

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES  
STATE OF MONTANA

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In the Matter of the Complaint of            )  
Davison for Governor Against                )  
Secretary of State Bob Brown                )

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ORDER GRANTING SUMMARY JUDGMENT  
REGARDING SECTION 2-2-121(2), MCA

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I. BACKGROUND

Mr. Scot Crockett, Campaign Manager for Davison for Governor (hereinafter "Davison"), filed a complaint against Secretary of State Bob Brown (hereinafter "Brown") on or about April 7, 2004. Mr. Crockett's April 7, 2004 complaint alleged that Brown violated Section 2-2-121(3)(a), MCA, of Montana's Code of Ethics. See the June 2, 2004 Findings of Fact, Conclusions of Law, Order and Memorandum Concerning Section 2-2-121(3)(a), MCA (hereinafter "Section 2-2-121(3)(a) Order"), issued simultaneously with this Order Granting Summary Judgment Regarding Section 2-2-121(2), MCA. Because Mr. Crockett's Section 2-2-121(3)(a), MCA, complaint dealt with matters directly related to the June 8, 2004 Republican gubernatorial primary election, the matter was placed on an expedited prehearing and hearing schedule so that the Commissioner could decide the issues raised in Mr. Crockett's complaint before the June 8, 2004 primary.

During preparation for the May 24, 2004 hearing on Brown's alleged violation of 2-2-121(3)(a), MCA, a last minute dispute arose between the parties about whether the hearing would include allegations that Brown had violated Sections 2-2-121(2)(a), 2-2-

121(2)(b) and 2-2-121(2)(e), MCA, of Montana's Code of Ethics. The dispute first was raised before the Hearing Examiner via telephone conference call originated by counsel for the parties at approximately 4:00 p.m. on Friday, May 21, 2004. Davison alleged that Brown had failed to file a motion *in limine* before the May 19, 2004 prehearing motion deadline and that the Section 2-2-121(2), MCA, allegations were properly before the Commissioner. Brown alleged that Davison had failed to amend Mr. Crockett's complaint before the May 19, 2004 prehearing motion deadline to include the Section 2-2-121(2), MCA, allegations and that Davison was therefore precluded from presenting evidence concerning the subsection (2) allegations.

The parties presented oral arguments on the Section 2-2-121(2), MCA, issues at the beginning of the May 24, 2004 hearing. Based on the May 24, 2004 arguments, the Hearing Examiner bifurcated the hearing. An informal contested case hearing was held on Brown's alleged violations of Section 2-2-121(3)(a), MCA, on May 24, 2004 (the 2-2-121(3)(a), MCA, allegations have been decided in the Section 2-2-121(3)(a) Order). The Section 2-2-121(2), MCA, issues were not heard on May 24, 2004. The parties were advised by the Hearing Examiner that the Section 2-2-121(2), MCA, legal issues would be treated as cross-motions for summary judgment and the need for additional informal contested case proceedings on the Section 2-2-121(2), MCA, issues would be dependent on the summary judgment ruling. See the Hearing Examiner's May 25, 2004 Post-Hearing Scheduling Order. The parties were then directed to file briefs on the following questions of law:

1. Whether Brown's campaign for Governor is a "private business purpose" subject to the prohibitions of Section 2-2-121(2)(a);

2. Whether Brown's employment of Jason Thielman as campaign manager for Bob Brown's gubernatorial campaign constitutes the performance of "an official act directly and substantially affecting to ... [Brown's] economic benefit a business or other undertaking in which ... [Brown] has a substantial financial interest" subject to the prohibitions of Section 2-2-121(2)(e); and

3. Whether Brown's employment of Jason Thielman as campaign manager for Bob Brown's gubernatorial campaign is "a substantial financial transaction for ... [Brown's] private business purposes" subject to the prohibitions of Section 2-2-121(2)(b), MCA.

During subsequent briefing by the parties, the Davison campaign advised that the Hearing Examiner's May 25, 2004 Post-Hearing Scheduling Order misstated Davison's contention concerning Section 2-2-121(2)(e), MCA. The correct contention by Davison is that Brown's participation in HAVA PSA's and advertisements provided an economic benefit to Brown's campaign for Governor, which is, according to Davison, a business or other undertaking under Section 2-2-121(2)(e), MCA. This corrected contention is duly noted and substituted for issue 2 in the Hearing Examiner's May 25, 2004 Post-Hearing Scheduling Order.

## II. JURISDICTION

The Commissioner has jurisdiction to decide Brown's alleged violations of Section 2-2-121(2), MCA. See Part II of the Section 2-2-121(3)(a) Order.

## III. NO MATERIAL FACTS ARE IN DISPUTE

Based on the Proposed Prehearing Order submitted by the parties on May 21, 2004, subsequent briefs filed by both parties on the Section 2-2-121(2), MCA, issues,

and the official public records on file with the Commissioner's office attached to this Order, there are no material facts in dispute and an order granting summary judgment on the Section 2-2-121(2), MCA, legal issues is appropriate.

IV. SECTION 2-2-121(2)(a), MCA,

PRIVATE BUSINESS PURPOSES

Section 2-2-121(2)(a), MCA, prohibits an elected official, including Brown, from using public resources and personnel for "private business purposes." Davison alleges that Brown's campaign for governor is for "private business purposes." This decision is the first opinion ever issued by the Commissioner's office addressing whether a campaign for public office is for "private business purposes." Similarly, there are no Montana court decisions addressing the "private business purposes" issue raised in this matter.

The term "private business purposes" is not defined in Montana's Code of Ethics. The terms "business" and "private interest" are defined. Section 2-2-102(1), MCA, defines a "business" to include a "corporation, partnership, sole proprietorship, trust or foundation, or any other individual or organization carrying on a business, whether or not operated for profit." Section 2-2-102(6), MCA, states that the term "private interest" includes an interest held by an individual that is:

- "(a) an ownership interest in a business;
- (b) a creditor interest in an insolvent business;
- (c) an employment or prospective employment for which negotiations have begun;
- (d) an ownership interest in real property;

- (e) a loan or other debtor interest; or
- (f) a directorship or officership in a business."

Davison argues that the "business" definition in the Code of Ethics must be "broadly and expansively interpreted" and that the word "includes" must be read to mean "includes but is not limited to." See Davison's May 27, 2004 Post-Hearing Brief, p. 4. In other words, Davison asserts that the list of entities qualifying as a business under 2-2-101(1), MCA, is open-ended and not restricted. Such an interpretation must be rejected based on the plain language of the definition and the rules of statutory construction. The "business" definition is restricted to the five types of entities listed (a corporation, partnership, sole proprietorship, trust or foundation). It is common for the Legislature to leave definitions open-ended by using the phrase "includes but is not limited to." The "not limited to" language is missing from the definition of a business in the Code of Ethics. Under Montana's rules of statutory construction, I am prohibited from inserting what the Legislature has omitted. Section 1-2-101, MCA.

Davison next argues that the business definition language is open-ended because it includes "any other individual or organization carrying on a business, whether or not operated for profit." See Davison's May 27, 2004 Post-Hearing Brief, p. 4. The circuitous phrase "any other individual or organization carrying on a business" does not support Davison's argument because the phrase requires us to revert back to the five types of entities constituting a business under 2-2-102(1), MCA (a corporation, partnership, sole proprietorship, trust or foundation). If the definition included only the words "or any other individual or organization" and did not include the words "carrying on a business," then Davison's assertion may have had some credence. Once again,

Montana's rules of statutory construction prevent me from omitting what the Legislature has inserted. Section 1-2-101, MCA.

Davison next argues that the definition of "private interest" is "broadly defined to include many different entities" and that the Montana Legislature simply could have excluded political campaigns from "these expansive definitions." See Davison's May 27, 2004 Post-Hearing Brief, p. 4. Davison's assertion that the definition of "private interest" is open-ended is incorrect. Furthermore, the definition of "private interest" only can be applied to Section 2-2-121(2)(a), MCA, if it is read in conjunction with the term "business" used in that section of law. Like the definition of "business" discussed previously in this Order, the definition of "private interest" is limited to the six types of interests listed in the definition. The unrestricted words "not limited to" have been omitted from the definition of what constitutes a "private interest." When the "private interest" definition is applied to the language of 2-2-121(2)(a), MCA -- public resources and personnel cannot be used for a public officer's "private business purposes" -- political campaigns are not included within the definition of a business under Montana's Code of Ethics.

In this matter, Davison has not contended or offered any proof that Brown's gubernatorial campaign is a corporation, partnership, sole proprietorship, trust or foundation (Davison has only argued that the definition of "business" must be expansively interpreted to include a campaign for governor). The Commissioner takes official administrative notice of the Brown campaign's C-1 Form, Statement of Candidate, attached as Exhibit 1 to this Order. Brown's C-1 filing substantiates that his gubernatorial campaign does not fall within the list of entities deemed to be a "business"

under Montana's Code of Ethics. Brown's gubernatorial campaign is not a corporation, partnership, sole proprietorship, trust or foundation.

Other provisions of Montana's Code of Ethics reinforce the conclusion that a political campaign is not conducted for "private business purposes." First and foremost, the Code of Ethics is intended to prohibit conflicts "between public duty and private interest" and the Code establishes "distinctions between legislators, other officers and employees of state government, and officers and employees of local government..." Section 2-2-101, MCA. It has never been previously suggested, at least to this Commissioner's knowledge, that a political campaign is created or conducted for "private business purposes." Considered as a whole, the Code of Ethics clearly addresses, subject to limited exceptions (e.g., Section 2-2-121(3)(a), MCA), the commonly understood potential conflicts between a public officer's or public employee's official public duties and a private commercial (business) endeavor in which the public officer or public employee may be involved. Political campaigns are commonly perceived to be quasi-public endeavors that are strictly regulated and all contributions and expenditures must be timely and accurately reported. See Title 13, chapters 35 and 37, MCA. Unlike a private commercial business, political campaigns are not created to exist perpetually. Many campaigns do not end with a positive cash balance and, even if a campaign ends with money in the bank, the candidate and the candidate's immediate family cannot personally benefit from the cash surplus. See Section 13-37-240, MCA, and ARM 44.10.335 and 336. Neither the express language of Montana's Code of Ethics nor public documents and discussions about the Code that

I have reviewed during my term as Commissioner suggest that political campaigns fall within the "business" and "private interest" definitions of the Code of Ethics.

The text of Section 2-2-121, MCA, when considered in its entirety, also reinforces the conclusion that subsection 2 addresses traditional private commercial (business) endeavors and that political campaign activities are addressed in subsection 3, not subsection 2. As codified, Section 2-2-121, MCA, segments potential conflicts between public duty and private interest by categories as follows:

Section 2-2-121(2), MCA, defines prohibited conduct involving a public officer's or public employee's private commercial (business) endeavors.

Subsection 3 of 2-2-121, MCA, prohibits the use of public resources and personnel to "solicit support for or opposition to" a candidate or ballot issue unless the use of public resources and personnel is "authorized by law" or is "properly incidental" to other activities the public official or public employee is authorized by law to perform. Subsection 3 is the only provision of 2-2-121, MCA, that expressly addresses conduct related to political campaigns.

Section 2-2-121(4), MCA, specifies that a public officer or public employee may not act in an official capacity if the officer or employee is an officer or director of a group or organization appearing in proceedings before the officer or employee. Subsection 4 also applies to attempts to influence other government proceedings in which the group or organization is attempting to influence government action.

Section 2-2-121(5), MCA, prohibits a public officer or public employee from engaging in any activity, including lobbying, on behalf of a group or organization in

which the officer or employee is a member "while performing the public officer's or public employee's job duties."

Subsections 6, 7 and 8 of 2-2-121, MCA, create exceptions from the prohibitions of the previous subsections for certain state and local government officers and employees.

When read in its entirety, the segregation and compartmentalization of prohibited conduct in Section 2-2-121, MCA, supports the conclusion that the Montana Legislature did not intend to apply the "private business purposes" prohibitions of 2-2-121(2)(a), MCA, to political campaigns. The express prohibition against using public resources and personnel for political campaigns in Section 2-2-121(3), MCA, coupled with the extensive regulation of political campaigns under Title 13, chapters 35 and 37, MCA, overcomes any inference that 2-2-121(2), MCA, applies to political campaigns.

Based on the preceding, Brown's gubernatorial campaign is not subject to the "private business purposes" prohibitions of Section 2-2-121(2)(a), MCA.

#### V. SECTION 2-2-121(2)(e), MCA,

#### SUBSTANTIAL ECONOMIC BENEFIT TO THE BROWN CAMPAIGN

Davison alleges that even if Brown's appearance in HAVA PSA's was a proper official act, such an official act violates Section 2-2-121(2)(e), MCA. See Davison's May 27, 2004 Post-Hearing Brief, p. 6. Davison asserts that Brown's campaign for governor is a "business or other undertaking in which ... [Brown] has a substantial financial interest or is engaged as counsel, consultant, representative, or agent...." Even if Brown's gubernatorial campaign is not a "business" under the Code of Ethics, it is,

according to Davison, an "undertaking" subject to the prohibitions of Section 2-2-121(2)(e), MCA.

Davison's contentions concerning Section 2-2-121(2)(e), MCA, have, for the most part, been considered and rejected in Part IV of this Order and the accompanying Section 2-2-121(3)(a) Order. The preceding portion of this Order concludes that the definition of "business" in the Code of Ethics cannot be given the expansive definition urged by Davison. Similarly, the term "or other undertaking" is not defined in the Code of Ethics or the Code's rules and Davison now urges the Commissioner to supply a definition in this decision that encompasses political campaigns as an "undertaking."

As previously indicated, the term "undertaking" is not defined in the Code of Ethics. The rules of statutory construction specify that when a term is defined in any Montana statute, that definition is "applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears." Section 1-2-107, MCA. The term "undertaking" is defined in two other provisions of the Montana Code Annotated. Sections 7-7-4402 and 85-7-1402, MCA, define an "undertaking" as types of projects (e.g., convention facilities, water and sewer systems, airport buildings and parking facilities) or interests (water rights, irrigation facilities, reservoirs and real and personal property necessary to maintain an irrigation district) for which revenue bonds can be issued by municipalities and irrigation districts, respectively. It is not possible to conclude that these statutory definitions should be applied to conduct under the Code of Ethics; however, it must be noted that these legislative definitions of "undertaking" include activities and ownership interests that are not activities associated with or conducted by political campaigns.

Based on a reading of the Code of Ethics in its entirety, the compartmentalization of prohibited conduct in Section 2-2-121, MCA (see Part IV of this Order), Montana's extensive regulation of political campaigns under Title 13, chapters 35 and 37, and the Legislature's unequivocal delegation of authority to Brown to administer and implement HAVA in Montana (see the Section 2-2-121(3)(a) Order), Brown's appearance in HAVA PSA's was not an undertaking in violation of Section 2-2-121(2)(e), MCA.

VI. SECTION 2-2-121(2)(b), MCA.

SUBSTANTIAL FINANCIAL TRANSACTION WITH JASON THIELMAN

Section 2-2-121(2)(b), MCA, prohibits a public officer or public employee from engaging "in a substantial financial transaction for the officer's or employee's private business purposes with a person whom the officer or employee inspects or supervises in the course of official duties." Davison alleges that Brown violated Section 2-2-121(2)(b), MCA, by hiring Jason Thielman, an employee in the Secretary of State's office who was supervised by Brown, to serve as campaign manager for Brown's gubernatorial campaign.

For the purpose of resolving this alleged violation, the Commissioner will accept the facts asserted by the Davison campaign and acknowledged in part by Brown. Mr. Thielman was serving as a paid staff member in the Secretary of State's office before being hired to serve as Brown's campaign manager. Mr. Thielman took unpaid leave status from the Secretary of State's office but used some or all of his accrued compensatory time and vacation time while serving as Brown's gubernatorial campaign manager. Jason Thielman was ultimately paid by the Brown campaign to serve as campaign manager after he had used all of his accrued compensatory time and

vacation time. Thielman remains on unpaid leave from the Secretary of State's office as of the date of this Order.<sup>1</sup>

Part IV of this Order concludes that Brown's gubernatorial campaign does not fall within the "private business purposes" provisions of Section 2-2-121(2)(a), MCA, and the Montana Code of Ethics. The ruling in Part IV applies to the same term ("private business purposes") used in Section 2-2-121(2)(b), MCA. Brown's campaign for governor is not for "private business purposes" and Brown did not violate Section 2-2-121(2)(b), MCA, in hiring Jason Thielman to be campaign manager for Brown's gubernatorial campaign.

My decision concerning the hiring of Mr. Thielman by the Brown gubernatorial campaign illustrates why the Legislature, not the Commissioner, must address the question of whether more restrictions should be imposed on state and local government employees who want to work on their own time for candidates or ballot issue campaigns. Davison's complaint involving Jason Thielman is more than a Code of Ethics issue for public officers like Brown. Davison is asking the Commissioner to make a ruling that, in effect, would impose significant new restrictions on the right of state and local government employees to work on their own time for political campaigns based on the "private business purposes" or the "other undertaking" language in 2-2-121(2), MCA. Such an expansive ruling cannot be made based on the express but limited language in the existing Code of Ethics prohibiting political activities by public

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<sup>1</sup> Davison's June 1, 2004 Reply Brief also asserted that Jason Thielman was reimbursed by the Brown campaign for expenses incurred by Thielman in attending a "candidate school" in Washington, D.C., in June of 2003. The reimbursement by the Brown campaign occurred at some unspecified time after the June 2003 candidate school. Mr. Thielman was, according to Davison, still "in active employment" in the Secretary of State's office in June, 2003. Thielman took "personal leave" to attend the campaign school. Davison waived his claim that Mr. Thielman could not use accrued vacation or compensatory time to work on the Brown gubernatorial campaign. See the May 25, 2004 Post-Hearing Scheduling Order and the Proposed Prehearing Order signed by counsel for Davison and Brown.

officers and public employees only as provided in Section 2-2-121(3), MCA. See also Section 13-35-226(4), MCA. There are numerous constitutional and public policy issues that must be considered and specifically addressed by the Montana Legislature in the Code of Ethics if, as Davison suggests, public employees like Jason Thielman cannot choose to work on their own time or take a leave of absence to work for a public officer who Mr. Thielman no doubt respects and admires. The need for a legislative resolution of the ethical issues raised by Davison is best illustrated by the changes in public policy that occurred in the federal Hatch Act in the 1990's.

Before 1993, federal executive branch and District of Columbia employees were prohibited from using "official authority" to affect the result of an election or "take an active part in political management or in political campaigns." See 5 USC § 7324 as enacted in 1966 and amended in 1993. Congress, stung by the criticism that the Hatch Act did not apply to congressional employees and continuing litigation over the prohibitions against executive employee participation in political campaigns, rewrote the Act in 1993. Congress adopted a new policy statement declaring that it was congressional policy that "employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal ... their right to participate or to refrain from participating in the political processes of the Nation." 5 USC § 7321. The pre-1993 prohibitions against participating in and managing political campaigns were replaced with new detailed language specifying how and when federal employees can and cannot participate in campaigns. For example, most federal employees are now specifically authorized to "take an active part in political management or in political campaigns" subject to certain prohibitions, such as not being able to solicit campaign

contributions from subordinate employees or run for partisan political office. See 5 USC § 7323. The absolute prohibition against active participation in or management of political campaigns was continued for some agencies, such as employees of the Federal Election Commission, law enforcement agencies (e.g., the FBI), and national security agencies (e.g., the CIA and the National Security Council). 5 USC § 7323(b)(2)(A). Other 1993 amendments specified that federal employees cannot engage in political activity while "on duty," while wearing a government uniform, or when physically present in a government office or a government vehicle. 5 USC § 7324. These detailed provisions of the federal Hatch Act illustrate why the present language of Sections 2-2-121(2)(a) and (b), MCA, cannot be the basis for imposing the far-reaching policy suggested by Davison.

Based on the preceding, Brown did not violate Section 2-2-121(2)(b), MCA.

#### VII. COSTS

Section 2-2-136(2), MCA, provides that the Commissioner may assess the costs of an ethics proceeding against the person bringing the charges if the Commissioner determines that a violation did not occur. Such a provision is necessary to deter a citizen from making a frivolous complaint. The facts surrounding the filing of the Davison complaint against Brown come close to justifying the imposition of costs against Davison.

Davison's campaign manager, Scot Crockett, filed the ethics complaint in this matter just a few days after Mrs. Louise Galt filed a campaign finance and practices complaint against the Davison for Governor campaign alleging that Mr. Pat Davison's running mate, David Mihalic, did not meet the two-year residency requirements of the

Montana Constitution. Mr. Crockett filed the original ethics complaint against Brown apparently without consulting legal counsel. When Mr. Crockett was asked by the Commissioner's office to identify the specific provisions of the Code of Ethics violated by Brown, he listed only Section 2-2-121(3)(a), MCA. Again, Mr. Crockett apparently made his amended allegation that Brown had violated Section 2-2-121(3)(a), MCA, without consulting legal counsel (Crockett's amended complaint made no mention of Section 2-2-121(2), MCA). After the Notice of Prehearing Conference was issued in this matter on April 16, 2004 and just a few days before the April 23, 2004 prehearing conference, Mr. Crockett finally notified the Hearing Examiner that Davison had retained Mr. Jack Sands to represent Davison in this matter. Although Mr. Sands did yeoman's work to present a legally defensible case on behalf of Davison, it is clear that the initial and amended Davison ethics complaint against Brown did not meet even the rudimentary pleading requirements of Rule 11, Montana Rules of Civil Procedure. It appears that the Davison ethics complaint filed by Mr. Crockett, at least initially, was designed to counter the complaint filed by Louise Galt against Mr. Davison and Mr. Mihalic.

Despite the preceding conclusion, I have determined that costs should not be assessed against Davison in this matter. Mr. Sands made a good faith and diligent effort to submit defensible arguments concerning the factual and legal issues in this matter. The Davison complaint provided a useful opportunity to further clarify Montana's Code of Ethics. It is my sincere hope that this decision will generate a thoughtful and bipartisan legislative effort to more precisely define the applicability of the Code of Ethics to public officers, public employees and political campaigns.

VIII. CONCLUSIONS OF LAW

1. Brown, as Montana's duly elected Secretary of State, is a public officer as defined in Montana's Code of Ethics. Sections 2-2-102(8) and 2-2-102(11), MCA, and Article VI, Sections 1 through 4 of the Montana Constitution.

2. As a public officer under Montana's Code of Ethics, Brown is subject to the prohibitions, requirements and penalties of the Code. Sections 2-2-101, 2-2-102(8), 2-2-102(11), 2-2-103 through 2-2-105, 2-2-121, 2-2-131 and 2-2-136, MCA.

3. Brown's gubernatorial campaign is not subject to the "private business purposes" prohibitions of Section 2-2-121(2)(a), MCA.

4. Brown's appearance in HAVA PSA's was not an undertaking in violation of Section 2-2-121(2)(e), MCA.

5. Brown did not violate Section 2-2-121(2)(b), MCA, in hiring Jason Thielman to be campaign manager for Brown's gubernatorial campaign.

6. Costs should not be assessed against Davison in this matter.

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## IX. ORDER

Based on the preceding, it is hereby ORDERED that:

1. Davison's Motion for Summary Judgment concerning Sections 2-2-121(2)(a), (b), and (e), MCA, is hereby denied.
2. Brown's Motion for Summary Judgment concerning Sections 2-2-121(a), (b), and (e), MCA, is hereby granted.
3. Each party shall be responsible for payment of their respective costs and attorney fees incurred in this matter.
4. The hearing scheduled for Thursday, June 3, 2004 is hereby vacated.

DATED this 2nd day of June, 2004.

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Linda L. Vaughey  
Commissioner of Political Practices

### NOTICE:

Any party to this proceeding may seek judicial review of this decision as provided in Section 2-2-136(3), MCA, and Title 2, chapter 4, part 7, MCA, of the Montana Administrative Procedure Act.