BEFORE THE COMMISSIONER OF POLITICAL PRACTICES STATE OF MONTANA

In the Matter of the Complaint of the Montana Republican Party, Complainant, Concerning Governor Brian Schweitzer, Respondent.	)))	**PROPOSED DECISION AND ORDER—PENALTY PHASE**

FINDINGS OF FACT

This is the penalty phase of a proceeding that was commenced a number of years ago. In the earlier proceeding it was determined that the Respondent violated State law concerning candidate political practices. By Order dated February 23, 2011, former Commissioner of Political Practices, Hensley, appointed this hearing officer to "convene a conference of counsel for the purpose of issuing a scheduling order to complete the penalty phase of this proceeding and ...conduct a penalty phase hearing, if necessary."

I. History

The current penalty phase proceeding was first ordered on November 14, 2008, by the then Commissioner of Political Practices, Unsworth. The November 2008 decision determined that "the Governor unlawfully used or permitted the use of state funds to produce and distribute two PSAs [public service announcements] prominently featuring the Governor in violation of the candidate PSA prohibition in Section 2-2-121(4), MCA." [November 14, 2008 Order, p. 20, Para. 4.]

Section 2-2-121(4) provides: A public official who has filed a petition for election or reelection "may not use or permit the use of state funds for any advertisement or public service announcement in a newspaper, on radio, or on television that contains the candidate's name, picture, or voice except in the case of a state or national emergency and then only if the announcement is reasonably necessary to the candidates' official functions. Mont. Code Ann. § 2-2-121(4) (emphasis added).

The original proposed decision by the undersigned to then Montana Commissioner of Political Practices Unsworth recommended a finding that the Respondent violated Section 2-2-121(4) and be fined $750. The Complainant, in its appeal of the proposed decision to Commissioner Unsworth, successfully argued that the Respondent had violated section 2-2-121(4) but that the undersigned had not afforded it the opportunity to address the number of violations committed by the Respondent or other relevant matters regarding the amount of the penalty. Commissioner Unsworth correctly concurred. He determined that three penalty issues remained to be decided: (1) the number of violations, (2) the amount of the administrative penalty, and (3) whether the costs of the proceeding should be assessed against the Respondent.[1] [November 14, 2008, Order, p. 20, para. 5.]

Thereafter, the Respondent sought a limited court review. On December 2, 2009, the court declined to exercise jurisdiction and remanded the matter back to then Commissioner Unsworth.

The case then sat dormant for a period of time. Commissioner Unsworth's term of office expired, and Commissioner Hensley was appointed the new Montana Commissioner of Political Practices.

On December 10, 2010, the Respondent filed a Motion with Commissioner Hensley to dismiss or otherwise resolve the matter. On February 23, 2011, Commissioner Hensley denied the motion to dismiss and then appointed the undersigned to complete the penalty phase of the proceeding. Ultimately, Commissioner Hensley was not confirmed by the Montana State Senate, and the current Commissioner, David Gallik, was appointed Montana Commissioner of Political Practices.

This penalty phase proceeding arises out of, and is an extension of, the earlier 2008, proceeding in which it was determined that the Respondent violated Montana Code Annotated § 2-2-121 (4).

II. Direction of Former Commissioner Hensley

The February 23, 2011, Order of former Commissioner Hensley directed that the three penalty issues referenced in Commissioner Unsworth's 2008 decision be addressed in the current proceeding: The number of violations, the amount of the administrative penalty, and whether the cost of the proceeding are to be assessed to the Respondent.[2] Accordingly, this penalty proceeding is limited to those issues, and the undersigned has jurisdiction only on those issues. While the Respondent continues to argue that the original finding that he violated the law is in error, the undersigned has had no jurisdiction to revisit this issue.

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[1] A fourth issue, whether grounds exist for the disqualification of Commissioner Unsworth, was ultimately dismissed as moot, and is no longer relevant in this proceeding.

[2]The Order notes that another proceeding, *the Matter of the Complaint of Mary Jo Fox against Brad Molnar,* addressed several matters related to the assessment of the penalty.

Both the original 2008, Order and the current Order authorized the Complainant to conduct appropriate discovery on the penalty issues—the number of violations, the amount of the administrative penalty, and whether the costs of the proceeding are to be assessed, and if so, what category of costs should be assessed. *See* the Scheduling Order, for this Proceeding, p. 1, bottom, & p. 3, item #1. In a Scheduling Conference with the undersigned and counsel for both parties, counsel for the Complainant stated that absent exceptional circumstance, it did not envision deposing the Respondent or his staff,[3] and that their discovery efforts would be directed to the number of PSAs sent to radio stations, the number of times the PSAs were run by the stations, and the approximate number of radio listeners that may have heard the PSAs. *See* Scheduling Order for this Proceeding, p. 3, item # 1.

The parties stipulated that after the completion of Complainant's discovery, the matter would be submitted to the undersigned, the right to a hearing having been waived. *See* Scheduling Order for this Proceeding, p. 3, item # 6. At this point, discovery has been completed and both parties have thoroughly briefed the penalty issues. Consequently, the matter is ready for decision.

III. The Issues

The issues are the number of violations committed by the Respondent, the appropriate penalty for each violation, whether the Respondent should be held responsible for the costs of this proceeding, and if so, what category of costs should be assessed.

IV. The Applicable Law

The applicable Montana state law regarding penalty states:

> If the commissioner determines that a violation . . . has occurred, the commissioner may impose an administrative penalty of not less than $50 or more than $1,000, and . . . may assess the costs of the proceeding.

Mont. Code Ann. § 2-2-121(4) (emphasis added).

V. Scope, Type, and Amount of the Penalty

Montana Code Annotated § 2-2-136 gives the Commissioner, upon finding a violation, great discretion to determine the type and amount of the penalty. A penalty must not be not less than $50 but not more than $1,000, and may include the assessment of costs of the proceeding. While the legislature did not provide specific criteria to guide the Commissioner in the exercise of discretion as to penalty, the Commissioner recognizes that the scope, type, and amount of any penalty is to be consistent with the intent of the Montana State Legislature when the provision was enacted.

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[3] It was agreed that if Complainant's discovery revealed some involvement of the Respondent or his staff beyond the making of the PSAs, discovery would/might then be directed to them. *See* Scheduling Order for this proceeding, p. 3, item # 3.

Consistent with this intent, the Office of the Commissioner has determined that where there are a number of separate violations, each violation is subject to a separate monetary penalty, and that an award of costs may be appropriate where there are numerous clear and serious violations occurring over a substantial time period and the party refuses a post-complaint opportunity for self-compliance. *In the Matter of Complaint of Mary Jo Fox Against Brad Molnar.*

In the original proposed decision to then Commissioner Unsworth, the undersigned determined that the Respondent committed a single violation and proposed a sanction of $750. On appeal of the proposed decision, the Complainant successfully argued to Commissioner Unsworth that it had not been afforded an opportunity to address the issues now the subject of this proceeding. The primary theory that the Complainant has consistently sought to pursue is whether the PSAs were ever broadcast, and the number of potential Montana voters who heard the PSAs and may have had their voting influenced by the message. In this proceeding, the Complainant has been afforded the opportunity to engage in discovery to learn the extent and magnitude of the Respondent's violation(s), marshal and present any newly discovered evidence, and argue its position on the penalty issues. What we now know has changed very little from what was known back in 2008. The following represents the facts as now known:

> On March 4, 2008, the Respondent filed for reelection. The next day, operating from a State office building, he used State equipment, and State paid staff to record two radio public service announcements (one 30-seconds in length and one 60-seconds in length). The Public Service Announcements (PSAs) related to Montana agriculture, and referred to "National Ag. Month." Who exactly coined the phrase "National Ag. Month," remains unknown, as it was in 2008. As was the case in 2008, the Respondent contends the phrase was originated by a radio station in Lewistown, Montana, the Complainant contends that it was coined by the Respondent's staff. Again, as were the facts in 2008, it appears that the Lewistown radio station initially solicited the Respondent to make the PSA. A 60-second and a 30-second PSA was sent to the Lewistown radio station and the 30-second PSA was sent to 39 other Montana radio stations. Why 39 other radio stations were sent a PSA remains unknown. A reasonable inference is that once the Respondent's staff decided to respond to the request of the Lewistown station, it decided to send PSAs to 39 other Montana radio stations. What is known is that the PSAs contained the slogan "Montana on the move," a slogan used by the Respondent in his campaign for reelection. It is also known that the Public Information Officer for the Montana Department of Agriculture, one of two staff members present when the PSAs were recorded, was authorized to duplicate and distribute the two PSAs to the 40 radio stations. As it was in 2008, the extent the radio stations broadcast the PSA's remains unknown. Indeed, there is no evidence before the undersigned that the PSAs were ever broadcast.

Consequently, the facts are that the Respondent recorded a 30 second and a 60 second PSA. One radio station was sent both the 60 second and the 30 second version, and 39 other Montana radio stations were sent the 30-second version.

Based on this factual record, the Complainant asserts:

> With respect to the number of violations, not only did . . . [the Respondent] use state resources to write, produce and record the . . . [PSAs], . . . [he] also used or permitted the use of taxpayer dollars to disseminate the . . . [PSAs] to 40 different radio stations. The production of the two . . . [PSAs] themselves are obviously . . . violation[s] of . . . law [citation omitted]. In addition, the dissemination of the 60-second . . . [PSA] to one radio station, and the dissemination of the 30-second . . . [PSA] to 40 radio stations also constitute separate violations . . . . Respondent therefore violated . . . [the law] on 43 separate occasions.

Next, the Complainant argues that each of the alleged violations be assessed a fine of $750 (a number between $50 and $1,000). The same number the undersigned used in his 2008 Proposed Decision to then Commissioner Unsworth.

Based on the calculation of 43 separate violations, the Complainant argues that the Respondent should be assessed a fine of $32,225 ($750 multiplied by 43).

The Complainant argues that there should be a finding of multiple violations based on the on its calculation of 43 separate incidences, and that the fine of $750 per violation be imposed because the PSAs were made the day after the Respondent filed for reelection (the law provides that it is illegal for a public official to use State resources to make PSA's only after the official filing), because his conduct should "set an example for future politicians who might consider . . . [similar conduct]," and because the Respondent continues to refuse to acknowledge his conduct was a violation of state law.

Finally, the Complainant argues that the Respondent should be assessed the costs of the proceeding based, in part, on the same arguments it made for the use of the $750 figure, because of the amount of public resources used to produce, duplicate and distribute the 41 PSAs, and because of Respondent's alleged unnecessary complication and delay in bringing the proceedings to a close.

CONCLUSIONS OF LAW

I. Multiple Violations

Despite what might appear at first blush to be obvious, calculating the number of independent violations that occurred here is not a simple matter. To do so requires careful consideration of the statute to determine what constitutes a separate PSA for the purpose of determining a violation. The applicable law prohibits the "use of state funds for <u>any</u> . . . <u>public service announcement</u> in a newspaper, <u>on the radio</u>, or on television . . . . Mont. Code Ann. § 2-2-121(4).

What is known is that the Respondent gathered two staff members, (Sarah Elliott, the Respondent's Communications Director, and Ron Zellar, the Public Information Officer for the Department of Agriculture) in a State-owned building, and, with the aid of a State-owned audio recording devise, made two short PSAs. Thereafter, and pursuant to plan, the PSAs were duplicated and 41 of them were packaged and mailed to 40 Montana radio stations.

The 2008 decision by former Commissioner Unsworth concluded this activity constituted "the use or permitted the use of state funds for any . . . public service announcement . . . on the radio."

The Complainant, in counting the number of PSAs for the purpose of determining the number of violations, counts the making of the two PSAs as two violations and the distribution (duplication and distribution) of the 41 individual PSAs as separate violations. The question presented is whether in calculating the number of PSAs, or number of violations, one defines a PSA/violation from the vantage point of the production, the number of PSAs actually distributed, or as the Complainant argues, both. The answer: It all depends on one's perspective of the process.

If asked how many PSAs he made, the Respondent's response would probably be one, for the single event of National Ag. Month. He may calculate the number of PSAs using the topic or reason for making the PSAs and would not consider the different lengths of each recording. Alternatively, he might say two, accounting for the fact that he recorded two messages, one 30-seconds and one 60-seconds.

By contrast, if the person who duplicated and possibly sent the PSAs was asked how many were there, the response may well be based on the number of entities to which the PSAs were sent. In this case, that number is 40. Alternatively, he might say the number is 41 based on the number of PSAs actually sent; this would account for the fact that one recipient, the Lewistown station, was sent two PSAs (both the 30-second version and the 60-second version).

Finally, if representatives of the radio stations were asked—in a time-frame when they remembered what they had recently received—"did you receive a PSA from the Respondent on National Ag. Month," each representative would undoubtedly respond, "yes." Each representative would remember the receipt of a PSA audio recording received from the Respondent or the Montana Department of Agriculture. Thus, from the perspective of the radio station representatives receiving the PSAs, the count would be either 40 or 41 depending on whether the Lewistown representative considered that the station received two recordings differing in length, or a single PSA on National Ag. Month.

There is no evidence the PSAs were ever broadcast. However, if a radio station had broadcast the PSA, and a representative of the station who could remember or otherwise had knowledge of the broadcasts, was asked "how many time was the PSA run," the answer may be a "substantial number." From the perspective of the station, while it only had one National Ag. Month PSA, that one PSA was run a number of times.

Finally, and again not relevant here because there is no evidence the PSAs were ever broadcast, if the PSAs were in fact broadcast, and a listener of the stations programing was asked if she heard a PSA by the Respondent about National Ag. Month, the response may well be, "yes, several times." Thus, from the perspective of the listener, each time the PSA was heard was a separate PSA.

Thus, the complication of determining how many PSAs or violations there were all depends on the perspective of the individual asked—from the Respondent as maker, to the technician who made the duplicates, to the state employee who sent them out, to the radio station representative who received them, to the radio station who broadcast them, and to the radio listener who heard them. The Complainant offers its count of 43, and the Respondent's perception is that there was only one National Ag Month PSA, in a 30-second and 60-second format.

Since the PSAs were never broadcast, the choice of perspective, and the resulting number of violations, is not substantial: between one and forty-three.

In this case, after the PSAs were produced, they were, at some cost to the taxpayers, duplicated and distributed to the broadcasters. This activity is separate and apart from the making of the PSAs—the duplication and mailing occurred later in time, at a different place, involved persons other than those involved in the making of the PSAs, and resulted in the expenditure of additional State funds. Thus, for the purposes of the statute, the prohibition against the use of State funds on any PSA may consist of two separate acts—production and distribution.[4] The use of state funds in the production of the PSA is unlawful, as well as the use of state funds in the distribution of the PSA. A violation occurs if the PSA is produced with State resources, even though distributed privately. Similarly, a PSA distributed with State resources is unlawful even though produced with private funds. Here the PSAs were produced and distributed with State resources.

Thus, to determine the number of violations, the fact finder must start with the number of PSAs produced, and then look to whether those PSAs were distributed. If the PSAs were produced, but never distributed, the number of violations is the number of PSAs produced. However, if the PSAs were distributed, the number of violations is the number of times the PSAs were distributed. At the point of distribution, the number produced becomes irrelevant; production is then relevant only in calculating the dollar amount per violation, with substantial production costs potentially increasing the dollar amount per violation. Similarly, although not raised in this case, if the PSAs were communicated by a media source, the number of violations is the number of times the PSAs were communicated. (The number of readers, listeners, or viewers who received the message may also be relevant, but that determination is for another case in which the PSAs were actually broadcast.) At the point of communication, the number of PSAs produced and distributed becomes irrelevant except in calculating the dollar amount per violation. In each phase, the fact finder need not look back to the previous phase in calculating the number of violations.

This graduating penalty scale fits with the law's intent. The statute prohibits the production and distribution of PSAs and holds a producer/distributor liable for those acts and the foreseeable consequences of those acts—that the PSAs, once distributed, could be read, heard or viewed. Indeed, a producer/distributor intends a PSA to be communicated to Montana citizens/prospective voters. The statute prohibits use of public funds/resources in the production

[4] The act of duplicating the PSA/s produced is not a separate unlawful act, but considered either part of the process of production or distribution.

and distribution, but ultimately, its focus is to assure that Montana citizens and prospective voters are not bombarded with a PSA made at taxpayer expense and used by incumbent State officials to benefit their own election campaigns. The statute was squarely aimed at the potential impact of such PSAs on the perspective voter. Accordingly, it is ultimately from that perspective—the listener, reader, or viewer—that the count for the number of violations must be calculated. It is fitting, then, that the number of violations will increase the closer a PSA gets to reaching the voter.

Fortunately, here the PSAs were never broadcast, so no one ever heard them. But that does not result in the conclusion that there were no violations. Since the statute prohibits use of public funds in the production and distribution of PSAs, to determine the number of violations, a fact finder must first look at the number of PSAs produced, and next at the number of PSAs distributed.

In the dispute here, it could be concluded that the gathering of the Respondent and two state employees to produce (write, stage, record) the PSAs involved one discrete activity, and thus, only one violation. However, because the statute in question prohibits the use of funds for "any" PSA, and two PSA were produced, a better reading of the statute is that there were two violations. Each PSA produced constituted a separate violation. The theme: If it isn't made, it can't be used.

The next question is how many PSAs were distributed. The concern, then, is the number of PSAs sent to the radio stations. That total is 41. Thirty-nine stations received one PSA and one station received two PSAs. With this calculation, there is no need to look back to also count the number of PSAs produced; the production is relevant if the cost of making the PSA was large, and then that factor is considered in determining the dollar amount, per violation, not the number of violations. See "II"—The Dollar Amount Per Violation.

Thus, the number of violations stops at 41, the number of times the PSAs were distributed by the Respondent to the broadcasters.

II. The Dollar Amount, Per Violation, of the Administrative Penalty

The law provides that the Commissioner is to impose an administrative fine of no less than $50, and no more than $1000, per violation.

The Complaint argues the fine should be $750 per violation because the PSAs were made the day after the Respondent filed for reelection, this case should be used to set an example for future politicians, and that the Respondent refuses to acknowledge his conduct was unlawful. None of the Complaint's arguments support its conclusion that the fine be $750 per violation.

First, the Respondent is not obligated to accept the findings of the Commissioner of Political Practices that he violated the law. He is entitled to have his own conclusions regarding the construction and application of Montana Law. Second, the 2008 decision by Commissioner of Political Practices sent the message to future State officials that it is illegal to make PSAs with public resources after filing for election, and this decision reaffirms that conclusion. Third, the

timing of the Respondent's violation, the day after he filed for reelection, is irrelevant in determining the dollar amount of each violation. The timing of the Respondent's violation seems to only support his consistent interpretation of the law, that, regardless of timing, he did nothing illegal.

Because this is a case of first impression (regarding both the construction of the statutory prohibition and the determination of how to calculate the number of PSA violations), because there is no evidence that the PSAs were ever broadcast, and finally because very little taxpayer money was spent in the production and distribution of the 41 PSAs, it is reasonable to select a low, per-violation, penalty amount. This entire case provides an excellent learning devise for State incumbent officials who seek election or re-election, for media sources who may be asked to run PSAs by such officials, and all those interested in ethical conduct in government. Consequently, there is no reason to subject the Respondent to an exorbitant administrative fine. Under the circumstances, the amount the Complainant requests, $750 per violation, is excessive.

An amount of $100 per violation is far more than adequate to cover the very small production and distribution cost to taxpayers and to send a strong message to other office holders. However, Montana office holders are on notice, a $100 fine per PSA will not likely be duplicated in a future proceeding. All are now on notice that office-holders who make PSAs at taxpayer expense, after filing for election or reelection, are engaged in an illegal activity and will be facing substantial administrative fines, especially if that PSA reaches potential Montana voters.

III. The Cost of the Proceedings

As part of sanction, the Commissioner may assess the costs of the proceeding against the Respondent. The Complainant urges that a portion of the costs of this entire proceeding (liability and damages) be assessed against the Respondent. In support of this proposition, the Complainant cites *In the Matter of Mary Jo Fox against Brad Molnar*. That case is clearly distinguishable from this one. The multiple violations in *Molnar* were the result of three separate complaints, filed over a period of time, involving discrete and independent acts occurring over a period of months and involving an array of people and conduct. There the respondent was sanctioned with the cost of the proceeding because of the number, seriousness, and, in part, the obviousness of the violations.

Because the instant proceeding is a case of first impression, the PSAs were not broadcast, and very little taxpayer money was spent, there is no reason to assess costs. Additionally, while the Respondent did seek the intervention of the district court, this is not reason, as the Complainant urges, to conclude that Respondent inappropriately complicated and delayed this proceeding. The Respondent was well within his rights to ask the court to review some portions of the proceeding.

This is an important and serious case for both parties, and there is no record justification to require the Respondent to bear its costs.

ORDER

It is determined that the Respondent committed 41 separate violations of Montana Code Annotated § 2-2-121(4), and that a fine of $100 per violation is imposed. Respondent is ordered to pay the Commissioner of Political Practices $4,100.

Dated this 31st day of August, 2011.

William L. Corbett, Hearings Officer