

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

IN THE MATTER OF THE)	SUMMARY OF FACTS AND
COMPLAINT AGAINST WILLIAM)	STATEMENT OF FINDINGS
W. ROCHE AND CITIZENS TO)	
RECALL MAYOR WHITLOCK)	

James A. Haynes, City Attorney of Hamilton, Montana, in a complaint on behalf of the City of Hamilton dated October 26, 1992, and filed with this office on October 28, 1992, alleges that William W. Roche and a group known as "Citizens to Recall Mayor Whitlock" violated section 13-35-225, Montana Code Annotated (MCA). That statute reads as follows:

Election materials not to be anonymous. (1) Whenever a person makes an expenditure for the purpose of financing communications advocating the success or defeat of a candidate, political party, or ballot issue through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, poster, handbill, bumper sticker, or other form of general political advertising, the communication must clearly and conspicuously state the name and address of the person who made or financed the expenditure for the communication, including in the case of a political committee, the name and address of the treasurer. Communications in a partisan election financed by a candidate or a political committee organized on the candidate's behalf must state the candidate's party affiliation or include the party symbol.

(2) If a document or other article of advertising is too small for the requirements of subsection (1) to be conveniently included, the person financing the communication shall file a copy of the article with the commissioner, together with the required information, prior to its public distribution.

(3) If information required in subsection (1) is inadvertently omitted or not printed, upon discovering the omission, the person financing the communication shall file notification of the omission with the commissioner within 5 days and make every reasonable effort to bring the material into compliance with subsection (1).

The results of an investigation of the alleged violation are set forth in the summary of facts that follows.

SUMMARY OF FACTS

1. A recall election against former Hamilton Mayor James Whitlock was placed on the November 1992 general election ballot. Mayor Whitlock resigned the office of Mayor effective September 30, 1992.

2. Sometime during the week of October 11, 1992, a two-page document entitled "WHAT YOU DON'T READ IN THE RAVALLI REPUBLIC," dated October 14, 1992, was distributed to an unknown number of people in Hamilton. Although the document includes statements and allegations highly critical of Whitlock, no statement appears that expressly advocates his recall from office. Indeed, the paragraph numbered 4. in the document states:

Many of you do not understand what a recall is. The ballot is rather confusing. If you want Whitlock out of office, then vote FOR THE RECALL. If you want to keep him in office, then you vote AGAINST THE RECALL. . . .

At the end of the document, at the bottom of page two, are these words: "Citizens to Recall Mayor Whitlock."

3. On or about October 20, 1992, another two-page document entitled "HAMILTONGATE 1992" was distributed to an unknown number of people in Hamilton. Again, while the document includes various statements and allegations concerning the Whitlock recall election, no statement appears expressly advocating Whitlock's recall from office. The fourth paragraph in this second document states:

Remember, when you vote on November 3, 1992 Recall ballot [sic], FOR THE RECALL is to extract Whitlock from office, and AGAINST THE RECALL is to keep him in office. Yes, Whitlock is still Mayor until the recall election decides his fate. Then you can decide who your Mayor will be, by your vote in a special mayorial [sic] election provided for in the Montana Recall Act 2-16-601 MCA, 2-16-632, Conducting of Special Elections [sic]. Don't let City Hall cheat you out of this right.

Again, the last words at the bottom of page two of this document are "CITIZENS TO RECALL MAYOR WHITLOCK."

4. Ravalli County Clerk and Recorder Betty Lund, who is also the county election administrator, began providing absentee ballots to voters on September 21, 1992, including a separate ballot on the issue of the recall election of Whitlock. On October 21, 1992, Lund was notified by the Hamilton City Council that the recall election of Whitlock was unnecessary. She also was provided with documentation in support of that contention. On that date Lund cancelled the recall election. Approximately 100 absentee ballots already had been received; they have been sealed and are in storage in the office of the Ravalli County Clerk and Recorder.

5. No recall election of Whitlock took place on general election day, November 3, 1992.

6. William W. Roche was interviewed as part of this investigation. He admitted that he is a member of a group known as Citizens to Recall Mayor Whitlock. He stated that it is a loose-knit citizens' group whose members are "fed up" with various aspects of the administration of the City of Hamilton. He stated that Citizens to Recall Mayor Whitlock had been working since December 1991 to remove Whitlock from office.

7. Roche admitted that Citizens to Recall Mayor Whitlock was responsible for printing and distributing the two documents entitled "WHAT YOU DON'T READ IN THE RAVALLI REPUBLIC" and "HAMILTONGATE 1992." He described the documents as being newsletters, not political fliers or handbills, and stated that they were compiled and printed as a joint effort by members of Citizens to Recall Mayor Whitlock. He stated that Citizens to Recall Mayor Whitlock does not receive monetary support from any outside groups or sources; rather, members use their own money to finance activities of the group. Roche views the documents as being informative rather than political.

8. David Trihey also was interviewed as part of this investigation. He admitted that he is one of the main members of Citizens to Recall Mayor Whitlock. He also stated that the newsletters were composed as a joint effort by the members of Citizens to Recall Mayor Whitlock. He stated that he and Roche typed the two newsletters. He stated that he believes the group may have paid to have the second document (HAMILTONGATE 1992) copied after it was typed, but he could not recall where it was copied or how much it cost. Trihey stated that Citizens to Recall Mayor Whitlock has never solicited funds to produce the newsletters.

STATEMENT OF FINDINGS

The complaint in this case alleges a violation of section 13-35-225, MCA, which is quoted in full on page one. That statute

requires that certain "communications" made for political purposes state, in a clear and conspicuous fashion, the name and address of the person who made or financed the expenditure for the communication. The statute is applicable, however, only if the communication is one ". . . advocating the success or defeat of a candidate, political party, or ballot issue. . . ."

The definition of "candidate" includes "an officeholder who is the subject of a recall election." Section 13-1-101(2)(c), MCA. In addition, the definition of "issue" or "ballot issue" includes recall questions. Section 13-1-101(10), MCA. Thus, if the communications in the documents in question in this case can be construed as advocating the success or defeat of the question at issue in the recall election of former Mayor Whitlock, they were subject to the attribution requirements of section 13-35-225, MCA, since they were made at the time the recall election was still on the ballot.

Section 13-37-128(2), MCA, sets forth the penalty for a violation of section 13-35-225, MCA, as follows:

Any person who makes or receives a contribution or expenditure in violation of 13-35-225 . . . is liable in a civil action brought by the commissioner or a county attorney . . . for an amount up to \$500 or three times the amount of the unlawful contribution or expenditure, whichever is greater.

Thus, section 13-35-225, MCA, with its accompanying penalty provision stated above, is a penal statute. The test in determining whether or not a statute is penal in nature is "whether the wrong sought to be redressed is a wrong to the public or a

wrong to the individual. . . ." Huntington v. Attrill, 146 U.S. 657 (1892); Department of Livestock v. Sand Hills Beef, Inc., 196 Mont. 77, 83, 639 P.2d 480, 483 (1981). Here, the statutes clearly establish a penalty to redress a wrong to the public, not to any specific individual.

Penal statutes, whether civil or criminal, must be strictly construed. Sand Hills Beef, Inc., supra, 196 Mont. at 83, 639 P.2d at 483; State v. Nagle, 100 Mont. 86, 90, 45 P.2d 1041, 1042 (1935). Courts will not apply penal statutes to cases that are not within the obvious meaning of the language employed by the Legislature, even though they may be within the mischief intended to be remedied. State v. Aetna Banking & Trust Co., 34 Mont. 379, 382, 87 P. 268, 269 (1906). See also State ex rel. Penhale v. State Highway Patrol, 133 Mont. 162, 165, 321 P.2d 612, 613-614 (1958).

Applying these rules of construction to the facts of this case, I do not find a clear violation of section 13-35-225, MCA. While the two documents in question are obviously critical of former Mayor Whitlock, they do not include language that expressly advocates the success or defeat of Whitlock at the recall election. Absent such clear and unambiguous language, and applying the rules of strict construction set forth herein, I cannot find that the communications that are the subject of this investigation were required to have the attribution required in section 13-35-225, MCA.

Based on the facts and these findings, I conclude that no further action is warranted against William W. Roche and Citizens to Recall Mayor Whitlock.

DATED this 11th day of December, 1992.

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DOLORES COLBURG
Commissioner of Political Practices