

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Colstad v. Devers No. COPP 2013-CFP-026	Summary of Facts and Finding of Insufficient Evidence to Show a Violation of Montana's Campaign Practices Act DISMISSAL OF COMPLAINT
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Carla Colstad is a resident of Hardin, Montana. In 2013 Ms. Colstad was a candidate for election to the Hardin city council. Kenneth Devers is a resident of Hardin, Montana. On October 23, 2013 Ms. Colstad filed a complaint with the COPP alleging that Mr. Devers had improperly prepared signs attacking her candidacy for the Hardin city council.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: 1) attribution responsibility under §13-35-225 MCA; and, 2) anonymous campaign activity.

FINDING OF FACTS

The foundation facts necessary for this Decision are as follows:

Finding of Fact No. 1: In 2013, Carla Colstad, Hardin city council member and Alderman for Ward 1, was running for re-election on the 2013 ballot. (City of Hardin, MT website).

Finding of Fact No. 2: A general election in the city of Hardin was held November 5, 2013. (City of Hardin, MT website).

Finding of Fact No. 3: Carla Colstad lost to Karen Molina by a vote of 93 to 133. (Big Horn County election results, city of Hardin, MT website).

Finding of Fact No. 4: A poster/flyer attacking Colstad's candidacy was prepared and posted prior to the election. (See copy of document attached to this Decision as Exhibit 1).

DISCUSSION

A local government election was duly held in Hardin, Montana on November 5, 2013. (FOF No. 2). Carla Colstad was a candidate for Hardin city council in that election. (FOF No. 1).

On October 23, 2013, prior to the election date, Ms. Colstad filed a complaint alleging that Mr. Devers distributed a document attacking her candidacy. Ms. Colstad attached a copy of the document to her complaint (hereinafter Document) and a copy of the Document is attached to this Decision as Exhibit 1. Ms. Colstad asserted that the Document was a campaign expense that needed attribution, reporting, and disclosure under Montana law.

The Document bears the name of no individual or group and does not meet or attempt to meet the attribution requirements of §13-35-225 MCA. Montana's campaign practice act requires that "all communications" constituting campaign materials be "attributed" such that the name and address of the person who "made or financed the expenditure" be disclosed. §13-35-225 MCA.

1. The Complaint Against Mr. Devers

Ms. Colstad believed that the Document was the work product of Hardin resident, Kenneth Devers. The Commissioner's investigators¹ interviewed Ms. Colstad (twice) and Mr. Devers. The investigators followed leads given them from those initial investigations and interviewed 4 additional Hardin residents, including a local government official. Based on those interviews the Commissioner makes the following determinations:

Finding of Fact No. 5. Mr. Devers' involvement was limited to distributing some copies of the Document. (Investigator notes).

Finding of Fact No. 6. There was no evidence or information provided to the Commissioner showing that Mr. Devers made or financed the production of the Document. (Investigator notes).

Based on the above two findings the Commissioner determines that there is insufficient evidence to show that Mr. Devers made or financed the production of the Document. Accordingly, the Commissioner determines that there is insufficient evidence to show that Mr. Devers violated the provisions of §13-35-225 MCA.

2. Further Investigation

Upon submission of a written complaint the Commissioner "shall further investigate any other alleged violation" of the Montana Campaign Practices Act. §13-37-111(2)(a) MCA. While Mr. Devers may not have made or financed the

¹ Vanessa Sanddal assumed the position of investigator starting December 2, 2013. Prior to that time Julie Steab served as the investigator.

Document, someone did. That person would, unless otherwise excused, be responsible for failing to meet the attribution requirements of §13-35-225 MCA.

The above said, it can be a nuanced determination as to whether attribution is or is not required. The acts of those seeking a larger democratic voice are, by necessity, noisy, chaotic, and amorphous. The chaos of Arab spring and the drama of Tiananmen Square are known to all of us as the unorganized actions of those seeking such a voice. Similarly, those within an established democracy can, under certain circumstances, properly choose to speak without disclosing their identity. The US Supreme Court in *McIntyre v. Ohio Elections Comm'n* 514 U.S. 334, 347 (1995) summarized the framework of anonymity as: “[u]nder our Constitution, anonymous pamphleteering is not a pernicious fraudulent practice, but an honorable tradition of advocacy and dissent.”

The *McIntyre* principles must be applied, when appropriate, to measure whether attribution is required under §13-35-225 MCA because, whenever possible, statutes should be construed narrowly to avoid constitutional difficulties. (*State v. Nye*, 283 Mont. 505, 510, 943 P.2d 96, 99 (1997); *State v. Lilburn*, 265 Mont. 258, 266, 875 P.2d 1036, 1041 (1994), *cert. denied*, 513 U.S. 1078 (1995).) The pamphleter in *McIntyre* diligently sought anonymity and was excused by the 1st Amendment from attribution.

Past Montana Commissioners, citing *McIntyre*, have determined that the 1st Amendment protects certain types of anonymous speech: *Vanmeter v. asksheriffluckylarson*, November 10, 2011 (Commissioner Gallik), *Wittick v.*

Campbell, November 17, 2009 (Commissioner Unsworth), and *Harmon v. Sweet*, December 31, 1997 (Commissioner Argenbright). Other commissioners have considered but not applied *McIntyre* principles on the basis that anonymity was surrendered within the publication (*Bixler v. Suprock* COPP-2013-CFP-13, Commissioner Motl) or compromised by actions inconsistent with anonymity. *Olsen v. Vallance*, November 17, 2009 (Commissioner Unsworth).

In particular, *Olsen v. Vallance* sets out a detailed consideration and analysis resulting in the identification of four factors that help determine whether or not a claimed anonymous campaign expenditure was outside of the reach of the attribution requirements of §13-35-225 MCA:

1. Did the anonymous political speech involve express advocacy (urging a vote for or against a particular candidate or ballot issue)?
2. Did the person who engaged in anonymous political speech act alone and use only his or her personal resources?
3. Did the person who engaged in anonymous political speech act independently and not coordinate the expenditure with a political committee or a campaign?
4. Did the anonymous campaign expenditure involve more than a *de minimis* amount?

The Commissioner next considers these four *Vallance* factors as applied to this Matter.

The Commissioner's review determined that the Document advocated a vote against candidate Colstad and therefore met the express advocacy standards last discussed by a Commissioner in *Bonogofsky v. National Gun*

Owners Alliance COPP-2010-CFP-008. The Commissioner's investigation continued far enough to determine that insufficient facts existed to take the Document out of the reach of the remaining *Vallance* factors. The Commissioner hereby determines that there is a lack of reliable information or evidence as to the person who made or financed the cost of the Document (investigators' notes). Further, the Commissioner determines that the Document is not professionally written and could easily have been prepared by one person working alone. Still further, the Commissioner determines a lack of evidence that the number of copies of, or cost of, the Document rises above a *de minimis* amount. The Commissioner therefore closes the investigation and considers the Document to be an anonymous pamphlet.

OVERALL DECISION

This Matter does not entirely involve the speech of innocents. The investigation in this Matter showed that the city council race at the heart of this complaint was perceived by some in Hardin as framing, through candidate choice, issues affecting the economy and function of the town. Passions were high and factions developed between some people living in the community. Candidate Colstad's home and personal property were vandalized. The Document was hung for public view in the middle of the night and Candidate Colstad traveled the town taking down the Document.

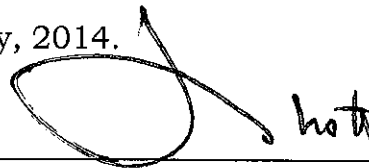
Political involvement serves citizenship and the community. Improper and/or necessary self-help acts do neither. Nevertheless, the Commissioner's role is limited to that of whether certain citizenship acts (campaign practice

acts) were or were not proper, as measured by Montana's Campaign Practice Act. A dismissal of this complaint does not condone the acts discussed above but simply measures the acts against campaign practice standards.

In turn, the Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must make, a decision as the law mandates that the Commissioner ["shall investigate," see, §13-37-111(2)(a) MCA] investigate any alleged violation of campaign practices law. 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 duly considered the matters raised in the Complaint, and having completed his review and investigation, hereby holds and determines, under the above stated reasoning, that there is insufficient evidence to justify a civil or criminal prosecution against Mr. Devers or any other person under §13-37-124(1) MCA. The Commissioner hereby dismisses this complaint in full.

DATED this 14th day of January, 2014.

A handwritten signature in black ink, appearing to read 'Motl', is written over a horizontal line.

Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana
P. O. Box 202401
1205 8th Avenue
Helena, MT 59620
Phone: (406)-444-4622

Current City Council Member

DO NOT

represent YOU or HARDIN!

SPENDING TAX PAYER DOLLARS TO TELL THEM 3 DIFFERENT WAYS
THAT THE CITY ATTORNEY NEEDS TO BE LET GO.

(Carson Taylor Report)

ILLEGALLY CLOSING THE DOORS TO MEETINGS & DENYING THE
PUBLIC THE INFORMATION

(Law Suit)

TO INFRINGE ON OUR CONSTITUTIONAL RIGHTS

(Graffiti Ordinance)

○ If YOU want REPRESENTED for the
Next 4 years...

It is TIME for

COLSTAD & KREBS & ZENT

to ship out!!!

EXHIBIT

1

tabbies