BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Juve v. Roosevelt County Commissioners No. COPP 2014-CFP-063	Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act DISMISSAL OF COMPLAINT BASED ON APPLICATION OF *DE MINIMIS*

On December 5, 2014, Bill Juve, a resident of Wolf Point, Montana filed a complaint against the County Commission of Roosevelt County, Montana. Mr. Juve's complaint alleged that the Roosevelt County Commissioners violated Montana campaign practice laws by advocating for a county jail bond using county funds.

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 FOUNDATION FACTS

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

> Finding of Fact No. 1: Wolf Point, Montana is the county seat of Roosevelt County, Montana. The position of Roosevelt County commissioner is a non-partisan elected position with a term of six years. The Roosevelt County Commission is comprised of three Commissioners who represent 3 districts within the county.

Current Roosevelt County Commissioners are Jim Shanks (District 1), Gary MacDonald (District 2) and Duane Nygaard (District 3). Jim Shanks's term ends at the end of 2014. Mr. Shanks did not run for re-election in 2014. Allen Bowker won the general election in November of 2014 and will become the Commissioner for District 1 beginning January of 2015. (Roosevelt County Clerk & Recorder's Office, Montana Secretary of State (SOS) website).

Finding of Fact No. 2: In 2014 the Roosevelt County Commissioners proposed a public safety bonding measure to improve the Roosevelt County Jail ("Jail Bond") and placed the bond for approval by voters on the primary ballot June 3, 2014. (Roosevelt County Commissioner's Office).

Finding of Fact No. 3: In the June 3, 2014 primary election 992 voters voted in favor of the Jail Bond and 718 voters voted against the Jail Bond. The 2014 primary election voter turnout in Roosevelt County was 34.88%. Montana law requires a minimum approval rate of 60% when voter turnout is between 30-40%. (§7-7-2237(4)(5) MCA). While the Jail Bond was approved, the rate of approval was 58.01% and the bond vote failed because it did not meet the 60% standard. (Montana law, Roosevelt County Website, Investigator's notes).

Finding of Fact No. 4: On November 4, 2014, a general election was held in Roosevelt County. The general election ballot included the "Roosevelt County Jail Bond Issue". The Jail Bond was approved with 1,512 votes in favor of the Jail Bond and 1,160 votes against the jail bond. The voter turnout this election was 47.58% so the majority vote was sufficient to pass the Jail Bond. (§7-7-2237(4) MCA). (Montana law, Roosevelt County Website, Investigator's notes).

DISCUSSION

The complaint alleges that the County improperly used public money to "hire outside consultants, pay for letters to the editor and run radio ads". Each of these allegations is discussed below.

1. Title 13 Jurisdiction

Proposals for authorization of government backed financing, such as the Roosevelt County Jail Bond involved in this matter, originate from a government entity and from the work of public employees and officials. A Jail Bond, such as involved in this matter, may not be issued unless authorized by electors in an appropriate mill levy election. *See* §7-7-2238 MCA. Accordingly, a complaint involving bond authority voting issues may address the ethical implications of the actions of the public officers or public officials involved in the bond approval election, or the complaint may address the election itself, based on the effect of the alleged improper actions. The former type of complaint is an ethics complaint against a public official made under Title 2 of Montana Code. The latter type of complaint is a campaign practice complaint made against the beneficiary of the election under Title 13 of the Montana Code.

The complaint references both Titles 2 and 13 but the Commissioner determines that the complaint in this matter was of a Title 13 tenor. The complaint in this Matter is focused on the Roosevelt County Commission rather than an employee or officer of the County. The Commissioner therefore determines that the complaint triggered Title 13 review, with the review taking place under the authority of § 13-35-226(4) MCA: "[a] public employee may not solicit support for or opposition to ...the passage of a ballot issue while on the job or at the place of employment." This statute incorporates the standards of § 2-2-121 MCA. This Office has applied § 13-35-226(4) to measure the

propriety of election related activity engaged in by county and state level officials and entities. *Roberts v. Griffin*, decided November 19, 2009 (Commissioner Unsworth); *Hansen v. Billings School District* #2, COPP-2013-CFP-027 (Commissioner Motl); *Essmann v. McCulloch,* COPP-2014-CFP-053 (Commissioner Motl); *Nelson v. City of Billings,* COPP-2014-CFP-052 (Commissioner Motl); and *Grabow v. Malone,* COPP-2014-CFP-060 (Commissioner Motl).

1. There is No Express Advocacy in Consultant Hiring or the Fact Sheet

The complaint implies impropriety in the County Commissioners' use of public resources to hire a consultant who aided in preparation of jail bond information, including a fact sheet. Montana law prohibits use of public resources, including paid work time, used to solicit "...support for or opposition to...the ...passage of a ballot issue..." § 2-2-121(3)(a) MCA.[1]

> Finding of Fact No. 5: Roosevelt County Commissioners hired the jail bond consulting firm Kimme & Associates, Inc. (Kimme) out of Champaign, Illinois to help prepare bond related information that could be provided to the public. Kimme charged Roosevelt County in the amount of $4,998.84 for its work including $3,200 in fees and $1,798.84 in expenses. (Kimme & Associates, Inc. Bill #1, Roosevelt County Office of the Clerk & Recorder, Claim # 42587).
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> Finding of Fact No. 6: On October 30, 2014, a Roosevelt County newspaper (The Searchlight) published a double-sided insert that was placed within the newspaper titled "Roosevelt County – Fact Sheet about the Proposed Public Safety Facility Addition & Re-modeling" with the graphic for the Roosevelt County Sheriff's Office (a Sheriff's badge in the front of a map of the State of Montana with Roosevelt County shaded in dark color). The County Commissioners paid the cost of the insert. (Jail Insert, the Searchlight Invoice

[1] 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 Roosevelt County Attorney. §2-2-144 MCA.

#2014004684 and Roosevelt County Office of the Clerk & Recorder, Claim # 42910).

The Commissioners' hiring of a consulting firm and publication of a fact sheet is not, by itself, a violation of law. A public officer or public employee can 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); *Essmann v. McCulloch,* COPP-2014-CFP-053 (Commissioner Motl); *Nelson v. City of Billings,* COPP-2014-CFP-052 (Commissioner Motl); and *Grabow v. Malone,* COPP-2014-CFP-060 (Commissioner Motl). The work of, or publications by, a public officer or public employee during work time runs afoul of Montana law only if his or her comments constitute "...support for or opposition to...the ...passage of a ballot issue...§ 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.[2] The functional equivalent standard, while measured by specific application, begins with the directive that

[2] *Roberts v. Griffin,* decided November 19, 2009, *Bonogofsky v. NGOA,* COPP-2010-CFP-008 and the Decisions cited therein.

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.[3] There is no need for a review in this Matter beyond the "no reasonable interpretation" measure. There is no exhortation to vote for or against the jail bond that can be implied from the hiring of a consultant nor is such an exhortation set out in the fact sheet prepared and used by the Commissioners. 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 fall comfortably within the level of activity Commissioner Unsworth found to be permissible activity 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 in an attempt to fund road improvements. 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 data pertaining to the mill levy" and as such was educational,

[3] Please see *Bonogofsky v. NGOA* at pages 8-9 for a detailed discussion of this requirement.

not advocacy. Indeed, the engagement of a consultant and the publication of a fact sheet to explain a proposed public safety project to the public are tasks incidental to duty, something specifically authorized by law. (2-2-121(3)(a)(ii) MCA or §13-35-226(4) MCA, second sentence).

2. The Public Meetings Did Not Involve Advocacy

The complaint implies that the Commissioners' authorization of public resources (vehicle use, public employees) was improper. Again, 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 ...passage of a ballot issue...". 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 ...passage of ballot issues...while on the job or at the place of employment."

Finding of Fact No. 7: During the month of October 2014, local newspapers, "The Herald News" and "The Searchlight", ran the following announcement:

The Roosevelt County Commissioners and the Sheriff's Office will hold five public information presentations on the public safety addition and remodeling project for the Sheriff's Office and Detention Center in Wolf point, Poplar, Culbertson, Bainville and Froid, Tuesday, Wednesday and Thursday, Oct. 14-16. Voters will consider the bond issue in the general election, Tuesday, Nov. 4. Questions and comments will be welcome. The meeting locations, dates and times are as follows:

- *Wolf Point: Roosevelt County Senior Center, Tuesday, Oct. 14 at 6 pm*
- *Froid: Fire hall, Wednesday, Oct. 15 at 1:30*
- *Bainville: Fire hall, Wednesday, Oct. 15 at 6 pm*
- *Poplar: American Legion, Thursday, Oct. 16 at 2 pm*
- *Culbertson: Roosevelt County Complex, Thursday, Oct. 16 at 6 pm*

For additional information, contact the Commissioners at 653-6246 or comm@rooseveltcounty.org *or Sheriff Jason Frederick at 653-6216 or* jfrederick@rooseveltcounty.org. (The Herald News, The Searchlight, Investigative notes).

Finding of Fact No. 8: The public officials at the informational meetings made use of a PowerPoint presentation to educate the public about the need for a jail. The meetings were sparsely attended and Sheriff Jason Frederick recalled no exhortation of a vote for the bond at any such meeting. (Investigative notes).

The Commissioner determines that there is no evidence of express advocacy (see discussion, above) in any of the meeting notice publications, nor is there testimony or observations of any such oral express advocacy having taking place at a meeting. The appearance of public officials at the events and use of public resources (vehicles) to attend the event is not improper as it serves a public purpose by allowing public presentation of information consistent with duty. Agencies of government, like the Roosevelt County Commission 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.

3. The Radio Ads Were Privately Paid Advocacy

The complaint alleges that during the election radio ads were run advocating a vote for the Jail Bond.

Finding of Fact No. 9: Sheriff Candidate Jason Frederick raised funds to support his contested election for Sheriff in the 2014 general election. Before the general election the opposing candidate withdrew from the election, leaving Candidate Frederick as the uncontested candidate for Sheriff. (Investigative notes).

> Finding of Fact No. 10: Candidate Frederick had pre-paid for ads supporting his candidacy for Sheriff. When his election became uncontested Candidate Frederick directed some of his pre-paid KVCK radio air time to pay for radio ads educating the public about the need for a new jail. The radio station ran Mr. Frederick's campaign advertisements and the jail bond advertisements on a rotational basis. However, all advertisements contained an attribution statement of "Paid for by Jason Frederick for Sheriff", even the jail bond advertisements. (Investigative notes).

The complaint did not identify the nuanced nature of the complained-of ads. While the ads did qualify as express advocacy, Candidate Frederick paid for the ads with non-public funds. Montana law specifically allows Candidate Frederick to so act as the laws restricting the activity of a public officer or employee are "not intended to restrict the right of a public officer or public employee to express personal political views." § 2-2-121(3)(c) MCA. Further, the Sheriff's title may be used in any such privately financed political expression as "[a] title or a uniform is simply an accouterment of a public employee's or officer's position." 51 AG Opinion, No. 1, January 31, 2005. With this analysis in mind there is nothing improper or wrong with the privately funded radio ads.

4. The Letter to the Editor Is Improper Advocacy

The complaint alleges that the County Commissioners improperly paid for a letter to the editor that expressly advocated a vote for the Jail Bond.

> Finding of Fact No. 11: On October 23, 2014, The Searchlight newspaper published a Letter to the Editor. This letter began, "Dear Friends and Neighbors of Roosevelt County" and ended, "I am asking everyone to please pass the word to your neighbors, family and friends to come out on Nov. 4 and vote in favor of building this new jail. Thank you, Sheriff Jason Frederick, Jail Administrator Melvin

> Clark, [and] Roosevelt County Commissioners. (*Paid Letter to the Editor*)." An invoice dated October 31, 2014 from The Searchlight to "Roosevelt County Sheriff " listed $112.13 owed for an October 23, 2014 "Letter to the Editor". The Commissioners paid the bill. (The Searchlight Invoice #2014004646 and Roosevelt County Office of the Clerk & Recorder, Claim # 42910).

The "vote in favor" statement in the letter to the editor meets the express advocacy standard discussed above, this Decision. Accordingly the use of public resources to pay for the letter (and presumably to write that part of the letter) by the County Commissioner violated § 2-2-121(3)(a) MCA because "...a public officer...may not use public time, equipment supplies.... to support for or opposition to ...the ...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 ...passage of ballot issues ...while on the job or at the place of employment."

The question the Commissioner next considers is whether the violation is insignificant such that it may be excused as *de minimis.* The Commissioner applies *de minimis* when required by the facts of the Matter. *Canyon Ferry Road Baptist Church v. Unsworth,* 556 F3d 1021 (9th Cir. 2009).[4] *See* also discussion of *de minimis* principles in *Matters of Vincent,* Nos. COPP-2013-CFP-006 and 009. In the past 100-plus Decisions issuing from the COPP *de minimis* has been considered in each Decision finding sufficient facts, as this

[4] *De minimis* is, at its core, a measure of facts against the applicable law: "the law does not care for, or take notice of, very small or trifling matters." Black's Law Dictionary Revised 4th Edition.

Decision does. In each such sufficiency Decision the Commissioner applied or did not apply the *de minimis* principle based on facts and circumstances set out in the Decision.

De minimis is now examined as to the infraction in this Matter. The Commissioner takes note of two factors when making this examination. First, past Decisions have applied *de minimis* to dismiss: a somewhat indefinite $428 incidental committee expenditure *Raffiani v. Montana Shrugged,* COPP 2010-CFP-017 (Commissioner Unsworth); and a $273 late registration violation *Royston v. Crosby,* COPP- 2012-CFP-041 (Commissioner Motl). Second, this Matter involves ballot issue speech, an area of election speech requiring deference. *Canyon Ferry Road Baptist Church v. Unsworth.*

The Commissioner commends Mr. Juve for bringing the complaint in this Matter. Community decisions, like the Roosevelt County Jail Bond vote, become part of the culture of a community. It is important, then, that these decisions be perceived as fair and fairness requires that issues and concerns be aired and discussed. In this Matter the complaint raises several major concerns about public official speech (use of public funds to hire consultants, prepare a fact sheet and publish a letter) that require reconciliation of the duty of a public official to identify and explain public safety needs while still refraining from requesting a vote in favor of ballot issue. This Decision says that the Roosevelt County Commissioners got most of this work right. The only misstep made was insertion of an exhortation into a paid, published letter to the editor.

Given the actions correctly taken, the Commissioner determines that the mistake made was *de minimis*, consistent with the earlier *de minimis* Decisions listed above. Ballot issue work by public officials is infrequently done and often outside of the normal area of work performed by a County Commissioner or Sheriff. When, as happened in this Matter, the public officials clearly tried hard to stay within the bounds of law and erred once on a matter costing less than $200 then the approval action of voters should not be disturbed or impugned. While Mr. Juve should be thanked for raising a necessary discussion, the Commissioner applies *de minimis* and dismisses the Complaint.

OVERALL DECISION

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must act on, an alleged campaign practice violation 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.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence (*see* Sufficiency Findings, as

set out in this Decision) to show that entities listed in the sufficiency findings in this Decision may have violated Montana's campaign practice laws, including, but not limited to § 13-35-226(4) MCA and all associated ARMs. Having determined that sufficient evidence of a campaign practice violation exists, the next step is to determine whether there are circumstances or explanations that may affect prosecution of the violation and/or the amount of the fine.

The actions of a public official cannot be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law. *See* discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

The Commissioner has, however, applied the principle of *de minimis* to excuse the impermissible actions for the reasons set out in this Decision. The Complaint is dismissed by application of *de minimis*.

DATED this 18th day of December, 2014.

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