BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Grabow v. Malone et. al. No. COPP 2014-CFP-060	Summary of Facts and Finding of Insufficient Evidence to Show a Violation of Montana's Campaign Practices Act DISMISSAL OF COMPLAINT

On November 18, 2014, Patricia Grabow, a resident of Livingston, Montana filed a complaint against Park County Commissioners Marty Malone and Jim Durgan and Park County Planner, Mike Inman. Ms. Grabow's complaint alleged that the Park County officers and employee violated Montana campaign practice laws by making public statements regarding 2014 Park County Commissioner candidate William Smith.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this decision is the allowed speech of a public official, as that speech may impact an election.

SUMMARY OF RELEVANT FACTS

The facts necessary for determination in this matter are as follows:

Finding of Fact No. 1: Livingston, Montana is the county seat of Park County, Montana. The position of Park County commissioner is a non-partisan elected position with a term of four years. The Park County Commission is composed of three members who represent 3 districts in Park County. Current Park County Commissioners are Jim Durgan (District 1), Marty Malone (District 2) and Clint Tinsley (District 3). Park County Commissioner Jim Durgan's terms ends in 2014. Mr. Durgan did not run for re-election. (Park County Clerk & Recorder's Office).

Finding of Fact No. 2: The Livingston Enterprise is a weekly local newspaper published Monday through Friday in Livingston, Clyde Park and Wilsall, Montana. On October 17, 2014, the Livingston Enterprise published an article titled, *"2014 Election: Commissioners raise concerns about Candidate William Smith"*. Commissioners Malone and Durgan and County Planner, Inman, made statements published in this article. (Livingston Enterprise, October 17, 2014 article by Natalie Story).

Finding of Fact No. 3: On November 4, 2014, two candidates were on the ballot for Park County Commissioner, District 1: Steven Caldwell and William Smith. Mr. Caldwell defeated Mr. Smith in the general election with 3,828 votes. Mr. Smith received 2,586 votes. (Park County Clerk & Recorder's Office, Secretary of State Website).

DISCUSSION

Park County, Montana operates under a "commissioner form of government." (Park County Homepage). The Park County Commissioners have broad "legislative, executive and administrative power and duties" with specific authority over planning. *Id.*

Park County Commission District No. 1 was an open election seat in the 2014 general election. FOF No. 1. Candidates Steven Caldwell and William Smith were competing for election as District No. 1 Park County Commissioner. FOF No. 3. On October 17, 2014, slightly over two weeks before the November

4 general election, two Park County officials (Commissioners Malone and Durgan) and a Park County employee (Inman) were quoted in a news article that discussed certain actions of Candidate Smith. FOF No. 2.

1. There is No Express Advocacy in the Newspaper Article

Complainant Grabow contends that the time spent by Commissioners Malone and Durgan responding to questions from a news reporter constituted a use of public resources in violation of Montana law.[1] Montana law prohibits use of public resources, including paid work time, used to solicit "...support for or opposition to...the ...election of any person to public office" § 2-2-121(3)(a) MCA.[2] A public officer or public employee can, however, present neutral facts and information to electors related to a ballot issue or candidate. § 2-2-121(3)(a)(ii) MCA; *Roberts v. Griffin,* decided November 19, 2009 (Commissioner Unsworth); *Hansen v. Billings School District* #2, COPP-2013-CFP-027 (Commissioner Motl).

Ms. Grabow's complaint appears to assume a violation lies with any comment or discussion by a public officer or public employee during their paid work time that concerns a candidate for public office. This is not an accurate assumption. Comments made by a public officer or public employee during work time runs afoul of Montana law only if his or her comments constitute

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[1] The information supplied in those interviews was published as part of a news story (FOF No. 2). The cost of the news story itself is not at issue in this Matter as cost of any news story distributed by a newspaper is exempted by Montana law as a contribution to a campaign. §13-1-101(7)(b)(ii) MCA.

[2] COPP enforcement of §2-2-121 MCA ethical standards is made as a campaign practice violation through incorporation into §13-35-226(4) MCA. If enforced solely as an ethical violation then enforcement lies solely with the Park County County Attorney. §2-2-144 MCA.

"...support for or opposition to...the ...election of any person to public office" § 2-2-121(3)(a) MCA. Such "support or opposition" is described as "express advocacy."

In order to constitute express advocacy the comment or discussion by the public officer or public employee would need to meet the "functional equivalent of express advocacy" test set out in *McConnell v. FEC,* 540 US 93(2003) and refined in *FEC v. Wis. Right to Life,* 551 US 449 (2007). This "functional equivalent of express advocacy" standard has been discussed and applied by the COPP in a series of sufficiency Decisions.[3] The functional equivalent standard, while measured by specific application, begins with the directive that the complained of language must "be susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" before it constitutes advocacy. *FEC v. Wisconsin Right to Life* at pp. 469-470.[4] There is no need for a review beyond the "no reasonable interpretation" measure. There is no exhortation to vote for or against a candidate reported in the news article through comments made by either Commissioners Malone and Durgan or by employee Inman. Further, the comments reported are more reasonably interpreted as compliance with duty (this Decision, below) than as express advocacy.

The Commissioner notes that the facts of this matter do not remotely rise to the level of activity Commissioner Unsworth found to be permissible activity

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[3] *Roberts v. Griffin,* decided November 19, 2009, *Bonogofsky v. NGOA,* COPP-2010-CFP-008 and the Decisions cited therein.
[4] Please see *Bonogofsky v. NGOA* at pages 8-9 for a detailed discussion of this requirement.

when engaged in by Lewis and Clark County officials. *See Roberts v. Griffin.* As explained in *Griffin*, Lewis and Clark County placed a county mill levy on the 2006 general election ballot. Lewis and Clark County officials hired a press relations firm and with its assistance prepared and published an advertisement attributed to Eric Griffin, Lewis and Clark County Public Works Director. The advertisement listed the date of the vote, urged readers to vote and presented detailed information regarding the need for the levy. *Roberts v. Griffin* determined that this level of information was presented "to educate the public by presenting various facts and date pertaining to the mill levy" and as such was educational, not advocacy.

The Commissioner determines that there is no express advocacy and therefore no campaign practice violation in the use of the language reported in the news article. This Matter is comparable to the language use and role played by the Montana Secretary of State and found to be acceptable in the companion Decision: *Essmann v. McCulloch,* COPP-2014-CFP-056.

2. <u>The Comments Are Properly Incidental to Duty</u>

The Commissioner notes that the Livingston Enterprise article is entitled "Commissioners raise concerns about candidate William Smith." The Commissioner's determination of no express advocacy (above) turns on the application of the precise language dictated for use by the US Supreme Court. Complainant Grabow, and perhaps others, may note a negative tone ("concerns") to the comments by the Commissioners and employee. Any such comment with a negative tone, however, is not in violation of law if not made

gratuitously, but as incidental to duty. (2-2-121(3)(a)(ii) MCA or §13-35-226(4) MCA, second sentence).

The newspaper article (FOF No. 2) quotes Malone, Durgan or Inman as describing or observing Candidate Smith's conduct when dealing with the Park County Commission or Planning Board (espouses "anti-government" ideology, fails to complete subdivision applications and is not an "advisor" to the County). Each of those observations, descriptions or comments, to any extent negative, was made consistent with performance of duty in the elected official role played by the Commissioners and the planning role played by Inman.[5] The Commissioner determines that the information and observations set out in the newspaper comments are more reasonably determined as meeting duty consistent with the governance functions of the Park County Commissioner than with any express advocacy regarding a candidate. These comments therefore are allowable comments of a public officer or public employee, even when made during work time. *Id.*

3. Advocacy Does Not Result from Language In a Newspaper Article

The Grabow complaint alleges implied express advocacy based on the printing by the newspaper of information provided by two County Commissioners and the County Planner. The complaint assumes such action is prohibited by § 2-2-121(3)(a) MCA because "...a public officer...may not use public time, equipment supplies.... to support for or opposition to ...the

[5] The comments or observations as to Smith's "advisor" status and record in managing sub-division applications are completely objective and constitute information that electors may value in deciding which candidate to vote for. The "anti-government" comment is observational but it is an observation that is made consistent with duty.

...election of any person to public office". Title 2 is ethics law but Title 13 campaign practice law incorporates these provisions of Title 2 through § 13-35-226(4) MCA: : "[a] public employee may not solicit support for or opposition to ...the nomination or election of any person to public office...while on the job or at the place of employment."

The Commissioner takes administrative notice that some public resources (time) were expended when the two Commissioners and the Planner talked to the news reporter while at their place of employment. There is nothing wrong, however, with the use of public resources to accomplish a legitimate public purpose task, even if the task leads to information or data that may find its way into discussion in a political campaign. (This Decision, above). There seems to be some confusion on this point as the Commissioner releases this Decision as part of a group of three companion Decisions (*Essmann v. McCulloch,* COPP-2014-CFP-053; *Nelson v. City of Billings,* COPP-2014-CFP-052 and *Juve v. Roosevelt County Commission,* COPP-2014-CFP-063) dealing with similar complaints filed against public officials.

In this Matter the use of public time to respond to a reporter's questions served a public purpose and was not prohibited as the information and observations were consistent with duty and did not advocate a vote for or against a candidate. Agencies of government, like the Park County Commission and Planner, are the natural repositories of information related to their areas of authority. Accordingly, agencies should be expected to (and commended when they do) provide observations, information and data to the

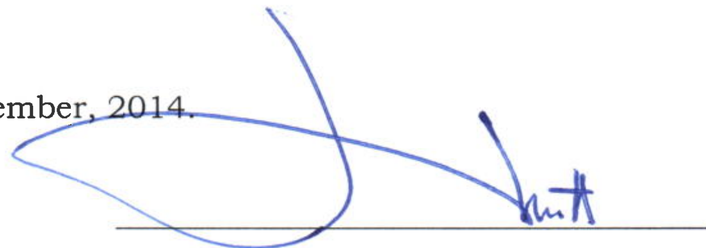
public that is of use to an elector when making an election decision. The Commissioner asks that Montanans take this discussion into consideration when assessing the propriety of such actions by public officers and employees.

OVERALL DECISION

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the 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 under § 13-35-226(4) MCA and § 13-37-124(1) MCA. Accordingly, the Commissioner dismisses this complaint in full.

DATED this 8th day of December, 2014.



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