BEFORE THE COMMISSIONER OF

POLITICAL PRACTICES

In the Matter of the)
Complaint Against)
TOM CONNOR)

SUMMARY OF FACTS AND STATEMENT OF FINDINGS

Sen. Eve Franklin, a candidate for Senate District 21 in the 1994 general election, filed a complaint against her opponent in the election, Tom Connor. The complaint alleges that candidate Connor violated Mont. Code Ann. § 13-35-234 by misrepresenting Sen. Franklin's voting record in a campaign flier.

SUMMARY OF FACTS

1. Sen. Franklin and candidate Connor were opposing candidates for the seat in Senate District 21 in the November, 1994 general election. Sen. Franklin defeated candidate Connor in the election, and is currently serving as senator for the district.

2. Sen. Franklin alleges that the following language in a campaign flier in support of candidate Connor's candidacy misrepresents Sen. Franklin's voting record:

Senator Eve Franklin voted FOR the sales tax . . . .

3. Sen. Franklin was in the Legislature during the 1993 session. Senate Bill (SB) 235, introduced during that session, provided that the question of whether a four percent sales and use tax should be enacted would be submitted to a vote of the qualified electors of Montana at a special election. The bill is described in the Senate Journal as "an act generally revising taxation; enacting a 4 percent sales and use tax; allowing exemptions from

the sales and use tax; . . . providing for distribution of sales and use tax revenue; . . . providing that this act be submitted to the qualified electors of the state at a special election; . . . "

Sen. Franklin voted "yea" on a motion to pass SB 235 on second reading in the Senate. The motion carried. Sen. Franklin then voted "nay" on third reading, but the bill passed and was sent to the House. Upon the bill's return from the House, Sen. Franklin voted "yea" on a motion that certain House amendments to SB 235 be not concurred in, and the motion carried. Sen. Franklin then voted against adoption of a Free Conference Committee report, but the report was adopted and the bill was sent to the Governor and signed. The sales tax was voted down at the special election held on June 8, 1993.

4. Sen. Franklin states that her second reading vote in favor of the bill was not the final vote on the bill. Her final vote was against adoption of the Free Conference Committee report, thus she contends that she opposed the bill. Sen. Franklin claims that in any event her "yea" vote was only a vote to put the sales tax on the ballot, to let the people decide whether it should be imposed. She believes that the statement that she "voted for the sales tax" misrepresents her voting record on the bill.

5. Candidate Connor states that he conducted the research on Sen. Franklin's voting record, and that he prepared the campaign flier. He states that he is not very familiar with the voting procedures, but he feels that Sen. Franklin's vote in favor of the bill on second reading could properly be represented as a vote in

favor of the sales tax. Candidate Connor believes that the distinction drawn by Sen. Franklin (that she only voted to put the measure on the ballot) amounts to "hair-splitting".

STATEMENT OF FINDINGS

Mont. Code Ann. § 13-35-234 provides:

> **Political criminal libel - misrepresenting voting records.** (1) It is unlawful for any person to make or publish any false statement or charge reflecting on any candidate's character or morality or to knowingly misrepresent the voting record or position on public issues of any candidate. A person making such a statement or representation with knowledge of its falsity or with a reckless disregard as to whether it is true or not is guilty of a misdemeanor.
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> (2) In addition to the misdemeanor penalty of subsection (1), a successful candidate who is adjudicated guilty of violating this section may be removed from office as provided in 13-35-106 and 13-35-107. [Emphasis added].

Criminal misrepresentation of voting records is committed only if the evidence supports a finding that a misrepresentation is made "knowingly" or "with knowledge of its falsity or with a reckless disregard as to whether it is true or not". Mont. Code Ann. § 13-35-101 states that the "penalty provisions of the election laws of this state are intended to supplement and not to supersede the provisions of the Montana Criminal Code." Mont. Code Ann. § 45-2-101(33) defines "knowingly" as follows:

> . . . [A] person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high

probability of its existence. Equivalent terms, such as "knowing" or "with knowledge", have the same meaning.

In determining whether a misrepresentation was made "knowingly" or "with knowledge" of its falsity, it would be necessary to prove that candidate Connor was "aware of a high probability" that the statement he made concerning Sen. Franklin's voting record was a misrepresentation, or was false.

A violation of the statute can also be proved if there is evidence that a person acted with "reckless disregard". The Compiler's Comments to Mont. Code Ann. § 13-35-234 note that the source of the "standard" in subsection (1) of the statute is "apparently drawn from New York Times v. Sullivan, 376 U.S. 254 (1964)". That case involved a civil libel action filed by a public official against a newspaper. The Supreme Court held that recovery would only be allowed if the public official could prove that the alleged libelous statement was made with "actual malice"; that is, with "knowledge that it was false or with reckless disregard of whether it was false or not." Sullivan, 376 U.S. at 279-280.

In a later case, Herbert v. Lando, 441 U.S. 153 (1979), the Supreme Court, citing Sullivan, stated that "reckless disregard for truth" means that the defendant "in fact entertained serious doubts as to the truth of his publications". The Court noted that such "subjective awareness of probable falsity" may be found if "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Herbert, 441 U.S. at 156-57.

Other cases have held that "reckless disregard" is "more than mere negligence", Major v. Drapeau, 507 A.2d 938, 941 (R.I. 1986);

and that "a failure to investigate is not sufficient in itself to establish reckless disregard", Bartimo v. Horsemen's Benevolent and Protective Association, 771 F.2d 894, 898 (5th Cir. 1985). In Green v. Northern Publishing Co., Inc., 655 P.2d 736, 742 (Alaska 1982), the Court observed:

> Reckless disregard, for these purposes, means conduct that is heedless and shows a wanton indifference to consequences; it is conduct which is far more than negligent. [Citation omitted]. There must be sufficient evidence to permit the inference that the defendant must have, in fact, *subjectively entertained serious doubts as to the truth of his statement*. [Italics in original].

Applying these principles to the facts in this case, the evidence does not support a finding that candidate Connor acted with the requisite knowledge or reckless disregard in making the representation regarding Sen. Franklin's voting record. Candidate Connor's interpretation of Sen. Franklin's second reading vote on the bill obviously differs from Sen. Franklin's interpretation. Each interpretation is arguably correct. On second reading Sen. Franklin cast a "yea" vote for a bill that would submit the question of the sales tax to a vote of the people. Yet her vote could be construed as a vote "for" the bill that contained the sales tax, thus a vote for the sales tax, notwithstanding that the tax was subject to a vote of the electors at a special election. Under these circumstances, there is not sufficient evidence that when candidate Connor made the representation regarding Sen. Franklin's voting record on SB 235 he was "aware of a high probability" that the representation was false, or that he

"subjectively entertained serious doubts" as to the truth of the representation.

Sen. Franklin contends that her vote for the bill on second reading was not the final vote, thus does not accurately reflect her voting record on the bill. Mont. Code Ann. § 13-35-234 does not define the phrase "voting record". There is nothing in title 13, chapter 35, Mont. Code Ann. indicating a legislative intent that a candidate's voting record must be construed as consisting of all votes on a particular bill. Sen. Franklin's "yea" vote on second reading is obviously part of her voting record on the bill, and could reasonably be construed as a vote "for" the bill.

Based on the preceding, there is insufficient evidence to conclude that candidate Connor violated Mont. Code Ann. § 13-35-234.

DATED this 19th day of January, 1995.

ED ARGENBRIGHT
Commissioner of Political Practices