

**BEFORE THE COMMISSIONER OF POLITICAL PRACTICES
STATE OF MONTANA**

In Re the Complaint of)
)
MARY JO FOX,)
)
 Complainant and Charging Party,)
)
Against)
)
BRAD MOLNAR,)
)
 Respondent.)

PROPOSED DECISION & ORDER

During 2008, Mary Jo Fox, hereinafter referred to as “the Complainant,” filed a series of complaints with the Montana Commissioner of Political Practices, Dennis Unsworth, against Public Service Commissioner Brad Molnar, hereinafter referred to as “the Respondent.” Commissioner Unsworth appointed the undersigned as the Hearings Officer. The matter was heard November 4 through November 6, 2009. Timely post-hearing briefs were received from both parties. The matter is now ready for decision.

The Respondent, a former Montana State Legislator, has twice been elected to the Montana Public Service Commission (PSC). He serves District #2, which includes Billings and South-Eastern Montana. The alleged offenses arose during the Respondent’s first term on the PSC. The Complainant alleges two types of activity: First, that Respondent solicited and received money from two business entities: Northwestern Energy, which is regulated by the

PSC, and PPL Montana, which regularly participates in official PSC proceedings. Second, that Respondent used State equipment and resources for electoral or private business purposes.

SUMMARY OF THE COMPLAINTS

Complainant filed a number of complaints against Respondent. Four of the complaints were consolidated and became the subject of the November 2009 hearing. The first alleged that Respondent received unlawful gifts in violation of Montana Code Annotated § 2-2-104. The other three alleged that Respondent unlawfully used State resources in violation of Montana Code Annotated § 2-1-121(2)(a) and (3)(a).

A. Unlawful Gifts

A complaint dated June 12, 2008, alleged that, since filing as a candidate for re-election to the Montana Public Service Commission in District 2, the Respondent, an incumbent PSC Commissioner, “has gone door-to-door in his district distributing a brochure that was printed using gifts of at least \$2,000 provided by at least two corporate entities, both of whom are regulated by the Public Service Commission.”¹

The complaint alleges violations of Montana Code Annotated § 2-2-104(1)(b) of the Montana Code of Ethics, which prohibits a public officer from accepting “a gift of substantial value . . . that would tend to improperly influence a reasonable person to depart from the faithful and impartial discharge of the person’s public duties.”

In his September 15, 2008, Answer to the Complaint, the Respondent denied all of the Complaint’s allegations.

¹ The record is clear that while donor NorthWestern Energy is regulated by the PSC, the second donor, PPL Montana, is not regulated by the PSC.

B. Unlawful Use of State Resources

Three separate Complaints allege that the Respondent unlawfully used State resources. In relevant part, the Montana Ethics Code prohibits a public officer from using public time, facilities, equipment, supplies, personnel, or funds for the officer's election or private business purpose. Mont. Code Ann. § 2-2-121(2)(a) (private business purpose); Mont. Code Ann. § 2-2-121(3)(a) (election).

A Complaint dated October 9, 2008, alleged that the Respondent used his PSC e-mail address, PSC phone number, and PSC computer in his 2008 reelection campaign.

A Complaint dated October 16, 2008, alleged that the Respondent used a PSC cell phone for personal business purposes.

A Complaint dated October 27, 2008, alleged that the Respondent used his State e-mail to solicit support for his 2008 reelection campaign (the Great Falls Rotary situation), and to arrange to attend a political campaign event (Miles City Bucking Horse Sale).

In his Answers, the Respondent denied all of these Complaints' allegations.

RESPONDENT'S MOTION TO DISMISS

On January 24, 2009, prior to the hearing, Respondent moved to dismiss the Complaints on the grounds that Complainant did not have legal standing to pursue ethics complaints against him. Both parties filed briefs and were afforded the opportunity of oral argument.

In an April 2, 2009 written decision, the Hearings Officer dismissed the motion, but allowed the Respondent to renew his motion at the ultimate fact hearing. Both parties were afforded the right to present evidence on the standing issue at the hearing. At and after the November hearing, the Respondent renewed his standing motion. At the November hearing, the Complainant presented evidence regarding her interest in the matters in dispute.

RESPONDENT'S MOTION TO DISQUALIFY COMPLAINANT'S COUNSEL

On June 16, 2009, Respondent named Complainant's attorney as a witness for the hearing, and thereafter sought to disqualify Complainant's attorney from representing the Complainant at the hearing. Respondent alleged that that Complainant's attorney was prohibited from serving as an advocate under Rule of Professional Responsibility 3.7. Respondent's argument was that Complainant, her attorney, and others engaged in a conspiracy to oppose Respondent's election campaign, and that evidence about this alleged conspiracy was material to the instant charges against him.

Complainant objected to the disqualification attempt on the grounds that her attorney had no relevant or necessary evidence to offer at the hearing regarding the ethics complaints. On September 16, 2009, the Hearings Officer issued a written decision, denying Respondent's disqualification motion. The Hearings Officer held that the existence or non-existence of a conspiracy to undermine Respondent or his recent re-election campaign is not relevant or material to the narrow charges against him, and that accordingly, Complainant's attorney had no necessary or relevant information to provide as evidence at the hearing. Additionally, it was determined that disqualifying the Complainant's attorney would "work substantial hardship" on her. However, to assure a full record in the event of an appeal, the Hearings Officer held that Respondent could make an offer of proof at the hearing regarding the alleged conspiracy and its relevance and materiality to the proceedings.

APPLICABLE LAW

The Montana Ethics Code states that holding public office is a public trust created by the confidence that the electorate reposes in the integrity of public officers to carry out their

individual duties for the benefit of the people of Montana. Mont. Code Ann. § 2-2-103. The Respondent, as a Montana Public Service Commissioner, is public officer within the meaning of this and other Montana statutes concerning the duty of public trust. Mont. Code Ann. § 2-2-102. A violation of the rules of public trust is a violation of the Montana Ethics Code and subjects that public officer to legal sanctions. Mont. Code Ann. § 2-2-136 (2).

A. Law Prohibiting Receipt of Gifts

The Montana Ethics Code prohibits a public officer from accepting “a gift of substantial value . . . that would tend to improperly influence a reasonable person to depart from the person's faithful and impartial discharge of the person's public duties.” Mont. Code Ann. § 2-2-104(1)(b). A gift of “substantial value” is a gift of “\$50 or more.” Mont. Code Ann. § 2-2-102(3). There are three major exceptions to Section 2-2-104(1)(b): First, an item returned by the public officer within 30 days of receipt is not considered a gift. Mont. Code Ann. § 2-2-102(3)(b)(i). Second, if the item is for “educational material directly related to official governmental duties,” it is not a gift. Mont. Code Ann. § 2-2-102(3)(b)(iii). Third, a gift for an “educational activity that: (A) does not place or appear to place the recipient under obligation; (B) clearly serves the public good; and (C) is not lavish or extravagant,” is not considered a statutory gift. Mont. Code Ann. § 2-2-102(3)(b)(v).

B. Prohibiting the Use of Public Resources for a Private Business or Political Purpose.

A public officer is prohibited from using “public time, facilities, or equipment for private business purposes or electoral purposes. Mont. Code Ann. § 2-2-121 (2), (3).

C. Sanctions.

If a public officer violates either of the above prohibitions, he may be subject to an “administrative penalty of not less than \$50 or more than \$1,000,” and assessed “the costs of the

proceeding against [him].” Mont. Code Ann. § 2-2-136. Alternatively, if there is a finding that no violation was committed, the Complainant may be assessed the “costs of the proceeding.” Mont. Code Ann. § 2-2-136.

FINDINGS OF FACT

A. Solicitation and Receipt of Unlawful Gifts

NorthWestern Energy, PPL Montana, and WalMart are all corporations. The Montana Public Service Commission (PSC) is a quasi-judicial governmental agency whose decisions affect hundreds of thousands of Montana individuals and businesses with respect to hundreds of millions of dollars in utility rates. NorthWestern Energy is a corporation that is regulated by the Public Service Commission. PPL Montana is a corporation that appears in contested matters before the Public Service Commission as a party and as a witness, and is affected by decisions of the Public Service Commission. The Respondent is an elected representative on the PSC from Montana District 2. As such, the Respondent, along with the other elected members of the Commission, makes decisions regarding the welfare and economic viability of NorthWestern Energy and PPL Montana.

“Brown Out” programs have been successfully used in cities around the world to demonstrate that energy savings result when people voluntarily turn off their lights for a proscribed time. The Respondent testified that he decided to organize a Brown Out program in Billings, the largest community in his PSC District, so that Billings residents would participate and discover that voluntary efforts result in substantial energy savings.

The Respondent began his re-election campaign for re-election for Public Service Commission in the Summer of 2007, although he did not officially announce his candidacy until

March of 2008. Respondent's first reported campaign expenditure occurred, according to his campaign finance report, in February 2008.

Respondent acknowledges that he decided to solicit money from NorthWestern Energy, PPL Montana, and two Billings WalMart stores to support and promote the Billings Brown Out. His solicitations were successful. His solicitation and receipt of money from WalMart were not part of the Complaint, and are referenced herein only for the purpose of completeness.

During the Fall of 2007, when NorthWestern Energy was appearing before the PSC, the Respondent approached NorthWestern Energy Officer William Thomas during a break in the proceedings and made a solicitation for Brown Out money. Thereafter, the Respondent had telephone conversations and meetings with William Thomas to obtain the money. Both Thomas and the Respondent testified that the Respondent specified \$1,000 as being the amount he needed, and that Thomas agreed to give him that amount of money on behalf of NorthWestern Energy. Ultimately, NorthWestern gave the Respondent two \$1,000 checks. The second of the two checks was given after the Billings Brown Out, and the Respondent returned that check. The Respondent's solicitation and receipt of the second \$1,000 were not part of the Complaint, are considered herein only as a background, and are not discussed for the basis of finding a violation of law.

Also during the Fall of 2007, Respondent contacted PPL Montana and solicited money from it for his Billings Brown Out program. Additionally, he visited two Billings WalMart stores and asked for money for the Brown Out program. Store managers responded by giving him cash taken from store cash registers. The Respondent testified that he did not remember exactly how much WalMart cash he received, but estimated it at \$400.

The Respondent deposited the first \$1,000 check he received from NorthWestern Energy and the \$1,000 check he received from PPL Montana into his personal checking account. He placed in his pocket the \$400 in cash he received from WalMart, which he testified he used to pay Brown Out expenses as they arose.

Months later, after the instant Complaints were filed, the Respondent was asked by the Commissioner of Political Practices to account for the money allegedly spent on the Brown Out program. Respondent produced no receipts. He did deliver an estimate from a Billings printing company for printing the Brown Out brochure, and a personal canceled check made payable to the print company.

The Billings Brown Out took place on December 6, 2007. The brochure used to promote the event contained a picture of the Respondent, listed him as the first of many “Major Supporters,” and in large bold print said:

PUBLIC SERVICE COMMISSIONER
BRAD MOLNAR
invites you to join your
neighbors and take part in the
GREAT BILLINGS BROWNOUT
December 6th 7-8 pm

In the Spring of 2008, months after the Billings Brown Out, while Respondent was campaigning for reelection door-to-door, he used some of the Brown Out brochures as campaign materials. He testified that if he knocked on a residence door and no-one answered, he left a brochure at the home. When NorthWestern Energy, which was listed on the brochure as a major supporter, learned that Respondent was using the Brown Out brochures in his campaign, it demanded repayment of the \$2,000 which it had given him. (By that time NorthWestern had delivered the second of its \$1,000 checks.) The City of Billings, Billings School District 2, and the Billings Chamber of Commerce, all three of which were also listed on the Brown Out

brochure as major supporters, also demanded that Respondent stop using the Brown Out brochure in his campaign because they did not endorse or support political candidates. Instead of discontinuing his use of the Brown Out brochures, Respondent placed an adhesive sticker on the Brown Out brochure, covering the names of the Billings Chamber of Commerce and the City of Billings, but not School District 2, which read:

The “Brown out” may be over.
But the energy tips are still good!
BRAD MOLNAR
Your Conservation Candidate For
Public Service Commissioner

Pursuant to the request of NorthWestern Energy for the return of their \$2,000 in contributions, the Respondent sent them a personal check for \$1,000 and returned the second \$1,000 check he had just recently received but not yet deposited. The second \$1,000 was to be used by Respondent to produce another energy conservation program, this time in other PCS District #2 communities.

B. Use of State Resources

1. Improper Use of State E-mail and Telephone Facilities.

The Respondent produced a letter dated July 21, 2008, for use in his reelection campaign. The “campaign” nature of the letter is not in dispute. The letter solicited contributions for his campaign, and listed his State PSC e-mail address and his State PSC telephone number.

Additionally, during this same period of time, the Respondent used his State government e-mail address in his 2008 election political website.

The Respondent testified that the use of his PSC e-mail address and phone number in these materials was an oversight. Additionally, he challenges whether the campaign letter was ever used, and asserts that it may be a forgery.

2. Improper Use of State Cell Phone

During his first term on the PSC, the Respondent placed an advertisement in a newspaper soliciting a roommate to share a Helena residential unit that he leased. The Respondent's former roommate had moved and Respondent needed someone to share the rent. Unfortunately, when the former roommate moved, he contacted the phone company and the phone company disconnected the residential phone. Faced with no Helena residential phone number for prospective roommates to contact him, Respondent listed in his advertisement the phone number of his State-owned PSC cell phone. He also recorded a voice mail message on that phone for prospective roommates to leave a message.

3. Improper Use of State Computer Facilities

The final Complaint alleges that the Respondent used the State computer system, his State-issued laptop computer, and the State e-mail system for his political purposes.

During the Summer of 2007, Respondent exchanged emails with an individual concerning a speaking engagement for the Respondent with the Great Falls Rotary Club. Great Falls is outside the Respondent's PSC District. In the e-mail exchange, the Respondent and the Great Falls Rotary representative arranged for the Respondent to make a noon Rotary presentation on August 14, 2007. The initial e-mails between the two concerned typical speaking arrangements, including speaking topics, location, and directions. The Respondent made the presentation as scheduled. There was nothing improper or illegal in this initial e-mail exchange.

Three days after the presentation, the Respondent e-mailed his Great Falls Rotary contact expressing his belief that the meeting was fun and that he had received quite a bit of positive feedback after the presentation. Then the message took on a political tone. Respondent wrote:

As you know, my position is an elected one and I'm up next election cycle. And earned media is free media. Would it be possible for you, or one of the others that seemed to enjoy my talk, to drop an editorial to the papers listed below? Just a simple thing about how lucky they are to have a commissioner that is so darn knowledgeable and willing to travel on his own dime to educate the public....Please?

The newspapers that the Respondent listed were located in his PSC District.

On May 12, 2008, the Respondent composed a campaign press release on his State-issued computer and sent the press release by using the State e-mail system. The next day, he composed a campaign editorial for a Billings news outlet, again using his State-issued computer, and sent it to the outlet using the State's e-mail system. On that same day, he composed another e-mail on his State-issued computer to the same news outlet regarding a campaign debate with his opponent.

Finally, during this same time period, the Respondent used his State-issued computer and the State e-mail system for e-mail communications to arrange to attend the Miles City Bucking Horse Sale and parade. Once at the Bucking Horse Sale, Respondent, wearing his campaign t-shirt, walked in the parade with other Republican candidates.

CONCLUSIONS OF LAW AND APPLICATION OF LAW TO FACT

A. The Complaints Were Sufficient to Place the Respondent on Notice of the Charges.

Throughout this proceeding, the Respondent has argued that the originally filed complaints failed to provide him with adequate notice of the charges. The Respondent did not choose to make this allegation the subject of a motion to dismiss or motion for summary judgment, but the allegation continues up through post-hearing briefs. This argument may, in part, be caused by the fact that the Complainant has, up through post-hearing briefs, cited and relied on Montana statutes and factual allegations that are outside the originally filed complaints.

This Decision is based exclusively on the originally filed complaints. It is determined as a matter of fact and law that the originally filed complaints were adequate to place the Respondent on notice of the charges against him and that this Decision does not stray beyond the originally filed charges.

B. Solicitation and Acceptance of Gifts

The evidence supports the conclusion that the Respondent, as an elected official to the Montana PSC, is a “Public Officer” within the meaning of the Montana Ethics Code. A “public officer” is defined as “any state officer.” Mont. Code Ann. § 2-2-102(8).

As a public officer, the Respondent is prohibited, under proscribed circumstances, from accepting a gift of \$50 or more. Mont. Code Ann. § 2-2-104 (1)(b); § 2-2-101(3). The money the Respondent received from NorthWestern and PPL each exceeded \$50. Finally, it is concluded that the money the Respondent received from NorthWestern and PPL Montana constituted gifts within the meaning of the Ethics Code.

1. The Respondent Received Gifts

The word “gift” as used in the Montana Ethics Code was intended by the Montana Legislature not as a technical or specialized word, but a word of ordinary meaning. Webster’s 3rd New International Dictionary defines a gift as “something that is voluntarily transferred from one person to another without compensation.” This definition has been adopted and used in previous cases before the Office of the Commissioner of Political Practices. See *Matter of the Complaint of L. David Frazier Against Barb Charlton and Mark Simonich* (2005) (A “gift means something is voluntarily transferred by one to another without compensation or value that is far less than the item, or service received.”)

In the instant case, the Respondent solicited money and money was given. The donors, Northwestern Energy and PPL Montana, were told by the Respondent how he intended to use the money, on the Brown Out program, but the donors were not given anything of value in exchange for the money given. While the purpose for which the money was given may be legitimate, the money given was a “gift” because nothing was given in return.

While the donors may be able to deduct the amount of the gift on their taxes or, in the case of NorthWestern, it may be included in its rate base, all this is irrelevant; at the time the money was given, it was a gift to Respondent. What the donors would report to others to account for the money given is irrelevant under the Montana Ethics Code.

However, the Montana Ethics Code provides that not all gifts in excess of \$50 are unlawful. One exception is that a gift received but unused and returned within 30 days is not considered a gift. This exception does not apply here because Respondent did not return the \$1,000 that NorthWestern Energy originally gave him within 30 days of receipt. Mont. Code Ann. § 2-2-102(3)(b)(i).

Another exception under the Ethics Code is that gifts of \$50 or more are not unlawful if for “educational material directly related to [recipient’s] official governmental duties” or for an “educational activity that...does not place or appear to place the recipient under obligation; clearly serves the public good; and is not lavish or extravagant.” MCA §2-2-102(b)(iii) & (v)(A)(B)(C).

The Respondent argues that the \$1,000 checks he received from NorthWestern Energy and PPL Montana were for Brown Out materials and that those materials were educational and directly related to his official duties as a PSC Commissioner. If this was the situation, the checks would not be considered a “gift” under the Ethics Code. However, this is not the situation.

While the Brown Out program may be considered an “educational” effort (i.e. inducing the public to reduce energy consumption), and the Brown Out brochure considered as “educational material,” the Respondent’s production and promotion of the Billings Brown Out was not part of his “official government duties.” For the gift to be exempt, the “education materials,” must be “directly related to official government duties.” Producing and promoting the Billings Brown Out may have been an appropriate activity for a PSC commissioner, but such activity was not directly related to his official government duties. The Respondent had no official government duty to produce and promote the Brown Out, or to arrange for the printing of the Brown Out brochures. Indeed, the timing of Brown Out, during the year before the election, and the Brown Out brochure itself, featuring the picture and message of the Respondent, appear to be, at least in part, self promotion. Clearly, they were not activities related to his “official government duties.”

The terms “educational materials directly related to official government duties” must be read narrowly; if not, all forms of self-defined education efforts or materials will be eligible for corporate and individual gifts to political figures. The Ethics Code exception that allows public officers to receive gifts for education material materials directly related to their official government duties does not authorize public officers to receive gifts to produce and promote anything considered by them to be relevant and that conforms to their interests and political perspective. If so, Montana political figures would be free to receive gifts to promote almost anything and everything as long as there was some educational component to the event and the materials involved. What may be educational in the eyes of a public official, particularly a political official up for reelection, may be naked self-promotion in the eyes of opponents,

prospective opponents, and the public. What were previously “campaign” materials will become “educational materials.”

The instant case represents a case-in-point. The brochures for the Billings Brown Out were, in part, “educational,” and, in part, self-promotion. The Respondent used the brochures to invite members of the Billings community to participate in the Brown Out. The brochure promoted the Respondent as much as the event. Indeed, it was the type of document that could easily be used as campaign material, and, as the evidence indicates, thereafter it was.

Next, the Respondent argues that if the brochures were not “educational materials directly related to official government duties,” they qualify, or the money spent to print them, qualifies under the second exception as an “educational activity” that served the “public good,” was “not lavish or extravagant,” and did not “place or appear to place [him] under obligation.” Indeed, there is substantial evidence to support the conclusion that the program was well received and highlighted how citizen efforts of turning off lights is a valid means of energy reduction. Moreover, the event was not “lavish or extravagant.”

However, contrary to Respondent’s testimony, the money the Respondent received from NorthWestern and PPL Montana to produce and promote the event “placed or appeared to place” him “under obligation.”

Because NorthWestern is regulated by the PCS, and PPL Montana frequently appears before the PSC, there is at least an appearance that Respondent’s solicitation of money from them placed them in a compromising position: if they declined his request for money, he might retaliate against them; alternatively, if they gave him the money, he might accord them favorable treatment. While the record is void of evidence that either of the corporate entities or the Respondent intended any obligation, there remains the appearance of wrongdoing.

If persons in positions of regulatory authority are free to solicit and receive gifts from regulated entities, there is a perception of impropriety. While the instant case record is not sufficiently complete to support a broad rule, a fair question is whether there is ever a situation when an individual regulator may solicit and receive money from any individual or entity subjected to his regulation without some appearance of wrongdoing.

Finally, at the point when some of the Brown Out brochures were used by the Respondent as campaign materials, there is no question that the money received to purchase them was not for “educational material directly related to official government duties,” nor was the activity for which the brochures were used an “educational activity.” At this point the use of the brochures was purely political.

The Respondent focuses his argument on this end use and then asserts that at this point left-over “Brown Out” brochures had an economic value so low that they were not worth \$50 or more. Respondent’s argument is that since only gifts of \$50 or more meet the threshold for becoming unlawful, and that Brown Out brochures, after the Brown Out was over, had a value of less than \$50, there was no “gift.” This argument is without merit.

The money the Respondent solicited, received, and spent on the brochures far exceeded the \$50 threshold. The statute prohibits gifts of more than \$50. The value of the gift under Sections 2-2-104 and 2-2-102 is measured at the time of receipt, not some later date. At the time the Respondent received money from NorthWestern and PPL Montana, the gifts exceeded the \$50 amount. It is irrelevant that the Respondent took the gifted money and used it to purchase brochures that thereafter fluctuated in value and at some point became worth less than the statutory proscribed amount. The brochures were the fruit of the gifted money; that they became

spoiled or worthless sometime after the gifted money was received does not make two \$1,000 gifts any less than two \$1,000 gifts.

2. The Gifts of Money Were Unlawful.

Having concluded that the Respondent received gifts from NorthWestern and PPL Montana, the only question is whether those gifts are prohibited by Section § 2-2-104.

This answer depends upon whether the receipt of such gifts “would tend to improperly influence a reasonable person to depart from the faithful and impartial discharge of the person’s public duties.” This standard does not ask whether the gifts caused the Respondent to depart from the faithful and impartial discharge of his public duties, (subjective standard), but whether the gifts would “tend” to improperly influence a reasonable person in the Respondent’s position (objective standard). I conclude that the solicitation and receipt of gifts by the Respondent from NorthWestern, an entity over which he exerts economically-significant regulatory authority, and PPL Montana, an entity that regularly appears before the PSC, would “tend to improperly” influence a regulator. In cases like this, the burden should not be unreasonably high.

The Legislature enacted the Code of Ethics to comply with the Montana Constitutional directive to provide a Code prohibiting conflict between public duty and private interest. See, Statement of Purpose of the Code of Ethics, Mont. Code Ann. §2-2-102 (“The purpose of this part is to set forth a code of ethicsas required by the constitution of Montana.”). The Legislature, in enacting the Code, recognized that public office is a “public trust, created by the confidence that the electorate reposes in the integrity of public officers.” If the public’s trust in its officials, particularly officials who wield significant regulatory authority, wanes, the strength of government and its ability to provide protection, stability and welfare for the governed will also wane. Public trust will not survive in the context of reasonable mistrust. Here the evidence

supports the conclusion that the Respondent's solicitation and ultimate receipt of monetary gifts from NorthWestern and PPL Montana would "tend" to improperly influence a reasonable person in the Respondent's position.

A regulator who views those regulated as the source of current and future money gifts would be influenced the by transaction. The Latin maxim quid-pro-quo---something given for something given---is unmistakable. It is reasonable to conclude that an elected regulator who solicits money from the regulated will look for and find some way to repay the implied obligation. The repayment may not amount to a large gesture. It may be a quick look away, a nod of the head, or the acknowledgment one team player gives another. But the fact that they are in it together will not be forgotten, and in some way, maybe some small way, the gift will be acknowledged. While individual intentions and motivations may remain strong to the contrary, the opportunity of a small deviation or slight hesitation from the faithful and impartial discharge of public duty may result. The deviation or hesitation may be so small that no one in the room will notice, and even the parties may not fully recognize the departure from public duty, but there it will be—the quid pro quo.

To be unlawful, no actual quid pro quo need be found, but the instant facts suggest an example. It was anticipated by both the Respondent and NorthWestern Energy that the monetary gifts given by NorthWestern to the Respondent would be reported by NorthWestern to the PSC as a proposed demand-side expenditure eligible to be included in its rate base. If so included, NorthWestern's ratepayers would ultimately pay for NorthWestern's monetary contribution to the Billings Brown Out. It can be anticipated that the Respondent would use his influence on the PSC so that the NorthWestern monetary gift would be included as a demand-side expenditure.

I conclude that Respondent's receipt of the monetary gifts from NorthWestern and PPL Montana violated Montana Code Annotated § 2-2-104(1)(b)(i).

3. Improper Use of State E-mail, Telephone, Cell Phone, and Computer Facilities

The Montana Code of Ethics provides in relevant part that a "public officer . . . may not use public time, facilities, equipment, supplies, personnel, or funds to solicit support for . . . the election of any person to public office." Mont. Code Ann. § 2-2-121(3)(a).

The Code also prohibits a public officer from using "public time, facilities, equipment, supplies, personnel, or funds for the officer's . . . private business purpose." Mont. Code Ann. § 2-2-121(2)(a).

The evidence is clear regarding the following:

The Respondent produced a reelection campaign letter that listed his State PSC e-mail address and his PSC telephone number. He also used his State government e-mail address for his 2008 election political website. He used the State computer system, his State-issued laptop computer, and the State e-mail system for campaign correspondence with a Billings News outlet. He also solicited Great Falls Rotary members to write favorable letters about him to newspaper editors in his PSC district. Finally he conducted correspondence over the State's e-mail system to attend the Miles City Horse Sale, an event he used for political purposes.

The use of public facilities and equipment to solicit support for his re-election, for campaign contributions, to state his opposition to the election of his opponent, and to arrange accommodation to attend a public event for campaign purposes are prohibited by Montana Code Annoated § 2-2-121(3)(a).

Regarding the campaign letter and his official campaign website, the Respondent testified that when he discovered the problem, he took corrective action. He also argues that when such

minor violations are the subject of a complaint, the violation is normally addressed informally by the Office of the Commissioner of Political Practices.

First, there is nothing minor about the violations. A re-election campaign document and website that directs citizens to contact the candidate at their official State office is exactly what the Ethics Code was designed to prohibit. Second, when the Complaints came to the Respondent's attention, there is no evidence that he attempted to dispose of the charges informally. Indeed, the evidence supports the conclusion that rather than attempt some informal resolution of this matter, the Respondent attacked the Complainant for filing the complaint, charged that there was a political conspiracy against him, and dismissed the Complaints as electioneering tactics by his opponent. Had he been open to some informal resolution, such a resolution could have been had without the time and expense of this proceeding.

Next, the Respondent argues that the campaign letter has, in some way, been altered, allegedly by the Complainant. Absent the Respondent's vague testimony that he thought the document has been altered, there is no evidence of an alteration, or that the Complainant had any complicity in any alteration. Finally, the alleged alteration has nothing to do with the unlawful conduct. Even if an alteration occurred to the body of the campaign letter, the letter listed the Respondent's official PSC office telephone number and his PSC e-mail address. It is his use of his official telephone and e-mail address in a campaign document that is the subject of this proceeding, not the text of the document.

Finally, the Respondent cites a PSC rule and another State rule, Administrative Rule of Montana 2.13.102, that allows State officers and employees an occasional use of the State's telecommunication system. While this is true, the rule referenced does not permit State officials to use State equipment/resources for political purposes. Indeed, if the cited rule permitted such a

use, it would be invalid because it would be inconsistent with the Ethics Code. The State Legislature makes it quite clear in the Ethics Code that State resources are not to be used for political or personal business purposes. That is the limited scope of this inquiry.

However, the Respondent's very limited use of a State-owned cell phone to assist in finding a Helena roommate does not violate the Ethics Code prohibition of using State resources for a "private business purpose." Mont. Code Ann. § 2-2-121(2)(a).

The Respondent turned to the State cell phone only when he discovered that his private Helena phone had been disconnected. His use of the State phone was limited to this one instance, and unlike the other uses, it was not for electoral purpose. The use was to assist him in maintaining Helena housing so that he could continue to perform his duties as Laurel, Montana, based representative on the PSC. While his use of the State phone had an economic component, to save him rent money by having a roommate, this savings does not constitute a "business purpose" under the Ethics Code. Indeed, this one time limited use is best classified as an occasional personal use, not within the prohibitions of the Ethics Code.

C. Other Matters

The Respondent's motion to dismiss the Complaints based on the allegation that the Complainant lacked standing is again dismissed. The Complainant is a Montana resident and resides in PSC District #2, the District that the Respondent represents. She actively participates in political activities, and is keenly interested in the ethical conduct of Montana public officials, particularly those who represent her. In 2008, she was actively associated with the campaign of the Respondent's opponent for the District #2 PSC seat. The Complainant has sufficient interest in the ethical conduct of elected officials that represent the geographical region in which she resides. Her interest conforms to the interest the Legislature recognized in allowing an

individual to file Ethics Code complaints. Indeed, Ethics Code complaints against elected public officials often arise in the context of an electoral campaign or an anticipated campaign. This fact alone does not create a standing problem. The findings and conclusions of the April 2, 2009 written decision are incorporated herein.

The Respondent's motion to disqualify opposing counsel is again dismissed. The Respondent's conspiracy theory and the potential role of opposing counsel, is not irrelevant or material to the charged Ethics Code violations.

RELIEF SOUGHT

Because Respondent's conduct violated the Montana Ethics Code, the issue of relief or sanction is now appropriate. The Ethics Code provides that "if the commissioner determines that a violation . . . occurred . . . an administrative penalty of not less than \$50 or more than \$1,000," and "costs of the proceeding" may be imposed. Mont. Code Ann. § 2-2-136 (2).

Respondent's misconduct is not isolated or insignificant. Of particular concern is his solicitation and receipt of substantial monetary gifts from NorthWestern Energy and PPL Montana. As for these violations, the Respondent is ordered to pay two separate administrative fines of \$1,000. While the number of such gifts and the donors of the gifts exceed two, the originally filed complaint referenced only two such gifts. Because this proceeding did not venture beyond the originally filed complaints, the administrative fine of \$1,000 each is for the original gifts the Respondent received from NorthWestern Energy and PPL Montana.

Regarding violations of the Ethics Code for using State resources in his re-election campaign, the Respondent is ordered to pay an administrative fine of \$750 for each violation. I determine that there were five separate violations: The campaign letter, the political website, the Rotary solicitation for a campaign letter, the e-mails to the Billings general circulation

newspaper, and The Bucking Horse Sale campaign arrangements. It is recognized that there were three e-mails to the Billings newspaper, but because they all occurred in close proximity, they are combined and treated as one violation.

Given the number of violations, the factual and legal clarity of the violations, Respondent's refusal to acknowledge any wrongdoing, in addition to his evasiveness, his attacks on the Complainant, his role in the protracted nature of the proceeding, and the State's expense in pursuing this matter to this point, it is ordered that the Respondent is liable for a portion of the costs of this proceeding. The exact amount of those costs will be determined after the staff at the Office of the Commissioner determines the exact costs of this proceeding. Once the staff prepares an audit of costs, it will report the audit to the Commissioner and counsel for the parties. Based on a showing of cause, a hearing will be held to determine the actual total cost and to allocate an appropriate amount of those costs to the Respondent. Thereafter, an order will issue assessing appropriate costs to the Respondent. Finally, Respondent's request for attorney fees is rejected. The Ethics Code does not provide for such fees, and no cause was shown to support such an award.

ORDER

An ORDER is issued in conformity with the above Decision.

DATED: March 09, 2010.

William L. Corbett, Hearings Officer

Notice: Either party may appeal this Proposed Decision to the Commissioner. Mont. Code Ann § 2-4-621(1) (opportunity to file exception, briefs and oral argument to final decision maker).