant facts are clear and undisputed, there is no reason to hold an evidentiary hearing in this matter.

Initially, in response to the Governor's Motion, MRP argued that the Motion should be denied. It argued that the relevant facts surrounding the event were not clear and that a hearing should be held to present the relevant evidence. It also argued that even based on the undisputed facts, the Governor's production and distribution of the PSAs was unlawful.

On August 1, 2008, a hearing was held on the Governor's Motion. The Governor again pressed his claim that all the relevant facts surrounding the incident were undisputed and that, as a matter of law, judgment should be rendered in his favor. MRP again argued that certain relevant facts were in dispute, but asserted that even under the undisputed facts, the Governor's production and distribution of the PSAs was unlawful.

The Governor's Motion requires a determination of whether, under the undisputed facts, the Governor's production and distribution of the PSAs violated Section 2-2-121(4), MCA.

B. The Hearing Examiner's Proposal for Decision

On August 21, 2008, Hearing Examiner William L. Corbett issued a Proposal for Decision determining that the Governor violated Section 2-2-121(4), MCA, a civil penalty of \$750 should be imposed, but the Governor should not be assessed the costs of the proceeding. Mr. Corbett's determinations were based on findings that the candidate PSA law was ambiguous but that the legislative history clearly resolved the statutory ambiguity in favor of MRP's interpretation.

A cover letter to Mr. Corbett's Proposal for Decision granted the parties 10 days to notify the Commissioner if they intended to appeal the Proposal for Decision. Mr. Corbett's letter also gave the parties 30 days from the date of the cover letter (August 21, 2008) to file exceptions and briefs in support of any appeal to the Commissioner.

C. Filings and events after the Proposal for Decision

1. The Governor's letter and personal check On August 25, 2008, the Governor's counsel forwarded to the Commissioner an August 22, 2008 letter from Governor Schweitzer and a \$750 personal check from the Governor. Mr. Meloy's cover letter stated that the Governor "is willing to pay the [\$750] fine [recommended in Mr. Corbett's Proposal for Decision] and be done with it." Governor Schweitzer's letter stated his disagreement with the Proposal for Decision but indicated the check could be "cashed upon ... [the Commissioner's] final decision assuming it does not vary from ... [Mr. Corbett's] decision."

The Commissioner returned the Governor's personal check to the Governor's attorney on August 27, 2008.

2. Commissioner's Disclosure of Eric Stern's *ex parte* communications. The Commissioner disclosed to the parties and the public the substance of the *ex parte* communications from Eric Stern, the Governor's senior counsel, on August 28, 2008.

3. MRP's Exceptions MRP filed a ten page Notice of Exceptions and Brief in Support on August 29, 2008 (MRP's Exceptions). MRP's Exceptions to the Proposal for Decision assert:

- MRP did not file a cross motion for summary judgment;
- MRP did not concede that the Governor committed only one violation and additional proceedings were necessary to determine the total number of violations;

- MRP did not make any concessions concerning the appropriateness of a penalty to be imposed and it was premature for the Proposal for Decision to assess a penalty;
- MRP is entitled to partial summary judgment on the sole issue that the agreed facts establish that the Governor violated state law;
- The Governor’s letter to the Commissioner and attempted payment of the \$750 civil penalty recommended in the Proposal for Decision was a confession of “culpability;” and
- MRP is entitled to conduct discovery in this matter regarding the number of violations that may have occurred, the amount of state funds that may have been unlawfully spent on PSAs, the appropriateness of sanctions to be imposed for each violation, and the ex parte contacts by the Governor’s senior counsel, Eric Stern.

4. The Governor’s Notice of Exceptions The Governor filed a Notice of Exceptions (Governor’s Notice) on September 2, 2008. The Governor asserted that because the candidate PSA law is ambiguous and cannot be interpreted without considering the legislative history, then sanctions cannot be imposed because a person of ordinary intelligence does not have fair notice of forbidden conduct. The Governor cited case law supporting his contention that a vague statute must either be declared void or, in the alternative, sanctions not imposed if a statute, on its face, is ambiguous.

5. The Governor’s Exceptions On September 19, 2008, the Governor filed a ten page Combined Brief in Support of the Governor’s Exceptions and in Opposition to Republicans’ Exceptions (Governor’s Exceptions). The Governor’s Exceptions assert that:

- The Commissioner cannot levy sanctions against the Governor because the candidate PSA law is ambiguous and can only be understood by considering legislative history;
- The Commissioner has discretion to impose sanctions for violations of the candidate PSA law and no sanctions should be imposed because Section 2-2-121(4), MCA, is ambiguous;
- Section 2-2-121(4), MCA, is void for vagueness but the Commissioner does not have authority to decide the constitutionality of the candidate PSA law;
- The Governor’s August 22, 2008 letter was not admission of culpability; and

- If the Governor violated the candidate PSA law, it was a single violation under an ambiguous statute.

6. MRP's Reply Exceptions MRP filed thirteen pages of Reply Exceptions on October 3, 2008 asserting:

- The Governor waived his right to raise the affirmative defense that Section 2-2-121(4), MCA, is void for vagueness;
- The candidate PSA law is not void for vagueness and the Commissioner has no authority to rule on the constitutionality of a statute;
- Statutes are presumed constitutional and the candidate PSA law is not ambiguous;
- The Governor's liability has been established, but not the amount of the penalty to be imposed; and
- MRP is entitled to conduct discovery regarding the number and severity of the violations, the appropriateness of sanctions to be imposed, Eric Stern's possible practice of law in this matter, and Mr. Stern's ex parte contacts with the Commissioner.

7. The Governor's Motion to Strike The Governor filed a Motion to Strike MRP's Reply Exceptions on October 8, 2008 (Motion to Strike), and also requested permission to file a response to MRP's Reply Exceptions regardless of whether the motion to strike was granted. The Governor's Motion to Strike alleged that MRP improperly filed its Reply Exceptions after the September 22, 2008 deadline.

8. MRP's Answer to the Governor's Motion to Strike MRP filed its Answer to Governor's Motion to Strike on October 20, 2008 (MRP's Strike Answer). MRP cited statements made by Mr. Corbett in a telephonic prehearing conference assuring the parties that they would have an opportunity to "fully brief" their respective issues after Mr. Corbett issued his proposed decision. MRP asserts that the Governor's Exceptions were not filed until September 22, 2008, the deadline established in Mr. Corbett's letter order (the Governor's Exceptions were e-mailed to Mr. Lovell and the Commissioner on Friday, September 19, 2008). MRP alleges that the Governor's Exceptions filing deprived MRP of its right to file an answer within the "customary

10-day period. . . as set forth in the Montana Rules of Civil Procedure.” MRP did not cite a specific rule.

9. The Governor’s Combined Reply and Answer Brief The Governor filed a Combined Reply Brief in Support of His Exceptions and Answer Brief Opposing Republicans’ Filings (Governor’s Reply/Answer Brief) on October 31, 2008. The Governor cites authority supporting his motion to strike MRP’s Reply Exceptions because the pleading was not timely filed. The Governor then asserts that he is not asking the Commissioner to forego imposition of a penalty under Section 2-2-136, MCA, based on a declaration that the candidate PSA law is unconstitutionally vague. Instead, the Governor states the Commissioner has discretion under 2-2-136 to impose no sanctions because the candidate PSA law is, on its face, ambiguous. The Governor has not waived his right to challenge the constitutionality of the candidate PSA law upon judicial review and the Commissioner is urged to either determine that no violation of the candidate PSA law occurred or that imposition of a penalty would be unjust if a violation of an ambiguous statute did occur.

II. FACTS

The Facts in the Proposal for Decision are adopted and incorporated into this decision but with the following revisions:

- The Facts have been renumbered because only 19, not 20 Facts were included in the Proposal for Decision (there was no Fact numbered 19);
- Facts 1 and 5 in the Proposal for Decision have been combined into Fact 1; and
- A new Fact 11 has been inserted based on the parties agreed facts and the parties’ pleadings in this matter.

The relevant and undisputed facts upon which this decision is based are:

1. MRP filed an ethics complaint against Brian Schweitzer, the Governor of the State of Montana, on April 8, 2008.
2. Ron Zellar is the Public Information Officer for the Montana Department of Agriculture and is employed by the State of Montana.
3. KXLO is a radio station in Lewistown, Montana.

4. In late February or early March of 2008, Mr. Zellar spoke to a representative of KXLO regarding having the Governor produce and distribute PSAs in support of agriculture in Montana.
5. Sara Elliott is the Governor's Communication Director and is employed by the State of Montana.
6. In early March 2008, Mr. Zellar informed Sara Elliott about the PSAs.
7. On March 4, 2008, the Governor filed for re-election.
8. On March 5, 2008, the Governor, Sara Elliott, and Ron Zellar spent an undisclosed amount of time producing two versions of the PSA (a 30-second version and a 60-second version) promoting agriculture in Montana.
9. The messages were recorded at the Governor's official state office.
10. The time spent producing the recorded messages was during the normal work day for Ms. Elliott and Mr. Zellar and they were both compensated by the State of Montana for their services.
11. The time spent by the Governor recording the messages was during a normal work day (a Wednesday, March 5, 2008) and the Governor was being compensated by the State of Montana when he recorded the messages.
12. State of Montana supplies, equipment, and facilities were used in recording the messages.
13. After the production of the PSAs, Mr. Zellar sent them to a number of news and advertising editors statewide.
14. State of Montana supplies, equipment, and facilities were used in distributing the PSAs.
15. Either or both of the PSAs were broadcast by Montana radio stations.
16. The PSAs were not produced or distributed pursuant to a state or national emergency.
17. The PSAs used the voice and name of the Respondent.

18. The 30-second spot:

“Agriculture is Montana's largest industry and we're working with producers in our agricultural industry to continue growing. This is a farmer and your governor, Brian Schweitzer, and Montana is on the move.

Montana farmers and ranchers have always produced top quality grains and beef, as well as hay, peas, honey, lamb and a host of other products. We're working to add value to Montana commodities. It is an exciting time in Montana Agriculture. Take the time to buy local products and say thank you to a farmer during this: The National Agricultural month.”

19. The 60-second spot:

“Agriculture is Montana's largest industry and we're working with producers in our agricultural industry to continue to grow. This is a farmer and your governor, Brian Schweitzer, and Montana is on the move.

“Montana farmers and ranchers have always produced top quality grains and beef, as well as hay, peas, honey, lamb and a host of other products. We're working to add value to Montana commodities. Montana is a leader in producing certified organic grains for buyers in the United States and overseas. Beef breeders have found markets in Brazil and Argentina and around the world. A livestock team from Russia will arrive later this year to discuss a partnership that would use Montana genetics in rebuilding their beef industry. In the future, large and small firms plan to process Montana oil seed into biofuels with a side benefit of supplying protein rich feed to livestock. It's an exciting time in Montana Agriculture. Take the time to buy local products and say thank you to a farmer during this: The National Agricultural month.”

III. APPLICABLE LAW

The Governor is charged with violating Section 2-2-121(4), MCA. That provision states:

“A candidate, as defined in 13-1-101 (6)(a), may not use or permit the use of state funds for any advertisement or public service announcement in a newspaper, on radio, or on television that contains the candidate's name, picture, or voice except in the case of a state or national emergency and then only if the announcement is reasonably necessary to the candidate's official functions.”

IV. ISSUE

The issue is whether the production and distribution of the PSAs by the Governor, using state facilities, equipment, supplies and personnel constituted the unlawful use of "state funds" under Section 2-2-121(4), MCA.

V. POSITION OF THE PARTIES

A. MRP's position

MRP alleges that the Governor's use of Montana State equipment, supplies, facilities, and employee time in making and distributing the PSAs constituted the unlawful use of state funds under Section 2-2-121(4), MCA. MRP asserts that the candidate PSA prohibition includes the direct expenditure of state money as well as the indirect use of state money by using state equipment, supplies, facilities, and employee time to produce and distribute the PSAs.

B. The Governor's position

The Governor asserts that the Section 2-2-121(4), MCA, prohibition only precluded him, as a candidate, from using state money to purchase air time for the PSAs. He argues that there was no violation of law because he did not use state money for this purpose. According to the Governor, the statutory prohibition does not prohibit public officials, as candidates, from using state owned equipment, supplies, facilities, and employee time to produce and distribute PSAs.

The Governor's position is based on a comparison of the language in the candidate PSA prohibition with Montana laws that prohibit all public officers and public employees from using "public time, facilities, equipment, supplies, personnel, or funds" for any private business purpose (§2-2-121(2), MCA) or to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue (2-2-121 (3), MCA). The Governor contends that Montana law does not preclude office holders, as candidates, from using public time, facilities, equipment, supplies, or personnel for advertisements or public service announcements using their names, pictures or voices.

The Governor asserts that he is on duty 24 hours a day, 7 days a week, that the issuance of press releases, speeches, or his help in communicating matters relating to Montana constituencies, in this case, farmers, is a normal part of his job, and the job of his staff. He states that the scope of the prohibition urged by MRP would unreasonably limit his ability to perform his job and that this was not intended by the Legislature. If the Legislature wanted to prohibit office holder candidates from using state resources other than money, it would have said so.

VI. CONCLUSIONS OF LAW

1. Upon filing for re-election, the Governor became a "candidate," as defined in Section 13-1-101(6)(a), MCA. That section defines a candidate as "an individual who has filed a declaration or petition for nomination, acceptance of nomination, or appointment as a candidate for public office as required by law...." It is undisputed that on March 4, 2008, the Governor filed for re-election. It is also undisputed that the PSAs in question were made on March 5, 2008, and thereafter distributed and aired. Therefore, the PSAs were made, distributed and aired after the Governor became a candidate for re-election.
2. The parties agree that the recorded and distributed messages were PSAs within the language of Section 2-2-121(4), MCA. The messages were recorded and distributed as PSAs and were thereafter aired by radio stations as PSAs.
3. The Governor's production and distribution of the two PSAs violated Section 2-2-121(4), MCA.

VII. REASONING IN SUPPORT OF THE CONCLUSION THAT THE GOVERNOR VIOLATED SECTION 2-2-121(4), MCA

A public officer or public employee, as a candidate for elective office, "may not use or permit the use of state funds for any advertisement or public service announcement" that contains the candidate's name, picture, or voice. Section 2-2-121(4), MCA. The Governor was a "candidate" for re-election at the time he produced and distributed two PSAs. The sole question to be resolved in this decision is whether the production and distribution of the PSAs by the Governor, his staff, and a Department of Agriculture employee while being paid by the State of Montana and while using equipment, office space, and supplies paid for and maintained by the State of Montana constituted the prohibited use of "state funds."

The term "state funds" is not defined in Section 2-2-121(4), MCA, or elsewhere in the Montana Code Annotated. The Governor's Motion asserts the failure to define "state funds" makes the candidate PSA prohibition ambiguous and leads to the conclusion that Section 2-2-121(4), MCA, only prevents state funds from being used to purchase air time for the PSAs. The Governor also asserts that the legislative history of the candidate PSA prohibition does not resolve the ambiguity.

Mr. Corbett's Proposal for Decision accepted the Governor's assertion that the candidate PSA law was, on its face, ambiguous. However, Mr. Corbett rejected the Governor's claim that the candidate PSA law's legislative history did not resolve the statutory ambiguity. Mr. Corbett concluded that the legislative history of the "state funds" candidate PSA law prohibited the use of state funded personnel, equipment, supplies, and office space to produce and distribute PSAs featuring an elected official who had filed for re-election.

I agree with Mr. Corbett's ultimate conclusion in the Proposal for Decision. Section 2-2-121(4), MCA, prohibits the use of state funded personnel, equipment, supplies, and office space to produce, distribute, and air PSAs featuring the Governor after the Governor became a candidate for re-election.

I respectfully disagree that Section 2-2-121(4), MCA, is ambiguous, and that it is necessary to consider the legislative history to resolve the ambiguity.

A. Section 2-2-121(4), MCA, is not ambiguous.

1. The plain meaning of Section 2-2-121(4), MCA I respectfully reject the Governor's assertion that the legislature's failure to define the term "state funds" in Section 2-2-121(4), MCA, creates an ambiguity that can only be narrowly interpreted to prohibit the use of legislatively appropriated state funds to purchase air time to run PSAs featuring the picture, voice, or name of a candidate. The plain meaning of Section 2-2-121(4), MCA, does not support the Governor's suggested interpretation of the candidate PSA law or his associated contention that the candidate PSA prohibition allows the use of state funded personnel, equipment, supplies, and office space to produce and distribute candidate PSAs.

The language of Section 2-2-121(4), MCA, is clear and unequivocal. After the Governor filed for re-election with the Secretary of State on March 4, 2008, he could "not use or permit the use of state funds for any advertisement or public service announcement ... that contains the candidate's name, picture, or voice." The sole exception to this broad but clear "use of state funds" prohibition is that the Governor, as a candidate, could have used state funds to produce, distribute, and air PSAs featuring his persona, name, or voice *if* the PSA dealt with a state or national emergency and the announcement was "reasonably necessary" to the Governor's "official functions."

The Governor's interpretation of 2-2-121(4), MCA, requires the insertion of the words "the purchase of" in the crucial prohibition language of the PSA law (a candidate "may not use or permit the use of state funds for *the purchase of* any advertisement or public service announcement". *Emphasis added.*) Insertion of these necessary words to effectuate the Governor's interpretation is contrary to the Governor's reliance on a fundamental rule of statutory construction -- a judge may not insert what has been omitted or omit what has been inserted. (See Governor's Motion, pages 2, 4-5, and Section 1-2-101, MCA.)

The Governor argues that if the legislature intended the candidate PSA prohibition to prevent the use of other state resources (personnel, equipment, supplies, and office space) to produce and distribute candidate PSAs, then language similar to that used in Sections 2-2-121(2)(a) and (3)(a), MCA, would have been incorporated. (See Proposal for Decision, pages 6-7; Governor's Motion, pages 3-7; Governor's July 15, 2008 Reply Brief in Support of Motion to Dismiss (Governor's Motion Reply Brief), pages 2-5 and 11; and MRP's June 26, 2008 Answer Brief to the Governor's Motion for Summary Judgment, pages 10-20. Sections 2-2-121(2)(a) and (3)(a), MCA, prohibit the use of "public time, facilities, equipment, supplies, personnel, or funds" for private business or political purposes.)

While the Governor's argument has a rational legal basis, it fails for the following reasons:

The Governor's argument presumes that there is only one set of words that the legislature could have used to impose the broad but clear candidate PSA prohibition codified in Section 2-2-121(4), MCA. As explained in the preceding pages, the candidate PSA prohibition in Section 2-2-121(4), MCA, is, on its face, plain, clear, and unambiguous.

Subsections (2)(a) and 3(a) of Section 2-2-121, MCA, address public officers and public employees using public money and other state funded resources for their private businesses or political activity. These two subsections speak generally to public officers and employees. Subsection (4), however, does not speak generally to public officers and employees, but to a limited subset of such officers and employees who become candidates for political office. Subsection (4) was enacted more recently and it is reasonable to conclude that it was enacted to address a different public policy issue. Indeed, unlike subsections (2)(a) and (3)(a), subsection (4) was taken from a North Carolina statute that also prohibits public officials, as candidates, from using state funds for PSAs. North Carolina General Statute § 163-278.16A. There is no reason to assume that the legislature intended that subsection (4) be read in reference to subsections (2)(a) and (3)(a).

The Governor's (2)(a) and (3)(a) argument also fails because it is rooted in the questionable notion that public funds provided by the Montana legislature to the Governor for performance of his important executive branch functions are not "state funds" subject to the prohibitions of Section 2-2-121(4), MCA. While the term "state funds" is not defined in either Section 2-2-121(4), MCA, or the Montana Code, it is a term "of common usage" and if "readily understood, it will be presumed that a reasonable person of average intelligence comprehends it." (*State v. Martel*, 273 Mont. 143, 150, 902 P. 2d 14, 18-19 (1995). See also *Clouse v. Lewis & Clark County*, 345 Mont. 208, 220, 190 P. 3d 1052, 1060 (2008); *State v. Adgeron*, 318 Mont. 22, 28-29, 78 P. 3d 850, 856 (2003); and *State v. McCarthy*, 294 Mont. 270, 273-274, 980 P. 2d 629 (1999). It is not necessary for the legislature "to define every term it employs when constructing a statute." (*Martel*, *supra*, page 150.)

Public funds that the Governor or any other state entity, including my office, are legally authorized to spend by the legislature constitute "state funds" within the commonly understood and accepted meaning of the term used in Section 2-2-121(4), MCA.

Undisputed Facts 2, 5, 6, 9, and 9-14 establish that state funds the Governor was legislatively authorized to spend in FY 2008 and 2009 were used to produce and distribute the National Ag Week PSAs at issue in this matter. The use of legislatively authorized funds to pay the Governor's salary and the salaries of the Governor's Communications Director and a Department of Agriculture employee while they produced and distributed the PSAs constitutes the use of state funds prohibited by Section 2-2-121(4), MCA. The use of legislatively authorized funds to pay for the acquisition, maintenance, and use of equipment, supplies, and office space made available to the Governor and the Department of Agriculture by the State and people of Montana constitutes the use of state funds prohibited by Section 2-2-121(4), MCA.

B. Ludicrous results must be avoided

The Governor's subsections (2)(a) and (3)(a) argument, while based on a rational legal theory, must also be rejected because it would lead to ludicrous results and great mischief.

The Governor argues that the candidate PSA prohibition only prevents the use of state funds to purchase air time to run candidate PSAs and that there was no violation of 2-2-121(4), MCA, because the PSAs at issue in this matter were "aired for free." (See the discussion of the "aired for free" issue on page 19 of this decision, the Governor's Motion, page 7, and the Governor's Motion Reply Brief, page 11.)

Such an interpretation leads to the absurd result suggested by the Governor – that incumbent elected officials who become candidates have unfettered discretion to use state funds and state funded staff, personnel, equipment, supplies, and office space to produce and distribute PSAs featuring the candidate during a political campaign so long as state funds are not used to purchase air time for the candidate PSAs. Under this interpretation, the Governor’s state funded airplane could be used to timely distribute candidate PSAs at crucial junctures during the primary and general election campaigns. Such an absurd result would undermine Montana’s historic prohibition against public officers and state employees using public resources to influence elections. (See, e.g., Sections 2-2-121(2) and (3), and 13-35-226(4), MCA.) Statutes must be interpreted to avoid absurd results. *Marriage of Syverson*, 281 Mont. 1, 19, 931 P.2d 691 (1996) (court refused to make an unjust and absurd interpretation of a custody modification statute); *Montana Dept. of Revenue v. Kaiser Cement Corp.*, 245 Mont. 502, 506, 803 P. 2d 947, 951 (1994) (literal interpretation of a tax statute rejected because it would lead to absurd results); and *Stroop v. Day*, 271 Mont. 314, 318-319, 896 P. 2d 439, 441-441 (1995) (literal interpretation of the word “provocation” in a dog bite statute would lead to absurd results).)

The parties have acknowledged that the enactment of Section 2-2-121(4), MCA, was the direct result of public and political concern that publicly funded candidate PSAs were being increasingly used by incumbent office holders to improve their name recognition during hotly contested campaigns for public office.

The parties discussed two seminal examples of candidate PSA abuse in their oral arguments on the Governor’s Motion. (See Transcript, pages 17, 24, 37-38, and 57.)

The Governor’s counsel stated that Democratic State Auditor Mark O’Keefe used \$133,000 of fines collected by his office to “pay for the production of and air time to put his name and face before the public.” (Transcript, page 17.) The Governor’s counsel indicated that he was personally present when Mr. O’Keefe “had a big production company” record PSAs in the Old Supreme Court Chamber of the Capitol Building and that the State Auditor “had all kinds of money to pay” for the PSAs. (Transcript, page 57.)

Republican Bob Brown was elected Secretary of State in 2000. He filed a Statement of Candidate for the office of Governor on July 15, 2003. The Secretary of State’s Office had received \$930,000 of federal funds to educate Montanans about the Help America Vote Act (HAVA). Brown spent \$350,875 of HAVA funds on PSAs from June of 2003 through June of 2004. (See Commissioner Linda Vaughey’s June 2, 2004 decision *In the Matter of the Complaint of Davison for Governor Against Secretary of State Bob Brown (Bob Brown PSA Decision)*, page 11.)

Brown personally appeared or was featured in \$150,059 of those PSAs in the months preceding the 2004 primary election. *Id.* Brown defeated Pat Davison in a bitterly contested primary campaign for the 2004 Republican gubernatorial nomination. The Davison campaign's expert witness testified that Brown's PSAs were designed to feature Brown and that the PSAs positively affected Brown's name recognition. (*Id.*, pages 12-13.)

The Governor's interpretation of 2-2-121(4), MCA, would give new life to the Brown and O'Keefe PSA abuses so long as state funds are not used to purchase air time for the PSAs. The Governor's interpretation would even allow state funds to be used to pay production companies like the one used by Mr. O'Keefe to produce PSAs prominently featuring an elected official who had become a candidate. Such an interpretation is an obvious benefit to incumbent public officers and prejudices opposition candidates who cannot avail themselves of the fruits of incumbency.

Even greater concerns exist if the Governor's interpretation of the candidate PSA prohibition were to be adopted. Commissioner Vaughney's *Bob Brown PSA Decision* warned that PSA expenditures may become reportable campaign expenditures if the production, distribution, or airing of PSAs is coordinated with a candidate's campaign. (*Id.*, pages 22-23.) MRP has alleged in this proceeding that the Governor's PSAs included the campaign slogan used by the Governor in his re-election campaign (MRP also alleges that the Democratic Party is using the same slogan. (See MRP's Answer Brief, pages 5-6 and 10; and Transcript 28-29.)) If the production, distribution, or airing of candidate PSAs is coordinated with the candidate's campaign, then an in-kind contribution issue may exist even if the PSAs are "aired for free." (See, *e.g.*, ARM 44.10.321(2) and 44.10.513.)

If a radio or television station airs a candidate PSA without charge or a private entity pays the radio or TV stations to air the candidate PSAs, and the production, distribution, or airing of the PSA has been coordinated with the candidate's campaign, then the specter of an illegal corporate contribution or a contribution that exceeds applicable contribution limits may also exist. (See, *e.g.*, Sections 13-35-227 and 13-37-216, MCA.) The broad but clear bright line prohibition against using state funds for candidate PSAs was truly a good government bill that enjoyed broad bi-partisan legislative support (the 2005 candidate PSA prohibition passed third reading 94-4 in the House and 49-1 in the Senate).

The following guiding principles of Montana’s Code of Ethics also require that the Governor’s suggested interpretation of the candidate PSA prohibition be rejected:

- “[C]onflict between public duty and private interest” is prohibited;
- “[H]olding public office or employment is a public trust, created by the confidence that the electorate reposes in the integrity of public officers, legislators, and public employees;”
- Public officials and public employees must “carry out ... [their] duties for the benefit of the people;” and
- A public official “whose conduct departs from the person’s public duty is liable to the people of this state and is subject to the penalties provided in ... [the Code of Ethics] for abuse of the public’s trust.”

(See Section 2-2-101, MCA, implementing Article VIII, Section 4 of the Montana Constitution; Section 2-2-103(1), MCA; and the 2005 decision of my predecessor, Commissioner Gordon Higgins, *In the Matter of the Complaint of L. David Frasier Against Barb Charlton and Mark Simonich* (Frasier Decision), page 4.)

These guiding principles are not, standing alone, enforceable standards of conduct under the Code but they do influence the application and interpretation of specific rules of prohibited conduct imposed by Sections 2-2-104, 105, 111, 112, 121, and 131, MCA. (See *Frasier Decision*, page 4.) The Governor’s interpretation of Section 2-2-121(4), MCA, would allow the use of state funds (legislatively appropriated tax dollars) by public officers and public employees to produce and distribute candidate PSAs for the purpose of enhancing a candidate’s name recognition during political campaigns. That absurd result conflicts with the “public trust” and “benefit of the people” principles upon which the Code is based.

C. Section 2-2-121(4), MCA, provides fair notice of prohibited conduct

The broad application of the PSA prohibition in Section 2-2-121(4), MCA, to encompass the use of state funds for any purpose related to the preparation, distribution, and airing of prohibited candidate PSAs does not create an ambiguity or require the insertion or deletion of words to give the statute its intended effect. The absolute and unambiguous prohibition embraced in this decision establishes a “bright line” by which an elected official or a public employee of ordinary intelligence has fair notice of prohibited conduct.

The 2-2-121(4), MCA, prohibition only applies to an elected official or a public employee *if* the individual files for election with the Secretary of State. Filing a Statement of Candidate with my office because a public officer or public employee is soliciting campaign contributions does not trigger the candidate PSA prohibitions.

An incumbent public officer who files for election with the Secretary of State is only prohibited from featuring his or her picture, name, or voice in PSAs. Nothing in 2-2-121(4), MCA, prohibits the Governor or other public officers seeking re-election from featuring their appointees or staff in state funded PSAs.

If a state or national emergency occurs, the Governor or other elected officials can use state funds to deal with those emergencies so long as the announcements relate to the candidate's "official functions."

Any uncertainty about the use of state funds can easily be resolved. A public officer or public employee need only do what any of us who work for a state-funded entity do -- determine whether the funding for the personnel, equipment, supplies, and office space used to produce, distribute, or air the PSAs consists of state funds that the legislature has provided via appropriation or spending authorization.

D. Section 2-2-121(4), MCA, does not unreasonably interfere with the Governor's legitimate functions

The Governor asserts that he is on duty 24 hours a day, 7 days a week, and that as Chief Executive Officer for Montana, he is constantly called upon to make statements of public importance -- in this case, the importance of Montana agriculture -- to Montanans. He states that the scope of the prohibition urged by MRP and adopted in this decision would result in an outright ban on office holder candidates from appearing in ads or PSAs related to official public business, and if the Legislature intended such a limitation, it should have adopted the language in Sections 2-2-121(2) and (3), MCA.

The Governor's essential functions argument is not that he should be excused from the requirements of the law, but that if the legislature had intended such a result, it would have clearly said so.

While the statute, as construed, will prohibit the Governor, as a candidate, from using PSAs like the one in question, this limitation will have little impact on his ability to communicate to Montanans or others. The Governor may continue to use press releases, press interviews, press conferences, opinion-editorial page pieces, personal appearances, and engage in all things, as governor, that may attract media attention. (See, e.g., the “bona fide news story, commentary, or editorial” exemptions from the definitions of “contribution” and “expenditure” in Section 13-1-101(7)(b)(ii) and (11)(b)(iii), MCA.)

The candidate PSA prohibition only prohibits reliance on PSAs produced, distributed, or aired using state resources featuring his name, picture, or voice after becoming a candidate. Section 2-2-121(4), MCA, as construed, will have a negligible impact on the Governor’s ability to communicate in his office holder capacity during a campaign. This decision reinforces the broad but clear prohibition against the use of state funds – taxpayer dollars – for political purposes after an office holder becomes a candidate.

E. The Governor’s “Void for Vagueness” arguments

I have determined that the language of Section 2-2-121(4), MCA, is not ambiguous. Therefore, it is not necessary to address the Governor’s “void for vagueness” arguments or consider legislative history to resolve ambiguities in the candidate PSA law.

VIII. PENALTIES AND SANCTIONS

Section 2-2-136(2), MCA, provides that “if a violation. . . has occurred, the commissioner may impose an administrative penalty of not less than \$50 or more than \$1,000....” The Commissioner may also “assess the cost of the [ethics] proceeding against the person bringing the charges if the commissioner determines that a violation did not occur or against the officer or employee if the commissioner determines that a violation did occur.” *Id.*

This is a case of first impression; there are no previous cases interpreting Section 2-2-121(4), MCA. The Governor’s interpretation of the candidate PSA prohibition, while incorrect, had a rational legal basis. However, it was premature for the Hearing Examiner to determine that only a single violation occurred, to assess a \$750 penalty based on a single violation, and to determine that the Governor should not be assessed the costs of this proceeding.

While I agree that the gravity of any sanctions imposed must not exceed the gravity of the offense, MRP is entitled to conduct discovery related to penalty and sanction issues as provided in Part X of this decision. In addition, it is necessary for the parties to address the penalty and sanction issues that arise under Section 2-2-136(2), MCA, as provided in Part X of this decision.

The determinations and recommendations in the Proposal for Decision concerning the number of violations, the assessment of a penalty, and the possible assessment of the costs of this proceeding are reserved for decision pending completion of these proceedings.

IX. MOTION TO STRIKE

Mr. Corbett's August 21, 2008 cover letter accompanying his Proposal for Decision unambiguously granted the parties 10 days from the date of his letter (August 21, 2008) to notify the Commissioner if they intended to appeal the Proposal for Decision. The parties were given 30 days from the date of the cover letter to file exceptions and briefs in support of any appeal to the Commissioner. Both deadlines were clear simultaneous briefing and filing requirements.

MRP apparently understood that it had to file notice of its intent to appeal the Proposal for Decision within ten days after Mr. Corbett's August 21, 2008 cover letter was issued. The ten day appeal deadline was, under applicable civil procedure rules and court decisions, extended to September 2 because August 31 was a Sunday and September 1 was Labor Day. MRP filed ten pages of exceptions and a brief on August 29, 2008 and the Governor filed his appeal notice on September 2, 2008.

The deadline to file briefs in support of their exceptions to the Proposal for Decision was September 22, 2008 (the 30 day deadline in Mr. Corbett's cover letter was extended to Monday, September 22, because September 21 was a Sunday).

On September 19, 2008, the Governor filed ten pages of exceptions and arguments opposing MRP's August 29, 2008 Exceptions. MRP did not file a pleading on or before the September 22 deadline imposed in Mr. Corbett's August 21, 2008 cover letter.

Eleven days after the September 22, 2008 deadline (on October 3, 2008), MRP filed thirteen pages of Reply Exceptions.

MRP's excuse for the late filing of its October 3, 2008 pleading was that MRP was entitled to file a responsive pleading to the Governor's September 19, 2008 Exceptions under the applicable but unspecified motion pleading rules in the Montana Rules of Civil Procedure. MRP asserts that there was not time to respond to the Governor's September 19, 2008 pleading before the September 22 deadline imposed by Mr. Corbett. This excuse ignores the fact that Mr. Corbett's simultaneous filing order applied to the filing of the parties' exceptions to Mr. Corbett's Proposal for Decision. The motion pleading provisions of Uniform District Court Rule 2 and the Montana Rules of Civil Procedure did not apply. MRP had received the Governor's September 2, 2008 Notice of Exceptions and MRP had proper notice of the Governor's vagueness and ambiguity arguments.

Mr. Corbett's simultaneous brief filing requirement for exceptions to the Proposal for Decision was clear, unequivocal, and appropriate.

MRP did not seek clarification or an extension of Mr. Corbett's September 22 deadline. MRP simply ignored the deadline and filed a responsive pleading eleven days after September 22, 2008. Such conduct cannot be condoned and the Governor's Motion to Strike is hereby granted. MRP's October 3, 2008 Reply Exceptions have not and will not be considered in rendering any decisions in this matter. It must also be noted that MRP's decision to ignore the September 22, 2008 briefing deadline precipitated the Governor's well-founded Motion to Strike and delayed the issuance of this decision by at least 30 days.

X. PREHEARING ORDER

Mr. Corbett and I have both determined that the Governor unlawfully used or permitted the use of state funds to produce and distribute two PSAs prominently featuring the Governor in violation of the candidate PSA prohibition in Section 2-2-121(4), MCA.

Yet to be determined are the number of violations, the amount of the administrative penalty to be assessed, whether the costs of this proceeding should be assessed, and whether grounds exist for MRP to seek my disqualification pursuant to Section 2-4-611, MCA, based on the *ex parte* contacts made by Eric Stern, the Governor's senior counsel.

Because a determination has been made that the Governor violated Section 2-2-121(4), MCA, both parties are entitled to an expeditious determination of the sanctions, if any, that will be imposed under Section 2-2-136((2), MCA.

However, the holiday season is upon us and both parties and my office will soon be preoccupied with the 2009 legislative session. Accordingly, it is *hereby ORDERED that*:

1. Mr. Corbett will reassume his duties as Hearing Examiner in this proceeding. Mr. Corbett shall initiate prehearing conferences with counsel for the parties to discuss and establish a schedule for completion of discovery, the filing of prehearing motions and supporting briefs, the filing of a proposed prehearing order in compliance with the requirements of Uniform District Court Rule 5, the date for a final prehearing conference, and a hearing date.
2. All subsequent pleadings filed in this matter and communications with the Hearing Examiner by counsel for the parties shall be simultaneously served electronically via e-mail on opposing counsel, the Hearing Examiner, and the Commissioner.
3. Discovery shall be conducted in this matter subject to the following admonitions and limitations:
 - A. It is presumed and expected that the Governor will cooperate with MRP and make all witnesses with knowledge of the matters at issue in this proceeding, including the Governor, available for depositions within the period established for completion of discovery. It is also presumed and expected that MRP will not make unreasonable demands to depose the Governor and his staff and that MRP will accommodate the Governor's busy schedule as he performs his important executive branch duties before and during the 2009 legislative session.
 - B. The deposition of Eric Stern, if taken, shall be limited to his knowledge of events related to the MRP complaint, his *ex parte* communications with the Commissioner in this matter, and the Governor's knowledge or authorization of Mr. Stern's *ex parte* communications with the Commissioner. Allegations that Mr. Stern has acted as legal counsel to the Governor and that Mr. Stern is unlawfully practicing law without a valid Montana license are not matters within the Commissioner's jurisdiction under the Montana Code of Ethics or other laws administered by the Commissioner.

4. The parties will be entitled to file post-hearing proposed findings of fact, conclusions of law, order, and supporting briefs pursuant to a briefing schedule to be established at the conclusion of the hearing. The parties' post-hearing pleadings shall address the following issues in addition to any other issues briefed by the parties:
 - A. Whether the Governor committed more than one violation of Section 2-2-121(4), MCA, and the specific facts upon which the number of alleged violations is based.
 - B. Whether Section 2-2-136(2), MCA, permits imposition of penalties and sanctions "per violation" as alleged in the MRP complaint and pleadings. In briefing this issue, the parties shall discuss and compare the specific language of Section 2-2-136(2), MCA, with other penalty statutes expressly authorizing imposition of civil penalties "per violation." (See, e.g., Sections 33-1-317; 33-1-318(3); 75-2-413; 75-5-611; 75-10-424; 75-10-943; 75-20-408; 80-8-306; and 82-4-254, MCA.)
 - C. The standard, if any, that the Commissioner must apply to assess the costs of an ethics proceeding against the complainant or the respondent under Section 2-2-136(2), MCA.
 - D. Whether the assessment of "costs" language in Section 2-2-136(2), MCA, authorizes the Commissioner to include the legal fees paid to the Hearing Examiner and other attorneys who were consulted by the Commissioner in rendering the decisions made in an ethics proceeding.
5. I will personally attend the hearing conducted by the Hearing Examiner. I will also promptly review all pleadings as they are filed by the parties. Upon completion of the hearing and review of the post-hearing pleadings filed by the parties, I will consult with Mr. Corbett and issue a final decision pursuant to Sections 2-4-621 and 623, MCA.
6. I am only interested in cogent legal arguments and relevant facts that will enable me to issue a fair and just final decision. The parties and their respective counsel will treat each other with respect and courtesy during the remainder of this proceeding. Partisan rancor and improper conduct will not be tolerated.

The parties are asked to remain focused on the important public policy issues to be decided in this matter – this decision and the remaining issues to be decided will establish important precedent that will be applied to public officers and public employees regardless of political affiliation.

XI. CONCLUSION

Based on the preceding:

1. The Governor's production and distribution of the two National Ag Week PSAs after he became a candidate for re-election violated Section 2-2-121(4), MCA;
2. The determinations and recommendations in the Proposal for Decision concerning the number of violations, the assessment of a penalty, and the possible assessment of the costs of this proceeding are not adopted and are reserved for decision upon completion of these proceedings;
3. The Governor's Motion to Strike is granted and MRP's October 3, 2008 Reply Exceptions will not be considered in rendering any decisions in this matter;
4. The parties shall comply with the Prehearing Order in Part X of this decision so that this matter may be fully submitted for a final decision as expeditiously as possible; and
5. Mr. Corbett will reassume his duties as Hearing Examiner in this proceeding.

DATED this 14th day of November, 2008.



Commissioner of Political Practices

Copies: William Corbett, Hearing Examiner
Lance Lovell, Counsel for MRP
Peter Michael Meloy, Counsel for the Governor