

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the Complaints
Against the Montanans for Better
Government

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**SUMMARY OF FACTS
AND
STATEMENT OF FINDINGS**

Jill Cohenour filed a complaint with the Commissioner of Political Practices (CPP) alleging Montanans for Better Government violated Montana Campaign Finance and Practices Law.

SUMMARY OF FACTS

1. Jill Cohenour (Cohenour) was a Democratic candidate for the office of State Representative, House District 78 (HD 78), in the fall of 2008. Her Republican opponent was Steve Gibson (Gibson). Cohenour prevailed in the election in November of 2008.
2. Montanans for Better Government (MBG) is a Political Action Committee registered with the Commissioner of Political Practices pursuant to 44.10.327(2)(a), Mont. R. Admin.
3. Charles Denowh (Denowh) is listed as Treasurer for MBG, and he responded on the committee's behalf.
4. In October 2008, a campaign flyer opposing Cohenour's candidacy (see below) was mailed to electors in HD 78. The return address on the flyer was that of MBG. The flyer contained language indicating it had been paid for by MBG.
5. The flyer contained the following language:

Jill Cohenour supported legislation that would trip up, tie up, and trap small businesses with new, un-needed regulations. With Montana's already-negative reputation as a poor place to do business, those new regulations would only make the situation worse

Don't let Jill Cohenour trip you up. On Election Day Vote NO on Jill
Cohenour

Vote referenced: Motion on SB 220, 4/26/2007

6. Attached to this decision is a scanned image of the flyer
7. While serving in the 60th Montana Legislature, on April 26, 2007, Cohenour voted in favor of a 'blast' motion to move SB 220 from committee to the floor of the House of Representatives for consideration under 2nd reading. (See also Fact 8)
8. SB 220 was introduced by Sen. Jim Elliott (D-Trout Creek) during the 2007 Legislative Session. Throughout the life of the bill, it underwent significant changes through amendments, and eventually died when it failed to be placed on 2nd reading in the House of Representatives by a motion by an unidentified Representative, supported by Cohenour.
9. HB 833 was introduced by Rep. Wayne Stahl (R-Saco) during the 2007 Legislative Session. It was briefly known as the 20-20 tax plan. It was significantly amended to include SB 220 language, and ultimately died when it failed to be placed on 2nd reading in the House of Representatives by a motion by Rep. John Parker (D-Great Falls), supported by Cohenour.
10. Cohenour alleges violations of 13-37-131(1), stating that her voting record was "misrepresented with reckless disregard because Montanans for Better Government failed to verify the public voting record...my record was misrepresented and...calculated falsehoods are used to further distort my record on the issues contained in the piece."
11. Cohenour further alleges that the material in question (flyer described in Facts 4-6) did not contain the requisite language pursuant to §13-35-225(3)(a)(iii) and (3)(b), MCA, a statement that to the best of the signer's knowledge, the candidate's voting record is accurate and true.
12. In his response to this office dated November 25, 2008, Denowh admits failure to include the aforementioned statement, contending that he was unaware of the requirement, and acknowledges that ignorance of the law is no excuse for violating it.
13. Also in his response, Denowh denies that he exercised "reckless disregard", claiming that instead he mistakenly cited the wrong piece of legislation after analyzing the legislative history of both bills.

STATEMENT OF FINDINGS

The complaint alleges violations of §§ 13-35-225 and 13-37-131, MCA.

MBG is accused of violating §13-35-225(3)(a)(iii) & (b), MCA, which provide:

Election materials not to be anonymous -- statement of accuracy.

(1) All 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, internet website, or other form of general political advertising must clearly and conspicuously include the attribution "paid for by" followed by the

name and address of the person who made or financed the expenditure for the communication. When a candidate or a candidate's campaign finances the expenditure, the attribution must be the name and the address of the candidate or the candidate's campaign. In the case of a political committee, the attribution must be the name of the committee, the name of the committee treasurer, and the address of the committee or the committee treasurer.

...

(3) (a) Printed election material described in subsection (1) that includes information about another candidate's voting record must include:

...

(iii) a statement, signed as provided in subsection (3)(b), that to the best of the signer's knowledge, the statements made about the other candidate's voting record are accurate and true.

(b) The statement required under subsection (3)(a) must be signed:

(i) by the candidate if the election material was prepared for the candidate or the candidate's political committee and includes information about another candidate's voting record; or

(ii) by the person financing the communication or the person's legal agent if the election material was not prepared for a candidate or a candidate's political committee.

The flyer clearly qualifies as a communication advocating the success or defeat of candidates or a political party, as it asks the reader to vote against Cohenour. (Facts 5 and 6)

The flyer from MBG did not include the language required by §13-35-225(3)(a)(iii), MCA - that to the best of [MBG's] knowledge, the statements made about the Cohenour's voting record were accurate and true. Denowh admits failure to include the requisite language. Denowh further admits, and this Commissioner agrees, that ignorance of the law is no excuse for violating it.

Alleged Violations of § 13-37-131(1), MCA

MBG is also accused of violating §13-37-131(1), MCA, which provides:

Misrepresentation of voting record -- political civil libel. (1) It is unlawful for a person to misrepresent a candidate's public voting record or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false.

Cohenour alleges that the flyer printed and distributed by MBG, and described in Facts 4-6, contained statements that "misrepresented (my voting record) with reckless disregard because Montanans for Better Government failed to verify the public voting record." Cohenour also alleges that "my record was misrepresented and ... calculated falsehoods are used to further distort my record on the issues contained in the piece."

The flyer referenced SB 220 as legislation that would "trip up, tie up, and trap small businesses with new, un-needed regulations." Cohenour contends that while the original form of SB 220 "may have added additional burdens to Montana Businesses," the amended version that was the subject of the previously mentioned blast motion did not.

Denowh stated that at the time of the blast motion referenced in the flyer, SB 220 was "drastically changed" in Committee, but that all of the business regulation provisions had been

amended into a different piece of legislation, HB 833, that Cohenour supported through her votes on procedural motions.

In his response, Denowh admits that a more accurate citation for the flyer would have been HB 833, as it contained the business regulation language referred to in the statement “trip up, tie up, and trap small businesses with new, un-needed regulations.”

A review of the history of SB 220 confirms that regulatory language had originally been in the bill, and had subsequently been amended out. Denowh stated that SB 220 was wholly contained in HB 833, and further states that a mistake had been made “due to the confusing nature of the changing bills.”

The germane portion of the statute alleged to have been violated reads “[i]t is unlawful for a person to misrepresent a candidate's public voting record or any other matter that is relevant to the issues of the campaign *with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false.*” (emphasis added)

In the *Matter of the Complaint Against Bradley Molnar and John E. Olsen* (April 4, 2006), this office discussed in some detail the standard of proof necessary to establish a violation of §13-37-131, MCA. The original source of the standard is the decision of the United States Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964). To prove that a person acted with “reckless disregard” in violation of the statute, there must be *clear and convincing evidence* that the person who made the representation *subjectively entertained serious doubts* as to the truth of the representation. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n. 6 (1974); and *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

The mental state requirement in the statute is derived from *New York Times*, where the Court held that a public official could not recover on a claim for defamation brought against a newspaper unless he proved “actual malice,” which the Court defined as “knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” *New York Times v. Sullivan*, 376 U.S. at 279-80. The Court based its decision on the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open...” *Id.*, 376 U.S. at 270. The high degree of First Amendment protection afforded by the *New York Times* rule is underscored by the requirement that actual malice must be proven with “convincing clarity.” *Id.*, 376 U.S. at 285-86. The facts established in this case do not support such a finding.¹

In order to reach a finding that MBG violated §13-37-131(1), MCA, there must be sufficient evidence to permit the conclusion that MBG in fact entertained serious doubts as to the truth of its

¹ There is no question that the First and Fourteenth Amendments embody our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.*, 376 U.S. 254, 270. But it is equally true that the use of calculated falsehood is not constitutionally protected. “Neither the intentional lie nor the careless error materially advances society's interest in ‘uninhibited, robust, and wide-open’ debate on public issues.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (quoting *New York Times*, 376 U.S. at 270).

publication. There is insufficient evidence to find MBG acted with reckless disregard, as there is no clear and convincing proof that it subjectively entertained serious doubts as to the truth of any representations it made about Cohenour's voting record.

MBG's handbill refers specifically to the April 26, 2007, vote on the motion to move the bill to a 2nd reading. (Fact 8) That reference accompanies an interpretation of the effect of the vote stating, "Jill Cohenour supported legislation that would trip up, tie up, and trap small businesses with new, unneeded regulations. With Montana's already-negative reputation as a poor place to do business, those new regulations would only make the situation worse."

There are nearly as many different ways to interpret a voting record as there are politicians to do the interpreting. Unfair though one interpretation may arguably be, it normally will not rise to the level of "calculated falsehood." In the instant case, Cohenour acknowledges the "original form of the bill may have added additional burdens to Montana businesses."

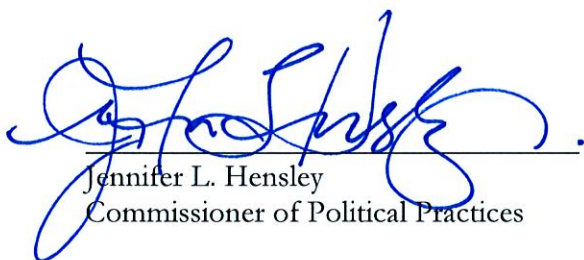
Given the confusing history of both bills, the fact that one was amended to completely engulf the other, and the regulatory nature of both bills at one point in time, it is clear that the citing of SB 220 rather than HB 883 was not, as alleged, a calculated falsehood, but in fact a mistake.

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings, there is insufficient evidence to conclude that there was a violation of §13-37-131(1), MCA.

There is sufficient evidence to conclude that the flyer did violate a provision of §13-35-225, MCA.

DATED this 19th day of April, 2011.


Jennifer L. Hensley
Commissioner of Political Practices

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Don't let Jill Cohenour trip you up. On Election Day Vote NO on Jill Cohenour

Vote referenced: Motion on SB 220, 4/26/2007.

Montanans for Better Government
PO Box 1743
Helena, MT 59624



Jill Cohenour's New Regulation Plan



Hurts Montana employers & reduces jobs.

Jill Cohenour voted to place new regulations on Montana small businesses.

Montana's already considered a difficult place to do business - Jill Cohenour's regulation plan would only make it worse.

Quinn Sather
2700 Bandera Drive
East Helena MT 59635-3105

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Prsrt Std
US Postage
PAID
Bozeman, MT
Permit #106



SMALL BUSINESSES
IN MONTANA ALREADY
HAVE SOME PRETTY
BIG HURDLES TO
CLEAR.



JILL COHENOUR VOTED TO ADD EVEN MORE.

