BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES
STATE OF MONTANA

In the Matter of the Complaint	)	
	)	SUMMARY OF FACTS
Robert Ebinger against	)	and
Montana Republican Party	)	STATEMENT OF FINDINGS
	)	

INTRODUCTION

On October 28, 2008, Robert Ebinger filed a complaint against the Montana Republican Party (hereafter "MRP"). Ebinger, incumbent candidate for House District 62, was running against Republican backed candidate Neal Donaldson. The complaint revolves around a handbill distributed by MRP stating, "Bob Ebinger and Montana Democrats support this [business equipment] tax, which hurts small businesses and the families who depend on them."

Ebinger's Complaint alleges the handbill in question violates 13-37-131, MCA, and that it fails to comply with Montana's Clean Campaign Act.

MRP responded to the complaint indicating, inter alia, that Rep. Ebinger's actions, as perceived by people observing and working in the legislature, caused the reasonable interpretation that he supports continuing the business equipment tax.

SUMMARY OF FACTS

The handbill at issue is attached as Exhibit 1. On November 6, 2008, then-Commissioner Dennis Unsworth wrote to the complainant advising,

> Your complaint refers, without specific citation, to the Clean Campaign Act. That act is codified at § 13-35-401, MCA. However, that section of law requires fair notice to opponents when new campaign ads appear in the last 10 days of the election. The provisions of law you apparently intended to refer to are found in 13-35-225(3), MCA, and related subsections. That section requires that printed election material '(t)hat includes information about another candidate's voting record ...' includes certain details and a statement of accuracy.
>
> The representation on the flyer you complain about is that you and the Democrats 'support' the business equipment tax. There is no reference to your voting record, per se, regarding bills that pertain to this tax. For this reason, the complaint does not appear to state a potential violation of the provisions of 13-35-225, MCA.

> To the extent the complaint alleges '(m)atters relevant to the issues of the campaign ...' were misrepresentation [sic] in violation of 13-37-131(2), MCA, I have jurisdiction over that limited allegation.

See letter attached as Exhibit 2.

In its November 26, 2008, response, MRP denied the allegations contained in Ebinger's complaint. Specifically, MRP refers to the affidavit of employee Max Hunsaker, which outlines steps taken to determine whether Ebinger supported or opposed the business equipment tax. Hunsaker states he considered Ebinger's votes on HB 529 from the 2007 Regular Session; his vote on HB 8 during the 2007 May Special Session; had multiple conversations with observers of, and participants in, the Legislature including citizens, business owners, business lobbyists, and Republican legislators. In conclusion, Hunsaker states the leaders of MRP determined Ebinger was not a reliable opponent of the business equipment tax.

Hunsaker states, specifically:

> The most important legislative vehicle during the 2007 Legislative cycle to reduce or eliminate the business equipment tax was House Bill 529, sponsored by Rep. Bob Lake, and fully supported by the business community. When Rep. Ebinger sided with his Democratic caucus [sic] concur in the Senate Amendments to HB 529, he opposed cutting the business equipment tax. In my conversations with people involved in that bill's history, all of them pointed to that important vote as being the most reliable determinant of a legislator's position on a bill. The reason for this is because the Senate had gutted HB 529's tax-cutting provisions, and a vote for that version of the bill (a vote against the motion to not concur in the Senate amendments) ended all hope of cutting business equipment taxes. Rep Ebinger voted with his Democratic caucus against cutting this tax when the chips were down.
>
> The same interpretation then discounted Rep. Ebinger's vote in support of House Bill 8, sponsored by Rep. Rick Jore, during the May 2007 Special Session. The conventional wisdom at the time of that vote was that the bill had no possible chance of passing the Senate and being signed by the Governor, and therefore it was considered a 'safe' vote for legislators who supported continuing the business equipment tax, but who wanted to throw a token anti-tax vote to the business community, to break with their caucus. Observers of the legislative session, including myself, reasonably believed this is what Rep. Ebinger did with this vote.
>
> Finally, Rep. Ebinger's general behavior throughout the 2007 Session did not suggest that he actively supported eliminating the business equipment tax. He did not actively lobby his fellow Democrat legislators to support efforts to eliminate or reduce this tax, he did not work cooperatively with Republican legislators in the same manner, and he did not communicate consistently with constituents or business owners in Montana to demonstrate or urge their support for this bill or other similar efforts. While it is true that Rep. Ebinger voted in favor of cutting the tax on a couple of occasions, his vote against

the tax and his failure to speak out against his caucus when his actions mattered most, caused us to conclude it was a reasonable interpretation that Rep. Ebinger does in fact support continuing the business equipment tax. At the very least, he is not a reliable opponent of the tax, in stark contrast to the Republican candidate Neal Donaldson.

Every vote made by Rep. Ebinger in the 2007 regular session and the 2007 May special legislative session showed he opposed the business equipment tax.

In an attempt to justify the MRP handbill, Mr. Hunsaker's affidavit contains numerous conclusory assumptions based upon hearsay, with minimal foundational facts. Affidavits that contained only hearsay statements are properly stricken. *Eberl v. Scofield*, 244 M 515, 798 P2d 536, 47 St. Rep. 1780 (1990). The following statements were made by Mr. Hunsaker in his affidavit.

"Rep. Ebinger's general behavior throughout the 2007 Session did not suggest that he actively supported eliminating the business equipment tax.", [Aff. PP. 4c]

"... he did not work with Republican legislators...", [Aff. PP. 4c]

"He did not actively lobby her fellow Democrat legislators...", [Aff. PP. 4c]

"...wanted to throw an anti-tax vote to the business community...", [Aff. PP. 4b]

"...failure to speak out against his caucus...", [Aff. PP. 4c]

"...he is not a reliable opponent of the tax...", [Aff. PP. 4c]

"...did not consistently with constituents or business owners in Montana to demonstrate or urge their support for this bill... [HB 8]", [Aff. PP. 4c]

"Rep. Ebinger voted with his Democrat[ic] caucus when the chips were down" [Aff. PP. 4c]

"I also considered multiple conversations with observers of, and participants of, the legislature,...in determining that Rep. Ebinger supports a continuation of the business equipment tax. [Aff. PP. 3]

Regarding HB8 – Hunsaker stated that it was a 'token vote' on a bill that "had no chance of passing the Senate and being signed by the Governor." He is asking us to place meaning upon a vote that was a vote to *eliminate* a tax, that would have this agency believe that by casting a YES vote, he actually meant NO.

An elected official's voting record is the only quantitative and substantive evidence the electorate has to determine how that individual stands on a topic – it is where the rhetoric ends and an official record is made of the legislator's position on an issue.

STATEMENT OF FINDINGS

§13-35-225(3), MCA, states:

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

(i) a reference to the particular vote or votes upon which the information is based;

(ii) a disclosure of contrasting votes known to have been made by the candidate on the same issue if closely related in time; and

(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 representation on the handbill about which Mr. Ebinger complains is that he and the Democrats 'support' the business equipment tax. Although there is no reference to a specific vote, the issue of the business equipment tax was addressed by the 2007 legislature, of which Mr. Ebinger was a member of the House of Representatives.

Ebinger's complaint states that he supported Representative Lake's HB 529, in the 2007 regular legislative session and Rep. Jore's HB 8, in the May 2007 special legislative session. It is clear from these votes, on both second and third reading, then Rep. Ebinger voted in favor of reducing the business equipment tax rate and increasing the exemption, along with voting in favor of phasing out the business equipment tax. However, the handbill at issue did not make a reference to Ebinger's voting record, per se, regarding bills that pertain to this tax. There is no reference to Ebinger's "voting record" regarding the business equipment tax bill(s). Although the handbill would leave a reasonable reader to conclude that Representative Ebinger was in favor of the business equipment tax, because the handbill made no reference to Ebinger's "voting record," there cannot be a finding that any part of Title 13, Chapter 35 was violated and those allegations should be dismissed.

The remaining allegation is that MRP violated § 13-37-131, MCA, which states:

(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.

(2) It is unlawful for a person to misrepresent to a candidate another 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.

(3) For the purposes of this section, the public voting record of a candidate who

was previously a member of the legislature includes a vote of that candidate recorded in committee minutes or in journals of the senate or the house of representatives. Failure of a person to verify a public voting record is evidence of the person's reckless disregard if the statement made by the person or the information provided to the candidate is false.

Ebinger's allegation pursuant to this statute is the MRP misrepresented *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.*

Ebinger asserts the handbill statement, "Bob Ebinger and Montana Democrats support this [business equipment] tax" is a misrepresentation of his position on the business equipment tax and relevant to the issue of the campaign. In support of his argument, as referenced above, Ebinger states he voted yes on 2nd and 3rd readings of HB 8, to phase out the business equipment tax. Ultimately, the bill died in the Taxation standing committee. Ebinger further reported his votes on HB 529, i.e., voting yes on 2nd and 3rd readings.

The Hunsaker affidavit is replete with references to unidentified third parties with whom he had conversations regarding Ebinger's position on the business equipment tax. Hunsaker also attests to personal knowledge of Ebinger's actions and his analysis of his voting record. It is clear Hunsaker made concerted efforts regarding the contents of the handbill at issue. Objectively, it appears these concerted efforts were in an attempt to circumvent the provisions of § 13-37-131, MCA. Subjectively, Mr. Hunsaker and the MRP state that they were led to the reasonable conclusion that "Rep. Ebinger supports the business equipment tax." This agency disagrees that this was a reasonable conclusion to reach, and finds that the handbill at issue makes a false allegation.

The Commissioner has addressed alleged violations of this statute on numerous occasions. *See* Koopman v. Vincent (2008); Degroot v. Harris (2006); Harris v. Fox, (2003). As discussed below, when construing statutes similar to § 13-37-131, Mont. Code Ann., the courts have consistently afforded a high degree of First Amendment protection to campaign statements made by candidates for public office.

To establish a violation of this statute, it would be necessary to prove that when MRP printed and distributed the handbill it misrepresented a "matter that is relevant to the issues of the campaign," and that it did so either "with knowledge that the assertion is false" or "with a reckless disregard of whether or not the assertion is false."

The mental state requirement in the statute is derived from the seminal case of New York Times v. Sullivan, 376 U.S. 254(1964). In that case, the United States Supreme 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." Id., 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.[1]

In several later opinions the Court applied the New York Times standard in libel actions brought by two candidates against newspapers that had printed allegedly defamatory statements about them. Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971). In Monitor Patriot Co. the Supreme Court stated:

> And if it be conceded that the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," [citation omitted], then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

Monitor Patriot Co., 401 U.S. at 271-72.

While the standard enunciated by the Supreme Court in New York Times and its progeny developed in libel actions, the standard also applies to statutes authorizing penalties for violation of election laws that limit campaign speech:

> Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount.

Brown v. Hartlage, 456 U.S. 45, 61 (1982). In Vanasco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) (affirmed 423 U.S. 1041 (1978)), Riccio, a political candidate who lost an election to Ferris, complained to the New York State Board of Elections that Ferris had misrepresented Riccio's voting record in a handbill distributed prior to the election. The statute at issue, which was somewhat similar to Montana's, provided:

> No person, . . . during the course of any campaign for nomination or election to public office . . . shall . . . engage in or commit any of the following: Misrepresentation of any candidate's position including, . . . misrepresentation as to political issues or his voting record . . .

Vanasco, 401 F. Supp. At 101. The court found the statute unconstitutional because it did not include the New York Times actual malice mental state requirement. The court also noted that proof by "clear and convincing" evidence is a constitutional requirement, and a standard of proof requiring only "substantial evidence" would be insufficient. Vanasco, 401 F. Supp. At 99.

It is important to note that the "clear and convincing" standard of proof is a "more exacting measure of persuasion" than the standard burden of proof by a preponderance of the

[1] In Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974), the Supreme Court noted that the New York Times rule calls for "clear and convincing proof that the defamatory falsehood was made with knowledge of a falsity or with reckless disregard for the truth."

evidence in typical civil actions. John W. Strong, et al., *McCormick on Evidence* § 340 at 575 (4th Ed. 1992). Moreover, the "actual malice" standard requires application of a subjective, rather than an objective test. In St. Amant v. Thompson 390 U.S. 727 (1968), the Supreme Court considered a case where a political candidate (St. Amant) made allegedly defamatory statements about his opponent. The Louisiana Supreme Court applied an objective test of recklessness in finding that St. Amant had violated the "reckless disregard of the truth" standard when making his statements. Rejecting this analysis, the United States Supreme Court held that proof of actual malice requires proof of "an awareness . . of the probable falsity" of the statement. St. Amant, 390 U.S. at 732. As the Court explained, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Id., 390 U.S. at 731. See also Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n. 6 (1974).

Of course, the New York Times standard itself reflects the principle that not all speech made during the course of a political campaign is protected by the First Amendment. The Supreme Court made this clear in Garrison v. Louisiana, 379 U.S. 64, 75 (1964), when it stated:

> "The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of a known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

Thus, while there is no question that speech uttered during political campaigns is entitled to considerable protection under the First Amendment, it is equally clear that candidates are not entitled to deliberately lie, or use "calculated falsehoods" in their campaigns.

In Garrison v. Louisiana, 379 U.S. 64, 75 (1964), the U.S. Supreme Court concluded;

> "Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like the Louisiana rule, permitting a finding

> of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded." Noel, Defamation [379 U.S. 64, 74] of Public Officers and Candidates, 49 Col. L. Rev. 875, 893 (1949). Moreover, "[i]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives." Id., at 893, n. 90.
>
> The test which we laid down in New York Times is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." at pg. 79.

The question for resolution in this case is whether the handbill printed and distributed by MRP meets the New York Times actual malice standard, thereby constituting a violation of Montana Code Annotated § 13-37-131(1). Although it is a very close call, upon review of the facts, there is not "clear and convincing evidence" that it meets that standard.

The handbill appears objectively false and most likely left many people with the impression that Representative Ebinger supported the business equipment tax. However, a violation of the statute must be based on false statements made with reckless disregard of the truth. Here MRP bases its position on its subjective beliefs that Ms. Kottel was in favor of the business equipment tax. There is no clear and convincing proof that MRP "subjectively entertained serious doubts" as to the truth of the statements.

Given the high bar established by the United States Supreme Court in New York Times and subsequent decisions, and the Court's consistent recognition that First Amendment free speech rights are paramount in political campaigns, there is insufficient evidence in this case to prove a violation of Montana Code Annotated Section 13-37-131.

CONCLUSION

Because the handbill made no reference to Ebinger's "voting record", there cannot be a finding that any part of Title 13, Chapter 35 was violated and those allegations are dismissed.

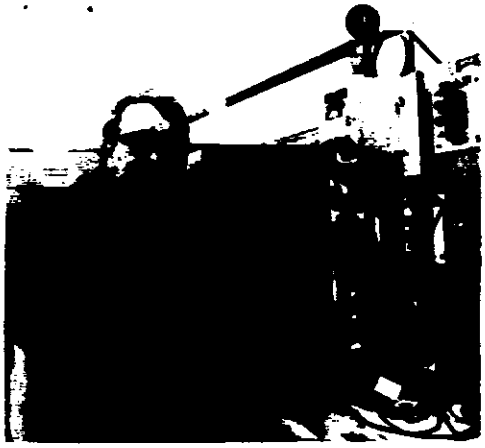
Based on the preceding Summary of Facts and Statement of Findings there is insufficient evidence to find that the Montana Republican Party violated § 13-37-131, MCA, as alleged in the complaint.

The complaint by Robert Ebinger against the Montana Republican Party Montana is hereby dismissed.

DATED this 6th day of July, 2011.

David B. Gallik
Commissioner of Political Practices

EXHIBIT 1



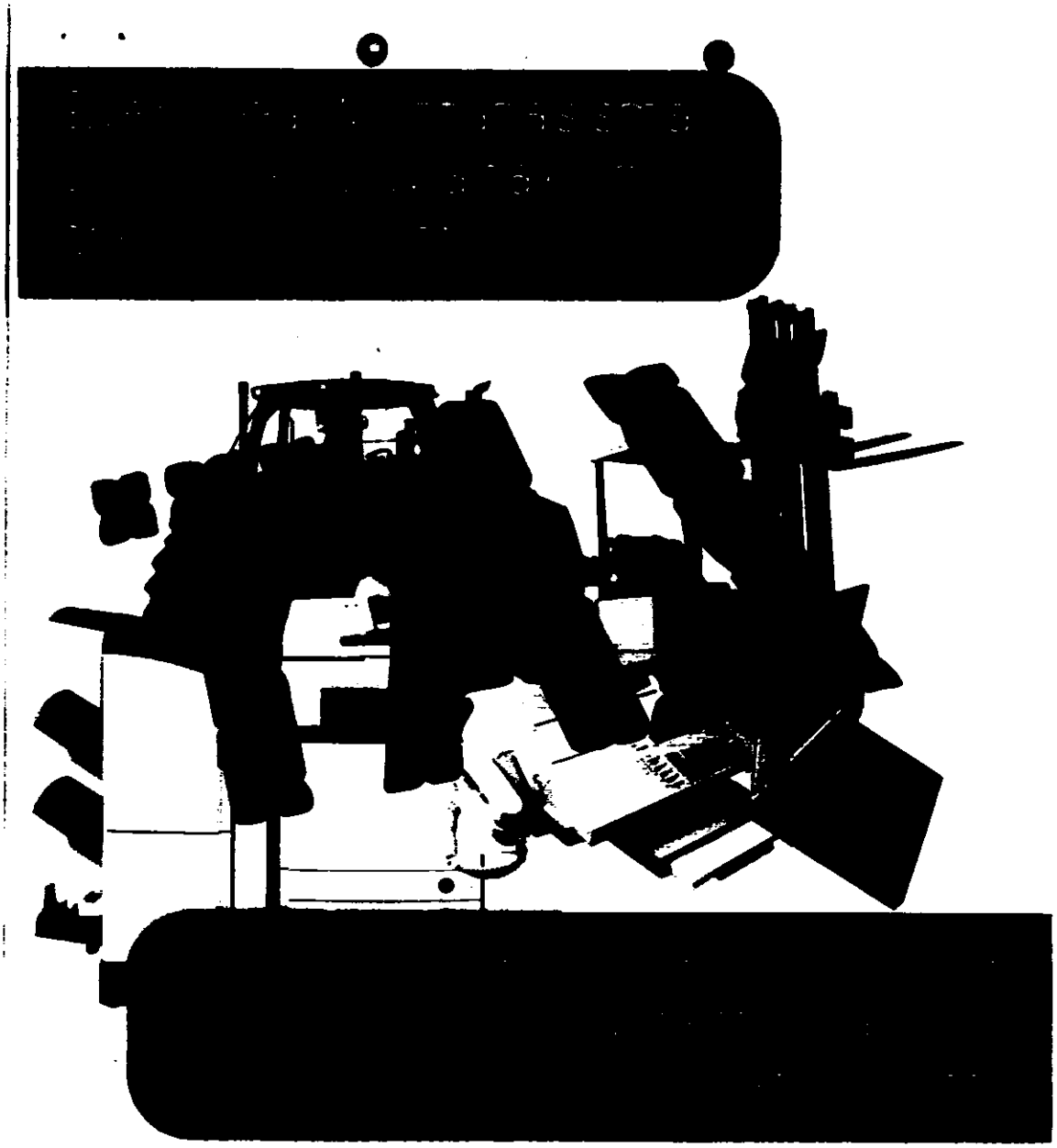
Year after year more taxes on the same equipment?

That's exactly what Montana's outdated Business Equipment Tax imposes on thousands of farms, ranches, and small businesses.

Bob Ebinger and Montana Democrats support this tax, which hurts small businesses and the families who depend on them.

Neighboring states don't have this tax, which means businesses in North Dakota and Wyoming have a competitive advantage, can hire more workers, grow their businesses, and pay better wages. **Montana workers lose with the Business Equipment Tax.**

Neal Donaldson



Paid for by the Montana Republican Party
Shirley Warehime, Treasurer
1313 N Last Chance Gulch
Helena, MT 59601

ECRLOT**C003
ROBERT F EBINGER JR T6 P18
OR CURRENT RESIDENT 436
128 S YELLOWSTONE ST
LIVINGSTON, MT 59047-2634

Bozeman Mt
U.S. POSTAGE
PAID

EXHIBIT 2

COMMISSIONER OF
POLITICAL PRACTICES

STATE OF MONTANA

DENNIS UNSWORTH
COMMISSIONER
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1205 EIGHTH AVENUE
PO BOX 202401
HELENA, MONTANA 59620-2401
www.politicalpractices.mt.gov

COPY

November 6, 2008

CERTIFIED MAIL
Return Receipt Requested

Robert Ebinger Jr
128 South Yellowstone St
Livingston MT 59047

Subject: Complaint received October 28, 2008; Montana Republican Party

Your complaint alleging violation of Montana campaign practices law appears to conform to the requirements of 44.10.307(2), ARM. A copy of the complaint will be sent today by certified mail to the Montana Republican Party. Please note, however, the caveat that follows.

Your complaint alleges that a mailer financed by the Republican Party violates "(M)ontana's Clean Campaign Act," and that the representations made in the flyer misrepresent your voting record, in violation of 13-37-131, MCA. The mailer refers critically to the "business equipment tax" and states, "Bob Ebinger and Montana Democrats support this tax, which hurts small businesses and the families who depend on them."

Your complaint refers, without specific citation, to the Clean Campaign Act. That act is codified at § 13-35-402, MCA. However, that section of law requires fair notice to opponents when new campaign ads appear in the last 10 days of the election. The provisions of law you apparently intended to refer to are found in 13-35-225(3), MCA, and related subsections. That section requires that printed election material "(t)hat includes information about another candidate's voting record . . . " includes certain details and a statement of accuracy.

The representation on the flyer you complain about is that you and the Democrats "support" the business equipment tax. There is no reference to your voting record, per se, regarding bills that pertain to this tax. For this reason, the complaint does not appear to state a potential violation of the provisions of 13-35-225, MCA.

To the extent the complaint alleges "(m)atters relevant to the issues of the campaign. . ." were misrepresented in violation of 13-37-131(2), MCA, I have jurisdiction over that limited allegation.

I may request additional information to determine whether the complaint is sufficient to proceed with an investigation under 44.10.307(3), ARM. If the complaint is dismissed based on one or more of the deficiencies described in that rule, you will be notified, and the basis for the dismissal will be explained. If an investigation is conducted, it will be limited to the allegations that certain provisions of § 13-37-131, MCA were violated.

A summary of facts and statement of findings will be prepared and a copy will be sent to you.

Dennis Unsworth
Commissioner of Political Practices

Copy: Montana Republican Party

"AN EQUAL OPPORTUNITY EMPLOYER"