

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

In the Matter of the Complaint)	SUMMARY OF FACTS AND STATEMENT OF FINDINGS
Against Representative Roy Brown)	

Andrew LeVigne, on behalf of the Montana Democratic Party, filed a complaint against then Representative Roy L. Brown on October 30, 2006 (Brown was subsequently elected to the Montana Senate in November of 2006). The complaint alleges that a constituent mailing by Brown in February of 2006 violates the following Montana campaign finance and practices laws:

Claim 1: If the mailing was paid for by a campaign committee, the documents included in the mailing did not contain a proper disclaimer in violation of § 13-35-225(1) and (2), MCA.

Claim 2: If the mailing was paid for with “constituent services account” funds, the mailing violated § 13-37-240, MCA, because it was sent to residents of a House District that Brown did not represent in 2006.

SUMMARY OF FACTS

1. Roy Brown was re-elected to represent House District 49 in the Montana House of Representatives in 2004 for a term that expired in early January of 2007.

2. Brown transferred \$1,431.28 of surplus campaign funds from his House District 49 campaign account to a constituent services account on November 16, 2004. Brown’s constituent services account was a pre-existing account established after his successful 2002 legislative race.

3. Brown's constituent services account had a balance of \$1,820.14 on November 24, 2004. This amount consisted of \$388.86 from surplus 2002 campaign funds and \$1,431.28 transferred from his 2004 campaign account. Brown's November 22, 2004 closing report filed with the Commissioner of Political Practices (CPP) confirms the transfer of \$1,431.28 from his 2004 campaign account to his constituent services account on November 16, 2004.

4. Wells Fargo Bank of Billings was the custodian of both Brown's House District 49 campaign account and his constituent services account.

5. The only activity in Brown's constituent services account until February of 2006 was a \$3 monthly bank service fee. The balance in Brown's constituent services account was \$1,778.14 on January 24, 2006 (\$1,820.14 minus \$42 in service charges from November of 2004 through January of 2006).

6. CPP received a Form C-1, Statement of Candidate for Senate District 25, on January 24, 2006. Brown's CPP Statement named a treasurer and deputy treasurer and designated a campaign account at Wells Fargo Bank in Billings.

7. Brown officially filed as a candidate for the Montana Senate District 25 seat on January 24, 2006. Senate District 25 is comprised of House Districts 49 and 50.

8. Brown sent a mailing to the residents of House Districts 49 and 50 on February 21, 2006. Brown did not represent House District 50 in 2005-06.

9. Brown's February 21, 2006 mailing included a newsletter entitled "59th Legislature Interim Report," a letter from Brown, a guest editorial written by Brown for the *Billings Gazette* on December 5, 2005, and a "voter survey." A total of 5,613 pieces were mailed.

10. Brown also mailed a copy of his February 2006 newsletter to then-Commissioner of Political Practices, Gordon Higgins, on February 21, 2006. A note from Brown accompanying the mailing to Commissioner Higgins stated "there is no mention of voting/re-election, etc., so its really not a political piece" but "I thought I would send you a copy anyway." Brown did not receive a response from Commissioner Higgins.

11. Brown personally designed the newsletter included in the February 21, 2006 mailing. Sir Speedy in Billings charged Brown \$815.00 to print 6,000 copies of the newsletter. Brown paid the printing bill on February 16, 2006 with funds from his constituent services account. After payment of the Sir Speedy bill, the balance in Brown's constituent services account was \$963.14.

12. Direct Mail Advertising in Billings charged Brown \$1,158.05 to prepare the mailing for Brown.

13. Brown paid Direct Mail \$960.14 from his constituent services account via a February 23, 2006 cashier's check. Brown closed out the account when he withdrew the funds for the cashier's check (the bank had accrued a \$3 service charge for February of 2006). Brown's constituent services account had a zero balance on February 23, 2006.

14. A Direct Mail invoice dated February 25, 2006 verified receipt of the \$960.14 payment and indicated the remaining balance was \$197.91. The Direct Mail invoice was addressed to "Roy Brown for Legislature, PO Box 22273, Billings, Montana 59104." The PO Box was also Brown's home mailing address in 2006.

15. Brown used Direct Mail for mailings related to his legislative campaigns before and during the 2006 state senate campaign. Beginning with Brown's first legislative race in 1998, Direct Mail was instructed to send billing statements to him in the name of his legislative campaign committee. Direct Mail sent its bill for the 2006 constituent services account mailing to "Roy Brown for Legislature" per Brown's long-standing instructions. Brown paid Direct Mail \$8,891.10 for services provided to his 2006 state senate campaign from August 26 through November 10, 2006.

16. Brown paid Direct Mail \$196.46 via a personal check dated March 3, 2006, leaving an unpaid balance of \$1.45. Brown said he mistakenly paid \$196.46 rather than the full amount of \$197.91 due and owing to Direct Mail. Direct Mail "zeroed out" the account for the February 21, 2006 mailing.

17. Margie MacDonald, Brown's opponent in the 2006 Senate District 25 race, officially filed as a candidate on March 23, 2006.

18. Brown's two-page newsletter included:
- a heading containing Brown's picture,
 - a logo that read "State Representative Roy Brown" in large letters,
 - a slogan "Working for you. . . for a Better Montana,"
 - the title "59th Legislature Interim Report,"
 - a salutation to "Dear Friends and Neighbors,"
 - a thank you "for the privilege, the honor, and the responsibility of representing you in the 59th Legislature of the State of Montana,"
 - information "about the sessions" that included a listing of bills proposing tax increases and tax cuts during the 2005 regular session and a discussion of the school funding proposals considered during the December 2005 special session,
 - a signature line titled "Roy Brown, State Representative, HD 49," and
 - Brown's Capitol office address and phone number, his Billings mailing address (PO Box 22273), and his legislative committees.

19. The "Guest Opinion" included in Brown's February 2006 mailing appeared in the December 5, 2006 *Billings Gazette*. The *Gazette* referred to Brown as a "Montana State Representative" and "the Montana House Republican leader" in the heading and conclusion of the Guest Opinion. Brown discussed education funding and state surplus issues in the piece.

20. A one-page "voter survey" was included in Brown's February 2006 mailing. The survey asked recipients general questions about surplus revenues, Montana's environment, K-12 education, the university system, and whether voters felt safe in their own homes and were satisfied with their personal income. Recipients were also asked to identify the three most important issues from a list of fourteen general issues listed in the survey (space was provided for the respondent to identify issues other than the 14 listed). Brown stressed in the newsletter that "your opinions and comments are very important to me. . ."

21. The envelope containing Brown's February 2006 mailing contained his picture and the same logo and slogan used in the newsletter heading. The back of the voter survey contained Brown's Billings mailing address (PO Box 22273) and a place for a stamp if the recipient chose to answer the survey.

22. Brown's February 2006 mailing did not contain any language indicating or suggesting that Brown was a candidate for the Senate District 25 seat or that a vote should be cast for Brown.

STATEMENT OF FINDINGS

Alleged Violation of § 13-35-225, MCA

The Democratic Party alleges that Brown's February 21, 2006 mailing violated § 13-35-225, MCA, if it was paid for by a "campaign committee."

§ 13-35-225(1), MCA, requires that all "communications advocating the success or defeat of a candidate, political party, or ballot issue. . . must clearly and conspicuously include the attribution 'paid for by' followed by the name and address of the person who made or financed the expenditure for the communication" and such an attribution must be included if "a candidate or a candidate's campaign finances the expenditure. . ." Brown's February 2006 constituent mailing did not advocate a vote for his candidacy or even mention that he was a candidate. Brown's February 2006 mailing did not violate the attribution requirements of § 13-35-225(1), MCA.

§ 13-35-225(2), MCA, requires that "[c]ommunications in a partisan election financed by a candidate or a political committee organized on a candidate's behalf must state the candidate's party affiliation or include the party symbol." Brown's 2006 campaign committee did not pay for the February 2006 mailing.

It must be noted, however, that § 13-35-225(2), MCA, also applies to "communications in a partisan election" financed by a candidate. Brown paid for a portion of the February 2006 constituent mailing (\$196.46) with a personal check. Brown's partial personal payment requires a determination of whether the party identification requirements of § 13-35-225(2), MCA, apply to every communication financed by a candidate after he/she becomes a candidate in a partisan election.

On its face, § 13-35-225(2), MCA, appears to require an individual who becomes a candidate in a partisan election to include the candidate's party affiliation in every communication personally financed by the candidate. But applying the party identification requirement to candidate financed non-political communications such as personal communications (e.g., personal or business letters that have nothing to do with

the candidate's partisan political campaign) would create serious constitutional issues and lead to a ludicrous result. I interpret § 13-35-225(2), MCA, as being applicable only to the advocacy communications defined in § 13-35-225(1), MCA.

Legislative intent must be based on the "reading and consideration" of a statute in its "entirety" and not the "wording of any particular section or sentence." (*State v. Meader*, 184 Mont. 32, 36-37, 601 P. 2d 386, 389 (1979).) Statutes must be interpreted to avoid absurd results "if a reasonable interpretation can avoid it." (*Bitterroot Protective Ass'n v. Bitterroot Conservation District*, 2008 MT 377, ¶ 72; *Montana Sports Shooting Ass'n v. State*, 344 Mont. 1, ¶ 11, 185 P. 3d 1003, ¶ 11; *Marriage of Syverson*, 281 Mont. 1, 19, 931 P.2d 691 (1996); and *Montana Dept. of Revenue v. Kaiser Cement Corp.*, 245 Mont. 502, 506, 803 P. 2d 947, 951 (1994).)

§§ 13-35-225(1) and 13-35-225(2), MCA, must be read and considered in tandem. The only legally defensible interpretation of the party identification requirement of § 13-35-225(2), MCA, is that such a requirement is limited to advocacy communications described in § 13-35-225(1), MCA – communications that advocate support for or opposition to a candidate, ballot issue, or political party.

Brown's February 2006 constituent mailing did not violate § 13-35-225(2), MCA.

Alleged Violation of § 13-37-240, MCA

Resolution of the Democratic Party's constituency account allegations requires an understanding of the recent evolution of constituent services accounts under Montana law.

In the 1980's, the public became increasingly concerned about the accumulation of large amounts of surplus campaign funds by elected officials. Many elected officials at both the federal and state levels were accumulating large amounts of surplus campaign cash because they represented safe districts or faced no serious opposition. In the absence of laws regulating how surplus campaign funds could be spent, elected officials were using the surplus funds to scare off serious opposition, finance future campaigns, supplement retirement income, or bestow other benefits on family or friends.

In 1994, Montana voters overwhelmingly approved I-118. One of its provisions imposed the first restrictions on how surplus campaign funds could be disbursed by Montana's elected officials. § 13-37-240(1), MCA, prohibits the contribution of surplus

campaign “funds to another campaign, including a candidate’s future campaign,” or use of the funds “for personal benefit.”

The term “personal benefit,” was defined to include “a direct or indirect benefit of any kind to the candidate or any member of the candidate’s immediate family.” § 13-37-240(2), MCA.

In response to the passage of I-118, Commissioner Ed Argenbright adopted rules further defining the political contribution and personal benefit prohibitions of 13-37-240, MCA. The 1995 rule was, in essence, a determination that the use of constituent services account funds to serve constituents did not violate the personal benefit and political contribution prohibitions of 13-37-240 even if the expenditures somehow resulted in a positive increase in name recognition or public presence. As originally adopted in 1995, 44.10.335(6)(c)(iii), ARM allowed elected officials to use surplus campaign funds to “establish an account to serve a public purpose related to the officeholder’s public duties.” (See also 44.10.336, ARM.) Constituent services accounts became part of the official Montana political landscape under this rule.

Unfortunately, I-118 did not impose public reporting obligations on officeholders who established constituent services accounts and both political parties did little to encourage public disclosure of such accounts. In 2006-07, the Montana media described constituent services accounts as “secretive” and largely unregulated slush funds that were being used for almost any purpose, including Christmas cards, brochures for constituents, travel expenses, and dinner bills. (See, *e.g.*, *Helena Independent Record*, December 18, 2006, page 1A and April 12, 2007, page 7A.) Other news articles lamented that many office holders were soliciting donations to their constituent services accounts and there were no donation limits or bans on corporate contributions. (*Id.* and *Billings Gazette*, May 29, 2006.)

The 2007 Montana Legislature passed the first comprehensive bill regulating the use of constituent services accounts. However, the 2007 legislation only made the tougher new regulations applicable to accounts created on or after the effective date of the legislation – May 14, 2007. (See Section 5, Chapter 487, Laws of 2007 (HB 462).)

Constituent services accounts in existence before May 14, 2007 are not subject to the new rules adopted on September 12, 2008. Brown's 2006 constituent services account was not subject to the new 2008 rules.

The gravamen of the Democratic Party's constituent services account complaint is that Brown's 2006 mailing violated the "rules governing" such accounts because the mailing was sent to "residents of a district Brown does not represent." The Democratic Party's allegations are without merit.

No statute or rule defined who was a "constituent" of an elected official before adoption of the current rules in September of 2008. Brown and many legislators who participated in the 2007 constituent services account debate argued that a legislator's constituency included any person, regardless of residency, for whom the legislator attempted to influence legislation. Brown's response to the complaint in this matter asserted that he represented people from all across Montana, including many individuals and businesses in HD 50, in legislative activities. Brown also asserted that he could have sent a constituent mailing statewide if he so desired under the laws in effect in 2006. Brown is correct.

The term "constituent" was defined for the first time in the 2008 rules in response to the prohibition against using constituent services account funds for anything other than providing "constituent services." (See § 13-37-402(2)(b), MCA.) Even under the current restrictive definition of a "constituent," individuals who may not reside in a legislator's district are, nevertheless, a "constituent" by virtue of owning property, working, providing goods or services, or attending school in a legislator's district. (See ARM 44.10.536(2).) However, the 2008 rule definition of a "constituent" would, if it had been in effect in 2006, have prohibited Brown's mass mailing to all residents of a House district Brown did not represent in 2005-06.

Although Brown's 2006 constituent mailing did not violate constituent services account statutes and rules in effect in 2006, two additional components of Brown's mailing emphasize why the complainant was legitimately concerned about the possible political motives for the mailing.

Brown mailed his 2006 legislative report to several thousand residents of a house district he did not represent. The mailing was sent after he opened a campaign account and after he filed as a candidate for the State Senate seat he now holds. That Senate seat (district) includes the house district he mailed to, but at the time did not represent.

The 2007 Legislature wisely recognized that incumbent elected officials could use constituent mailings to buttress a candidate's name recognition after becoming a candidate. The 2007 constituency account legislation unequivocally prohibits expenditures from a constituent services account if the elected official "also has an open campaign account." (§ 13-37-402(2)(b), MCA; See also ARM 44.10.539(1)(e).)

The new constituent services account rules also ban the inclusion of public opinion surveys in constituent mailings. (44.10.540(6)(c), ARM.) Brown's 2006 constituent mailing included a "voter survey" that Brown said was of great importance to him. (See Statement of Fact 20.) The prohibition on using constituent account funds to poll/survey constituents eliminates the temptation to use such surveys for political purposes that benefit an incumbent office holder rather than to provide services to constituents.

To Brown's credit, he sponsored legislation in the 2007 Legislature that would have outlawed constituent services accounts, though the bill died in committee. (See SB 310 sponsored by Sen. Brown in the 2007 Legislature.) Brown has made a similar bill draft request for the 2009 Legislature. (See LC0748.) Brown fully cooperated with my office during the investigation of this matter and provided timely and appropriate responses to requests for information and documents.

CONCLUSION

Based on the preceding, Brown's 2006 constituent mailing did not violate §§ 13-35-225(1) and (2) or 13-37-240, MCA.

DATED this 5th day of December, 2008.



Dennis Unsworth
Commissioner of Political Practices