

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Bosse v. Swanson No. COPP 2014-CFP-022	Dismissal of Complaint Based on Lack of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act
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Karla Bosse is a resident of Townsend, Montana. Corey Swanson is resident of Winston, Montana. On May 21, 2014 Ms. Bosse filed a complaint against Mr. Swanson alleging that Mr. Swanson's actions constituted a breach of the Montana Campaign Practices Act.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this decision is that of improper inducement to vote, as defined by §13-35-214(2) MCA.

RELEVANT FOUNDATIONAL FACTS

The Foundation facts necessary for determination of this matter are:

Finding of Fact No. 1: The Broadwater County Attorney is a non-partisan elected position with a 4 year term. John Flynn served as the Broadwater County Attorney from 1978 until his death in May of 2012. Mr. Flynn was re-elected to the position in 2010 so he was unable to complete his 4 year term. (Broadwater County Clerk and Recorder's Office, Helena Independent Record article May 30, 2012).

Finding of Fact No. 2: Karla Bosse, a Deputy County Attorney for Hill County was appointed to serve as Interim County Attorney for Broadwater County. Ms. Bosse was appointed to serve out the last two years of John Flynn's term. Ms. Bosse submitted a C1 Statement of Candidate form to the Commissioner of Political Practices Office on August 12, 2012 and ran unopposed in the November 6, 2012 general election. (Broadwater County Clerk and Recorder's Office, Commissioner's records, University of Maine Alumni Magazine, Vol. 3, Issue 1, Fall 2012).

Finding of Fact No. 3: On January 10, 2014 Cory Swanson submitted his C1 Statement of Candidate form for the position of Broadwater County Attorney. On March 10, 2014 Jack Morris submitted his C1 Statement of Candidate form for the position of Broadwater County Attorney. (Commissioner's records).

Finding of Fact No. 4: Karla Bosse's term as Broadwater County Attorney ends November of 2014. Ms. Bosse is not running for re-election for the position. There are two candidates on the ballot in 2014 for Broadwater County Commissioner: 1) Cory Swanson of Winston, MT, and 2) Jack Morris of Helena, MT. (See FOF No. 3 and Broadwater County Clerk & Recorder's Office).

DISCUSSION

The Broadwater County Rod and Gun club hosted a Broadwater County Attorney candidate forum on May 7, 2014 (Broadwater County Commission You Tube Channel). Both 2014 county attorney candidates (Candidate Morris and Candidate Swanson) were present at the forum. *Id.* The forum was recorded and the meeting record is available to the public on a YouTube channel sponsored by Broadwater County.¹

During the course of the meeting Candidate Swanson responded to a question and suggested personnel changes in the Broadwater County Attorney's Office. It is that discussion that serves as the basis of Ms. Bosse's

¹ YouTube Channel link: <http://www.youtube.com/watch?v=CF2gZtuIOV4#t=2386>

complaint. The COPP investigator listened to and watched the recording of the meeting and summarizes the content relevant to the complaint in this Matter as follows:

TRANSCRIPT of Cory Swanson's comments regarding Shari Little

The following was the first question asked by the Moderator.

Moderator: Do you anticipate a need to expand the office with a potential need for a deputy county attorney and/or a criminal investigator position?

[14:02 – 16:35] Cory Swanson: Uh, no. I don't. If there's an expansion I think it needs to be a paralegal or a secretary. Here's how I understand the current position. First of all, we only have a full-time county attorney with a high salary for a short while. John Flynn for years did this as a part-time practice while he had his own in-home practice and didn't have a deputy and so right now, the work habits and the hours of the Incumbent, I don't believe that there's any justification for a deputy county attorney. I expect to go in fully and put in long hours. I put in long hours in my job now, I expect to put in long hours and be the only county attorney. I will rely on MACO and some other um, expertise for civil stuff when I need it. I'll certainly rely on the state prosecutors for criminal expertise when I need it, but I don't think there's a need to hire anybody and I would say, give it at least 2 years, and assess it and come back, but I really, I think it's highly unlikely that a deputy is needed. There may be a need in the staff though because of the way I understand right now there's a Victim's Advocate who is half time and then half time in the court and then there is one secretary and I think that one of the ways that a lawyer works really effectively to get more done is to have an effective paralegal where you can do a lot of prep work for a civil or criminal case. A lawyer can check on it and then come back and get, and audit, now...

[15:26]....a lady named Shari Little used to be in the office. She was outstanding, uh, she was chased away by the Incumbent County Attorney. I've talked to Shari Little and I said, hey, if I get elected I would love to hire you and she said, well, let me get to know you. I don't want to work for a crazy person. [Laughter from the crowd] But I can tell you where I see that there may be a need for a secretary or paralegal. I do not believe, I mean, in, in, it's really beyond what I

think is foreseeable is there will be a deputy county attorney. As far as a criminal investigator goes, I think we need a better working relationship with the Sheriff's Office and their detectives so that we can work together on cases and we can sit down and go, "we need to talk to this person, this person, get the subpoena and we'll check back in a week" and work on cases together cooperatively like that and then the state, the criminal investigators are always a resource that we can use so, um, I'm not going to be going in asking for an increase in budget. The only thing I would look at is whether a paralegal, somebody of a Shari Little type person would make sense. But I really think we need to try and keep our budget low because the costs in the county might be going up and I want to be part of the solution, not part of the problem.

[16:40 -19:14] Jack Morris: Comments regarding Shari Little & a new position

I tend to concur. I knew John since 1991 and it was always a part-time county attorney position and uh, I was surprised when I did learn that uh, uh, it became full-time after John passed away and I, you know, John did it for so long part-time so I don't anticipate the need for a deputy myself and uh, Shari Little was a huge asset to that office and it's too bad that she left and I would do my best to try to get her to come back because I, I'd worked with her over the years and I know how valuable she was to John so uh, uh I don't think I'm going to need a deputy. [There was no other comment regarding Shari Little].

The above discussion was the basis for Ms. Bosse's complaint. Specifically Ms. Bosse asserts that Candidate Swanson "apparently suggest[ed] ...hiring of this specific individual [Shari Little] as an inducement to vote for him".

1. Illegal Consideration

For over 100 years Montana has prohibited acts that amount to "vote buying" or candidate manipulation. These prohibited actions have been renumbered and reorganized several times within Montana's code and are now called "improper nominations," "illegal influence of voters" and "illegal consideration for voting". The prohibitions are set out in Montana law at §§13-

35-214, 215, and 221 MCA. The complaint asserts that Candidate Swanson's actions implicate §13-35-214 MCA.

a. Section 13-35-214 MCA Must be Criminally Enforced

Violations of Montana's campaign practices law (Title 13) are enforced civilly and/or criminally. The Commissioner's civil enforcement authority, however, is limited to violations of Chapter 37 and certain provisions of Chapter 35. See §13-37-128 MCA. Section 13-35-214 MCA is not among the Chapter 35 provisions that can be civilly enforced. This means that enforcement of a violation of this section of law, if found, is under §13-35-103, MCA, the catch all election law enforcement statute. In turn, Section 13-35-103 provides for enforcement as a criminal misdemeanor.

Over the past two decades the Commissioner has uniformly considered enforcement of such sections of Chapter 35 under criminal law standards. See *Parrent v. Ames*, July 25, 1990; *McFadden v. Stanko*, June 1, 1994; *Masters v. Nixon*, August 3, 1994; *Seward v. Andrick*, December 13, 2004; *Vance v. Walseth*, February 23, 2009; *Scott v. Doyle*, COPP-2011-CFP-007; *Loney v. Moore*, COPP-2013-CFP-014; *Bixler v. Suprock*, COPP-2013-CFP-013; and *Ravndal v. Halver*, 2014-CFP-020. This Matter will also follow that approach and enforcement of any violation will be by criminal prosecution.

b. Candidate Swanson Did Not Violate §13-35-214 MCA

Candidate Swanson discussed hiring a particular person, Ms. Little, as part of the County Attorney's office. Montana law potentially limits employment or

appointment promises by a candidate when those positions fall under the power of the office being sought:

§ 13-35-214 MCA: A person may not knowingly or purposely, directly or indirectly, individually or through any other person, for any election, in order to induce any elector to vote or refrain from voting or to vote for or against any particular candidate, political party ticket, or ballot issue:

...

(2) promise to appoint another person or promise to secure or aid in securing the appointment, nomination, or election of another person to a public or private position or employment or to a position of honor, trust, or emolument in order to aid or promote the candidate's nomination or election, except that the candidate for governor may publicly announce or define the candidate's choice for lieutenant governor.

On its face, the statute appears to generally limit a candidate's speech in regard to staffing and personnel appointments connected with the Office being sought. The criminal enforcement requirements, however, necessitate a particularly close look at whether there are sufficient facts to show such a violation.

When dealing with a statute enforced as a criminal violation, this Office has required a substantial degree of definiteness in the facts showing a connection between the disallowed "valuable consideration" (in this case, reinstating Ms. Little as a public employee) inducing the dependent act, in this case causing voters to choose Candidate Swanson. In that regard the Commissioner is guided by the decisions of prior Commissioners who have uniformly dismissed complaints alleging criminal violations of Montana election

law: *Parrent v. Ames*, July 25, 1990 (Commissioner Colburg); *McFadden v. Stanko*, June 1, 1994 (Commissioner Argenbright); *Masters v. Nixon*, August 3, 1994 (Commissioner Argenbright); *Seward v. Andrick*, December 13, 2004 (Commissioner Vaughey); *Vance v. Walseth*, February 23, 2009 (Commissioner Unsworth) ; *Scott v. Doyle*, COPP-2011-CFP-007 (Commissioner Gallik); and *Loney v. Moore*, COPP-2013-CFP-014 (Commissioner Murry). This Commissioner likewise dismissed such a complaint in *Bixler v. Suprock*, COPP-2013-CFP-013 but sustained the substance of such a complaint (dismissed on a *de minimus* principle) against a candidate who sought a job linked to his candidacy *Ravndal v. Halver*, COPP-2014-CFP-020.

The dismissed complaints challenged actions such as partisan distribution of water to electors at the polling place and advertisements seeking candidates to run for office. Of particular application are two decisions (*Parrent v. Ames* and *Masters v. Nixon*) dismissing § 13-35-214 MCA claims based on the announcement of the name of an undersheriff by a sheriff candidate.

The Commissioner has recently discussed the overall law governing this category of Decision in *Ravndal v. Halver*. That discussion is incorporated by reference and will not be repeated in full here. For the purposes of this Decision the Commissioner determines that the facts of this Matter fall under the reasoning of *Parrent v. Ames* and *Masters v. Nixon*. That is, Candidate Swanson, in making the statements, had an alternative purpose (answering a question posed to him), other than the purpose of inducing voters by the specific content of the statement. Because there is another explanation for the

statement there is a lack of sufficient proof that the statement was made “...in order to aid or promote the candidate’s nomination or election”, as required to show a violation of § 13-35-214. The Commissioner determines that there is a lack of sufficient facts to show a violation of § 13-35-214. See *Parrent v. Ames* and *Masters v. Nixon*.

The Commissioner next distinguishes this Matter from *Ravndal v. Halver*. In particular, the *Ravndal v. Halver* Decision looked to the overt act standard of *Garver v. Tussing*, February 28, 2007 (Commissioner Unsworth). In *Garver v. Tussing* Commissioner Unsworth considered the interplay of §13-35-104 and §45-4-103 MCA as part of criminal enforcement and noted “...it would be necessary to establish 1) that he had the purpose to commit the specific offense, and 2) that he did an act toward the commission of the offense” *Id.* p. 6.

In *Ravndal v. Halver* the Commissioner found that Candidate Halver “made at least one further “overt act” toward commission of an offense” thereby meeting the *Garver v. Tussing* test. In contrast, Candidate Swanson simply discussed possible improvements in the function of the Broadwater County Attorney office. Candidate Swanson could not and did not take actions in regard to the discussion. Because “there was no overt act amounting to movement toward commission of the offense” the Commissioner finds insufficient facts to show a violation by Candidate Swanson. *Garver v. Tussing*, *supra*, p. 7.

c. Independent County Attorney Authority

Ms. Bosse is the current County Attorney of Broadwater County. As County Attorney, Ms. Bosse had and has independent authority to conduct Title 13 investigations (§13-37-125 MCA) of campaign practices taking place in Broadwater County and authority to enforce the results of the investigations (§13-37-128 MCA). Ms. Bosse instead chose to file the Complaint in this Matter before the COPP. Ms. Bosse's action was, in the judgment of this Commissioner, prudent in light of her involvement in the election to choose her successor. Nevertheless, this Decision dismisses Ms. Bosse's complaint and in doing so establishes a degree of authority. Ms. Bosse may wish to consider the impact of this authority before deciding whether or not to duplicate this investigation and analysis under her independent authority.

ENFORCEMENT

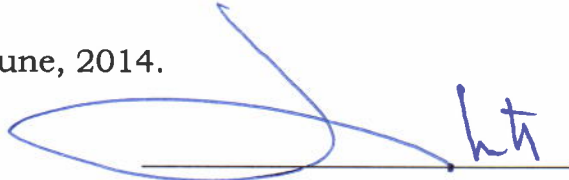
The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner generally cannot avoid, but must investigate a complaint alleging a violation of campaign practices law: "shall investigate," See, §13-37-111(2)(a) MCA. The mandate to investigate is followed by a mandate to take action as the law requires that if there is "sufficient evidence" of a violation the Commissioner must ("shall notify", See §13-37-124 MCA) initiate consideration for prosecution.

This Commissioner, having been charged to investigate and decide, hereby determines that there is a lack of sufficient evidence to further pursue this Matter. The Complaint is dismissed.

CONCLUSION

Based on the preceding discussion as Commissioner I find and decide that sufficient evidence is lacking to show any violation as alleged by the complaint in this Matter. The Complaint is dismissed.

DATED this 24th day of June, 2014.



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