BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Magill v. Reintsma No. COPP 2014-CFP-037	Summary of Facts and Finding of Sufficient Evidence to Show Violations of Montana's Campaign Practices Act

On September 22, 2014, Arlen Magill, a resident of Libby, Montana filed a complaint against James Reintsma, attorney for the City of Libby, Montana. Mr. Magill's complaint alleged that Mr. Reintsma violated Montana campaign practice laws by filing a pre-election complaint in district court against Allen Olsen, sitting Libby City Council member and 2013 candidate for Mayor.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this decision is the allowed use of public resources by a public employee and public officials, as that use of public resources 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: Libby, Montana is the county seat of Lincoln County. The City of Libby is governed by a six member city council and a Mayor. The position of Mayor is an elected position with a term of four years. The position of city council member is an elected position with a term of four years. (Lincoln County Clerk & Recorder, City of Libby Clerk's Office).

Finding of Fact No. 2: Allen Olsen was elected as a member of the Libby City Council in November of 2011, serving through November of 2015. (Lincoln County Clerk & Recorder, City of Libby Clerk's Office).

Finding of Fact No. 3: Doug Roll was elected Mayor of Libby in November of 2009, serving through November of 2013. (Lincoln County Clerk & Recorder, City of Libby Clerk's Office).

Finding of Fact No. 4: Mr. Roll was a candidate for re-election as Mayor in the November 2013 election. Mr. Roll was opposed by Mr. Olsen. Mr. Roll and Mr. Olsen were the only two candidates on the ballot for Mayor in 2013 so no primary election was held. A general election was held on November 5, 2013 and Doug Roll was reelected as mayor, defeating Allen Olsen by a vote of 290 (Roll) to 277 (Olsen). (Lincoln County Municipal Elections webpage).

Finding of Fact No. 5: From December of 2010 to December of 2014, the City of Libby employed James Reintsma as part-time City Attorney. As City Attorney, Mr. Reintsma attended city council meetings and provided council members with legal advice and opinion. (Deposition of James Reintsma, May 28, 2014, SOS business website, Libby City Council minutes).

DISCUSSION

The complaint alleges improper use of public money in the filing of a particular lawsuit against 2013 Libby Mayoral candidate Olsen. The details of the lawsuit are as follows:

Finding of Fact No. 6: On October 18, 2013, Libby City Attorney, James Reintsma, prepared a Memorandum

(Memo) announcing his "intention as City Attorney to [file a lawsuit] request[ing..." that a district court issue an Order declaring Candidate Olsen to lack the residency required to serve as Libby councilman or Mayor. (Response from James Reintsma and complaint).

Finding of Fact No. 7: On October 24, 2013, The City of Libby through City Attorney, James Reintsma, filed a lawsuit captioned *City of Libby v. Allen Olsen,* No. DV-13-232, 19th Judicial District, Lincoln County, Montana. The complaint was titled "Complaint For Declaratory and Injunctive Relief." (Response from James Reintsma and review of district court file).

1. Title 13 Jurisdiction

The actions challenged in this Matter originate from a local government entity and from the actions or work of local public employees and officials, as those actions or work may impact an election. Accordingly, a complaint involving such election related local government actions may address the ethical implications of the actions of the public officers or public officials involved in the election process, 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 local 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 only Title 13 and the Commissioner determines that there are Title 13 issues that can be addressed. As to a public employee, the Commissioner 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 nomination or election of any person to public office..." This statute incorporates the standards of § 2-2-121 MCA. This Office has applied § 13-35-226(4) MCA to measure the propriety of election related activity engaged in by local and state level employees. *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); *Grabow v. Malone*, COPP-2014-CFP-060 (Commissioner Motl) and *Juve v. Roosevelt County Commissioners*, COPP-2014-CFP-063 (Commissioner Motl).

The Mayor and City Council Members are elected office holders and thus are public officers rather than public employees. (§2-2-102(8) MCA). As described further in this Decision, public officers also have election related responsibilities under Title 13 of Montana's campaign practice laws.

2. <u>There Was Use of Public Resources</u>

The complaint claims impropriety in use of public resources to prepare and file a certain pre-election lawsuit against Mayoral Candidate Olsen. (FOF Nos. 6 and 7). Montana law prohibits use of public resources by public employees and public officials, including paid work time, to solicit "...support for or opposition to...the nomination or election of any person to public office..." ..." §

2-2-121(3)(a) MCA.[1]

There is no doubt that public resources were used in a lawsuit brought by a public employee (the City Attorney) and public officials (the Mayor and 5 Council members of the City of Libby) against a City Council Member and Mayoral Candidate, Allen Olsen. (Findings of Fact, Nos. 6 and 7). The public resources used included the paid time of the City Attorney and the associated filing and litigation costs involved in the lawsuit. The entity using the public resources was the City of Libby and its officials because the City was named as the plaintiff in the lawsuit against Candidate Olsen.

Use of public resources in regard to an election matter is not, by itself, a violation of law. A public officer or public employee can use public resources to 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 nomination or election of any person to public office..." ...§ 2-2-121(3)(a) MCA. Such "support

[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 Lincoln County Attorney. §2-2-144 MCA.

or opposition" is more narrowly described as "express advocacy."

3. There is No Public Resource Exception Based on a Complaint Filing

The principal public resource at issue in this matter is the paid time of the City Attorney. That public resource use culminated in the preparation and filing of a complaint in a state district court (FOF No. 7). The Commissioner now examines whether there is law providing a special exception to the timing of, or use of, language or words in a complaint filed in a district court action such that they cannot be construed or examined as possible express advocacy in an election matter.

The Commissioner first looks to the applicable statutory and regulatory law. Based on that review the Commissioner determines that there is no generic campaign practice exception under Title 2 or Title 13 for public resources expended in preparing and filing an election related district court complaint. The Commissioner therefore determines that a district court complaint may be examined for express advocacy indicia and, if determined to be express advocacy, the public resources used to prepare the complaint can be treated as an expenditure or contribution under Montana's campaign practice laws.

The Commissioner next turns to Montana's rules of civil procedure and case law as these relate to judicial pleadings. The Commissioner determines that there are no privileges or other such considerations that prevent examination of a district court complaint as a campaign practice violation

based on indicia of express advocacy. Indeed, under Montana case law[2] a civil claim can be based on the improper use, timing and purpose of a prior underlying civil complaint. It follows that if an improper complaint can lead to a later filed tort claim based on that improper complaint, than an improper complaint can also lead to a later filed campaign practice violation based on that improper complaint.

4. The City's Pre-election Lawsuit Constituted "Express Advocacy"

This Decision has determined, above, that an express advocacy analysis may properly be carried out, as measured by the words and actions associated with the complaint described in FOF No. 7 (hereafter Complaint). This Decision has already determined that public resources were used in preparing the Complaint.

This examination starts with the understanding that public resources cannot be used for express advocacy. Stated another way, Montana law prohibits use of public resources, including paid work time, used to solicit "...support for or opposition to...the nomination or election of any person to public office..." ..." § 2-2-121(3)(a) MCA.[3] Such "support for" or "opposition to" is measured by the "express advocacy" standard incorporated into Montana law through ARM 44.10.323(3). The "express advocacy" standard originated from a 1976 decision of the US Supreme Court (*Buckley v. Valeo,* 424 U.S. 1 (1976)).

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[2] *See,* for example, the abuse of process analysis set out in *Seltzer v. Morton,* 2007 MT 62, 336 Mont. 225, 154 P.3d 561.

[3] 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 Lincoln County Attorney. §2-2-144 MCA.

The standard was intended as a measure of the allowed breadth of governmental regulation of political speech.

The express advocacy standard must be applied when measuring whether a particular activity is or is not an election expenditure such that it falls under Montana's campaign practice laws.[4] In turn, the *Buckley* Court provided a definition when it narrowly construed the federal statutory definition of an election "expenditure" to apply "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley* at 44, emphasis added. The *Buckley* Court recognized that general discussions of issues and candidates (which are not election expenditures) are distinguishable from more pointed exhortations to vote for or against particular persons (which are election expenditures). In a footnote the Court listed examples, which have become known as the "magic words" of express advocacy, including phrases such as "vote for," "elect," "support," "cast your ballot for," "vote against," "defeat," "reject," etc. *Buckley* at 44, n. 52.

As measured by the "magic words" standard of *Buckley*, the Commissioner hereby determines that the language of the Complaint constitutes express advocacy. The Complaint consists of 33 paragraphs of allegations and six claims for relief. The Complaint lists the name of "Olsen" in

[4] Montana's campaign practice laws, at Title 13, govern election related expenditures.

21 of the 33 paragraphs of allegations and does so in the context of Olsen's candidacy "for the position of mayor for the City of Libby."[5]

The Complaint, having first targeted Olsen's candidacy then opposed that candidacy. The Complaint asks for the district court's injunctive intervention to "...address the harm caused by the actions and conduct of defendant Olsen prior to the current general election on November 5, 2013." Among remedies sought are "an order declaring defendant Olsen's seat on the Libby City Council to be vacated" and an order restraining the Election Administrator of Lincoln County from "counting any vote for defendant Olsen in the Libby City Mayor election."

The Complaint was filed 12 days prior to the November 5 election. The Commissioner determines that the use of the word "vacate" and the exhortation to not "count[ing] any vote for defendant Olsen..." are "magic words" advocating against Candidate Olsen in the November 5 election. The Commissioner determines that the Complaint is express advocacy and therefore constitutes an election expense under the *Buckley* express advocacy standard.

The Commissioner further determines that the Complaint meets the additional standard of the "functional equivalent of express advocacy", as 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 prior

[5] In October of 2013 Allen Olsen was a sitting member of the Libby City Council (FOF No. 4). Olsen was also a candidate for Mayor in the 2013 elections, running against the sitting Mayor. (FOF No. 4).

sufficiency Decisions.[6] 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 express advocacy. *FEC v. Wisconsin Right to Life* at pp. 469-470.[7]

The Commissioner determines that the language of the Complaint, as discussed above in this Decision, is "...susceptible of no reasonable interpretation other than as an appeal to vote ... against a specific candidate". Further the Commissioner determines that the Complaint language meets the "focus", "position", "exhort" and "contact" considerations set out in FN 7 of this Decision.

Lastly, as part of the "functional equivalent" examination the Commissioner may place the content of the Complaint in the context of use by a limited examination of background information. This is allowed because while "contextual factors...should seldom play a significant role in the inquiry," courts "need not ignore basic background information that may be necessary to

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

[7] Chief Justice Roberts, writing for the majority, applied the functional equivalent test to WRTL's ads as follows:

> Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: the ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: the ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

WRTL at 470.

put an ad in context", *WRTL* at 473-74. The background information leading to the filing of the Complaint includes the following:

> Finding of Fact No. 8: James Reintsma prepared a memorandum dated October 18, 2013 detailing the allegations that would later be restated in the Complaint. (Response from James Reintsma and Complaint).
>
> Finding of Fact No. 9: The October 18, 2013 memorandum was submitted under the letterhead of "James D. Reintsma Libby City Attorney". The memorandum was addressed to Mayor Roll and the Libby City Council. The memorandum covered the facts later recited in the Complaint and concluded with "Mr. Olsen has the option of resigning his seat on the Council and removing his name from consideration in the upcoming election or he can have the District Court make a determination for him....I will file the appropriate paper work in District Court next week if Mr. Olsen does not concede the points in this memorandum." (Response from James Reintsma).
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> Finding of Fact No. 10: The October 18, 2013 memorandum was presented to and reviewed by Mayor Roll and members of the Libby City Council. (James Reintsma Deposition of May 28, 2014, p. 55).
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> Finding of Fact No. 11: The Complaint was filed October 24, 2013 consistent with the content of the memorandum. (Review of Complaint and memorandum).
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> Finding of Fact No. 12: On October 28, 2013 Allen Olsen sought to call a City Council meeting to discuss the Complaint but Mayor Roll refused to call a meeting. (Commissioner's records and Roll Deposition).

The Commissioner determines that the basic background information, including the call for Olsen's resignation, (FOF Nos. 8-12) support the determination that the Complaint is express advocacy and that any value associated with the preparation and filing of the complaint is an election

expense. The Complaint is "...susceptible of no reasonable interpretation other than as an appeal to vote ... against a specific candidate".

5. Responsibility For A Campaign Practice Violation

This Decision, above, determines that timing and language of the Complaint constituted express advocacy such that it made the value involved in preparing and filing the complaint an election expenditure. *FEC v. Wisconsin Right to Life.* The campaign practice responsibility of the individuals involved in the preparation, filing and handling of the Complaint are discussed below.[8]

A. James Reintsma's Responsibility As a City Employee

James Reintsma was employed as the City Attorney for the City of Libby at the time he filed the Complaint. As a public employee Mr. Reintsma's election related conduct is defined and measured by several Montana laws including §13-35-226(4) MCA:

> A public employee may not solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue while on the job or at the place of employment. However, subject to 2-2-121, this section does not restrict the right of a public employee to perform activities properly incidental to another activity required or authorized by law or to express personal political views.

This Decision determines, above, that that there are no privileges or other considerations that prevent application of §13-35-226(4) MCA to measure Mr. Reintsma's responsibility. This Decision also determines that the Complaint is express advocacy and further determines public resources were expended in

[8] An election expenditure if properly made, reported and disclosed is not a campaign practice violation. Further, it is possible that a limited role played by a particular individual may excuse that person from individual responsibility.

preparing and filing the Complaint. Mr. Reintsma is the public employee who prepared and filed the Complaint and, unless excused, he has violated the prohibition set out in the first sentence of §13-35-226(4) MCA.

Mr. Reintsma can, however, avoid personal responsibility if his personal involvement in the Complaint falls under the second sentence of §13-35-226(4): "However, subject to 2-2-121, this section does not restrict the right of a public employee to perform activities properly incidental to another activity required or authorized by law or to express personal political views."

The Commissioner first examines Mr. Reintsma's involvement under "personal political views" language that has been used by this Commissioner in multiple prior Decisions to determine that candidate endorsement statements of public officials or public employees, even those using the title of the public official or public employee, are not campaign practice violations. *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); *Grabow v. Malone,* COPP-2014-CFP-060 (Commissioner Motl); *Juve v. Roosevelt County Commission,* COPP-2014-CFP-063 (Commissioner Motl) and *O'Neill v. Hansen* COPP-2014-CFP-048 (Commissioner Motl).[9] Mr. Reintsma's involvement with the Complaint cannot be compared to a pubic employee's candidate endorsement letter. A public employee's candidate endorsement letter involves only the

[9] County Attorney Fitch, for example, engaged in permissible personal express advocacy when he sent a letter to the editor, under his title as County Attorney, endorsing a candidate for Sheriff. *O'Neill v. Hansen.* The letter was prepared by the Mr. Fitch on his personal time and did not involve any use of public resources.

employee's personal time and cost. In contrast, the preparation and filing of the Complaint by employee Reintsma involved use of public resources. Because public resources were used there is no protection by the "personal political views" platform of above cited Decisions.

The remaining examination is whether Mr. Reintsma was performing "... activities properly incidental to another activity required or authorized by law..." when he filed the Complaint. §13-35-226(4). The Commissioner has determined this language exempts certain pre-election actions of public employees and officials (including meeting and providing comments to a news reporter) providing observations of the government related conduct of a candidate. *Grabow v. Malone.* In making this Decision the Commissioner wrote: "[a]gencies 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." *Id.,* pp. 7-8.

Such allowed "incidental" activity can involve use of public resources so long as the use does not constitute express advocacy. In past Decisions Commissioners, including this Commissioner, have found certain questioned actions involving public resource use to be "properly incidental" under §13-35-226(4). *Roberts v. Griffin,* decided November 19, 2009 (Commissioner Unsworth); *Hansen v. Billings School District* #2, COPP-2013-CFP-027 (Commissioner Motl). This fact of public resource use in this Matter, however,

crosses the express advocacy line.

Stated in plain terms, the City of Libby public resource use was that of the majority of sitting elected officials in a sitting unit of government (along with their principal employee) using the power and resources of government to directly interfere with the election opportunity provided a candidate disfavored by the majority. There is nothing properly "incidental" and thus the actions involved in preparing and filing the Complaint cannot be excused as "...properly incidental to another activity required or authorized by law...".

Mr. Reintsma's role, however, is that of City Attorney and his conduct could be excused as "required", had the decision to file the Complaint been made entirely by the City Council, thereby reducing Mr. Reintsma's role to that of following directions. Mr. Reintsma's May 28, 2014 deposition testimony shows, however, that he was a willing co-participant in preparing and filing the Complaint along with Mayor Roll and 5 members of the 6 member City Council. (Commissioner's records).[10] Accordingly, the Commissioner determines that there are no excuses and the first sentence of §13-35-226(4) applies allowing the following sufficiency finding.

> Sufficiency Finding No. 1: The Commissioner determines that there are sufficient facts to show that City Attorney, James Reintsma, acted in violation of Montana's campaign practice laws when he, while on the job, engaged in use of public resources for the express advocacy purpose of opposing the election of Mayoral candidate Olsen.

[10] Mr. Reintsma's testimony was to the effect that he initiated discussion of filing the Complaint, including the timing of filing.

B. Responsibility of Mayor Roll and the Members of the City Council

The City of Libby, Mayor Roll and 5 members of the 2013 Libby City Council (Robin Benson, Barbara Desch, Vicky Lawrence, Peggy Williams and Bill Bischoff) are also responsible for the campaign practice violation stemming from the Complaint.[11] The Complaint was filed by the "City of Libby" through its paid City Attorney. The City of Libby is recited as the plaintiff in the first paragraph of the Pleading.

At no time did the City of Libby, Mayor Roll or any of the 5 certain City Council members (hereinafter "City") state or indicate that they did not support the Complaint. The May 13, 2104 deposition of Doug Roll and the May 28, 2014 deposition of Mr. Reintsma show that on October 18, 2013 the members of the Libby City Council received a Memo from the City Attorney announcing the intention to file the Complaint against Mr. Olsen. No Council member other than Allen Olsen objected. The Complaint was then filed on October 24, 2013. The Complaint was dismissed with prejudice by an Order of the district court dated August 24, 2014. (Commissioner's records). Under those circumstances the Commissioner determines sufficient facts as follows:

[11] The COPP's expansion of a complaint to include all identified responsible parties is firmly rooted in law and practice. The Commissioner is generally charged to be proactive in investigating violations of Montana's campaign practice act as Montana law requires investigation of "...all of the alleged violations of election laws..." §13-37-111(1) MCA. The Commissioner is specifically charged ("shall") to investigate "failures to file any statements" and further charged to investigate "any other alleged violation" set out in a complaint. §13-37-111(2)(a) MCA. The Commissioner is authorized to exercise discretion in carrying out these actions. *Powell v. Motl*, OP-07111 Supreme Court of Montana Order of November 6, 2014; *Doty v. Montana Commissioner of Political Practices*, 2007 MT 341, 340 Mont. 276, 173 P. 3d 700. The practice of this Commissioner and past Commissioners is to exercise discretion to include identified participants in addition to the party or parties named in the complaint filed with the COPP. *See Greenwood v. Hoklin*, COPP-2014-CFP-032 (Commissioner Motl) and *Motl v. MIA* (Commissioner Unsworth, June 26, 2009 at pages 80-82 and page 104).

Sufficiency Finding No. 2: The Commissioner determines that there are sufficient facts to show that the City, including its Mayor and City Council members, acted in violation of Montana's campaign practice laws when they engaged in unreported and undisclosed use of public resources for the express advocacy purpose of opposing the election of Mayoral candidate Olsen.

The campaign practice responsibility of the City lies under Title 13, Chapter 37. The City engaged in express advocacy (this Decision, above) with the value of that express advocacy set at the amount of funds connected with the preparation and filing of the Complaint, including the paid time of the City Attorney. The City, having spent public funds for express advocacy, became a political committee that was required to register (§13-37-201 MCA) and then report/disclose expenditures under §13-37-225, 226 MCA.[12] The City's failure to follow campaign practice laws led to Sufficiency Finding No. 2, above.

ENFORCEMENT OF SUFFICIENCY FINDINGS

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

[12] The Commissioner notes that §13-35-226(4) applies only to the acts of public employees and does not apply to the acts of public officials. The first level measure of impropriety of the City's acts is made solely under Montana's ethics laws (§2-2-121(3) MCA) with enforcement of the ethics law against local officials vested solely in the office of the County Attorney. (§2-2-144 MCA). Montana's ethics laws do prohibit local officials from use of public funds for express advocacy purposes. §2-2-121(3) MCA

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 finding), as set out in this Decision, to show that the a City of Libby employee and certain 2013 City of Libby officials may have violated Montana's campaign practice laws, including, but not limited to §§13-35-226 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 improper electoral use of public resources by public officials 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.

Likewise, the Commissioner does not accept that electoral use of public resources by public officials can be excused as *de minimis*. *See* discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil/criminal prosecution and/or a civil fine is justified (*See* §13-37-124 MCA) as well as any other action

the Commissioner is directed to take. In this Matter that "other action" could include removal of an elected official from office. §13-35-106 MCA. The Commissioner notes that this approach is grounded in law as an elected candidate assumes a public office he or she also assumes the ethics and public trust responsibilities that accompany assumption of a public office. §2-2-103 MCA.

The Commissioner hereby, through this decision, also issues a "sufficient evidence" Finding and Decision justifying civil prosecution of each person listed herein for electoral use of public resources. Most campaign practices violations occur in Lewis and Clark County (any failure to timely report occurs in Lewis and Clark County) but the at least part of the violations (the ones involving the City Attorney) in the Matter took place solely in Lincoln County. Accordingly, this matter is referred to the County Attorney of Lincoln County for his consideration as to prosecution. §13-37-124(1) MCA. Should the County Attorney waive the right to prosecute [§13-37-124(2) MCA] or fail to prosecute within 30 days [§13-37-124(1) MCA] this Matter returns to this Commissioner for possible prosecution. *Id.*

Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil or criminal prosecution as the Commissioner has discretion ["may then initiate" *See* §13-37-124(1) MCA] in regard to a legal action. Instead, most of the Matters decided by a

Commissioner are resolved by payment of a negotiated fine. In the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of law, including those of §13-37-226 MCA. (*See* 13-37-128 MCA). Full due process is provided to the alleged violator because the district court will consider the matter *de novo.*

DATED this 12th day of May, 2015.

Jonathan R. Motl
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