

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

<p>Ravndal v. Halver and Obert No. COPP 2014-CFP-020</p>	<p><u>Summary of Facts and Findings:</u></p> <ol style="list-style-type: none">1. Dismissal of Complaint Against Laura Obert based on Lack of Sufficient Evidence to Show a Violation of Montana’s Campaign Practices Act;2. Dismissal of Complaint Against Roger Halver based on Application of <i>De Minimis</i> Principle After Finding of Sufficient Evidence to Show a Violation of Montana’s Campaign Practices Act.
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Timothy Ravndal is a resident of Townsend, Montana. On May 1, 2014 Mr. Ravndal filed a complaint against Laura Obert and Roger Halver, also of Townsend. The complaint alleges that on April 9, 2014 a communication ensued between Mr. Halver and Ms. Obert, the content of which violated provisions of Montana’s campaign practices act.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this decision is that of “improper nominations”, as defined by §13-35-221 MCA.

RELEVANT FOUNDATIONAL FACTS

The Foundation facts necessary for determination of this matter are:

1. Broadwater County elects a 3 person board of non-partisan county commissioners (District #1), each serving a term of 6 years. (Broadwater County Clerk & Recorder's Office).
2. The current County Commissioners for Broadwater County, District #1, are: Laura Obert, Elaine Graveley and Franklin Slifka. (Broadwater County Commissioner's Office).
3. The County Commissioner seat now held by Laura Obert is subject to election on the 2014 ballot. (Broadwater County Clerk & Recorder's Office).
4. Laura Obert is running for re-election as Broadwater County Commissioner. Four other candidates have filed for the Commissioner's position. The five candidates on the primary ballot are: Laura Obert, Terry Lewis, Curtis Spatzierath, Tim Ravndal and Roger Halver.
5. A primary election will be held on June 3, 2014. The two candidates receiving the most votes in the primary election will move onto the General election in November. (Broadwater County Clerk & Recorder's Office).

DISCUSSION

The Broadwater County Commissioners held a work session meeting on April 9, 2014 (Commissioner's records). Present at that meeting were the three commissioners (FOF No. 2) and two members of the public, Bill Kearns and Roger Halver. Roger Halver was and is a candidate for County Commissioner,

as is Laura Obert. (FOF No. 4). The meeting was recorded and the Commissioner has a copy of a disk containing a video/audio record of the meeting. The meeting videos are also available to the public on a YouTube channel sponsored by Broadwater County.¹

During the course of the meeting Candidate Halver asked to be heard by the Commissioners and proceeded to talk to the Commissioners for about one hour of time. The COPP investigator listened to and watched the record of the meeting and summarizes the relevant content as follows:

Approximately 40 minutes into the meeting, Mr. Halver came forward to the Commissioners' table and handed them copies of a 5 page proposal (provided by the Complainant and can be seen on video footage). Mr. Halver's proposal consisted of: A position description for a Chief Administrative Officer with Mr. Halver's resume and references attached to the description. Mr. Halver was allowed to speak with the Commission about his proposal for approximately one hour and the following took place.....

Mr. Halver first stated, "As you all three know, I am a candidate for county commissioner." Mr. Halver told the Commissioners that he is the most experienced candidate for commissioner and that while they each have unique qualifications, they lacked expertise in management and auditing. Mr. Halver proposed to the Commissioners that they create a job for him and make him the Chief Administrative Officer for Broadwater County. Mr. Halver prepared the position as "exempt" (to serve at the pleasure of the Commissioners). Mr. Halver proposed that he would "advise and direct" the commission in investigations, internal and external, with audit findings, and represent the commission with outside agencies, the media and relationships with department heads and in the legislature. Mr. Halver said he prepared the job description by mirroring Lewis & Clark County's CEO position held

¹ YouTube Channel link: <http://www.youtube.com/watch?v=CF2gZtuIOV4#t=2386>

currently by Eric Bryson, but adding that the Broadwater County CEO must live within the county and the position was regular full-time “exempt.” Mr. Halver stated that he was ready start work immediately and would work from 7:30 to 5:30.

The above presentation by Candidate Halver engendered response from Commissioners. The COPP investigator summarizes the interplay between Candidate Halver and the Commissioners as follows:

- Mr. Halver told Commissioner Obert that she was elected to be a county commissioner, not a Human Resource Officer, so he could take over those duties she is currently performing if they make him CEO.
- Commissioner Graveley asked what salary Mr. Halver proposed (it was not in the proposal). Mr. Halver said he has not done a salary evaluation yet, but was making \$25/hour as a house painter so he could do it for the same, which is \$52,000 per year.
- Commissioner Graveley said to Mr. Halver that if they accepted his proposal that he obviously would have to withdraw from the (Commission) race. Mr. Halver stated, “Yes”
- Commissioner Graveley said that it was too late for Mr. Halver’s name to be taken off the ballot.

Mr. Halver then said:

“That is one of my concerns. Not only am I wanting to get started on this and I recognize the needs of my expertise in this county, but I had to deal with the “race thing” too....its...its...and in no way do I mean this as a threat to anyone of you on this commission, but if you don’t hire me, I’m going to fire my campaign up big time. And as you can see from my references and who I talked about, I’ve got some of what we lobbyists used to always call “juice.” The other thing too, as far as a lobbyist, I have never had to call a favor in and I’ve got a lot of favors still out there and that’s a political fact. Yesterday I considered calling a favor in. Yesterday I considered calling Jim Rice and Rick Hill and have them both make personal calls to the three of you to recommend me for this position. But I decided, no, I can do this on my own.

There is a term in insurance and in law, its Latin, its “Res Ipsa Loquitur” which means “it speaks for itself.” And I hope by me sitting here like this, it speaks for itself. I shouldn’t have to call in any political favors because of my qualifications and expertise for this position. I’ll save those political favors. I’ll use a political favor when I call Mike Cooney and say “Mike, what programs do you have that can help the county I’m working for?” Emphasis added.

Mr. Ravndal, who was not at the meeting, later reviewed the content of the video and audio recording and filed the complaint in this Matter. Mr. Ravndal is one of the 5 current candidates for Broadwater County Commissioner. Mr. Ravndal filed against the two candidates (Ms. Obert and Mr. Halver) who were present at the meeting.

1. Improper Nominations

For over 100 years Montana has prohibited acts that amount to “vote buying” or candidate manipulation. These prohibited actions, renumbered and reorganized several times within Montana’s code and now called “improper nominations,” “illegal influence of voters” and “illegal consideration for voting,” are set out in Montana law at §§13-35-214, 215, 221 MCA. Candidate Halver’s actions potentially implicate §13-35-221 MCA.

a. Section 13-35-221 MCA Must be Criminally Enforced

Violations of Montana’s campaign practices law (Title 13) are enforced civilly and/or criminally. The Commissioner’s civil enforcement authority, however, is limited to violations of Chapter 37 and certain provisions of Chapter 35. See §13-37-128 MCA. Section 13-35-221 MCA is not among the

Chapter 35 provisions that can be civilly enforced. This means that enforcement of a violation of this section of law, if found, is under §13-35-103, MCA, the catch all election law enforcement statute. In turn, Section 13-35-103 provides for enforcement as a criminal misdemeanor.

Over the past two decades the Commissioner has uniformly considered enforcement of such sections of Chapter 35 under criminal law standards. See *Parrent v. Ames*, July 25, 1990; *McFadden v. Stanko*, June 1, 1994; *Masters v. Nixon*, August 3, 1994; *Seward v. Andrick*, December 13, 2004; *Vance v. Walseth*, February 23, 2009; *Scott v. Doyle*, COPP-2011-CFP-7; and *Loney v. Moore*, COPP-2013-CFP-014. This particular section of Chapter 35, however, (that is §13-35-221 MCA) has only been involved in one prior complaint before the Commissioner. *Bixler v. Suprock*, COPP-2013-CFP-013. The *Bixler* Decision determined a criminal law enforcement approach for a violation of §13-35-221 MCA. This Matter will also follow that approach and enforcement of any violation will be by criminal prosecution.

b. Candidate Halver Did Violate §13-35-221 MCA

Candidate Halver initiated a proposal that he be hired by Broadwater County. It was a serious proposal (at least on Candidate Halver's part) as he came prepared with a resume, job description and extensive argument. The nature of Candidate Halver's proposal is ultimately reflected by his statement that "but if you don't hire me, I'm going to fire my campaign up big time."

Section 13-35-221 MCA prohibits manipulation of candidacy status as a means to secure employment:

- (1) A person may not pay or promise valuable consideration to another, in any manner or form, for the purpose of inducing the other person to be or refrain from or to cease being a candidate, and a person may not solicit or receive any payment or promise from another for that purpose.”
- (2) A person, in consideration of any gift, loan, offer, promise or agreement, as mentioned in subsection (1) may not:
 - (a) be nominated or refuse to be nominated as a candidate at an election....or
 - (c) withdraw if the person has been nominated.

On its face, the timing, manner and method of Candidate Halver’s employment proposal, coupled with his campaign related activity, implicates §13-35-221 MCA. The criminal enforcement requirements, however, necessitate a particularly close look at whether there are sufficient facts to show such a violation.

When dealing with a statute enforced as a criminal violation, this Office has required a substantial degree of definiteness in the facts showing a connection between the disallowed “valuable consideration” (in this case, a job) inducing the dependent act, in this case Candidate Halver’s offer of withdrawal or inactivity as a candidate. In that regard the Commissioner is guided by the decisions of prior Commissioners who have uniformly dismissed complaints alleging criminal violations of Montana election law: *Parrent v. Ames*, July 25, 1990 (Commissioner Colburg); *McFadden v. Stanko*, June 1, 1994 (Commissioner Argenbright); *Masters v. Nixon*, August 3, 1994 (Commissioner Argenbright); *Seward v. Andrick*, December 13, 2004 (Commissioner Vaughey); *Vance v. Walseth*, February 23, 2009 (Commissioner Unsworth) ; *Scott v. Doyle*, COPP-2011-CFP-007 (Commissioner Gallik); and *Loney v. Moore*, COPP-2013-

CFP-014 (Commissioner Murry). This Commissioner likewise dismissed such a complaint in *Bixler v. Suprock*, COPP-2013-CFP-013. The dismissed complaints challenged actions such as partisan distribution of water to electors at the polling place and the announcement of the name of an undersheriff by a sheriff candidate.

The Courts of Montana and elsewhere have, however, determined such a campaign practices connection leading to criminal prosecution. In *Kommers v. Palagi*, 111 Mont. 293, 108 P2d 208 (1940), the Montana Supreme Court upheld the removal of Sheriff Palagi from office of the elected sheriff of Cascade County under Montana's Corrupt Practices Act, the predecessor law to §§13-35-214, 221 MCA. Palagi was determined to have submitted false campaign account records and to have used a "slush" fund, consisting of excess mileage and board reimbursement for prisoners, as a secret campaign fund from which he purchased pencils, beer and sewing kits to give to potential voters. The court specifically found that the pencils and "handy menders" were articles of value distributed by the candidate and his deputy sheriffs as his political agents with the intent to influence votes contrary to the provisions of law. *Id.*, 111 Mont. 308, 108 P2d 215.

In *Tipton v. Sands*, 103 Mont. 1, 60 P. 2d 662 (1936), the Montana Supreme Court considered whether a candidate for Chief Justice of the Montana Supreme Court had violated election law by stating that, if elected, he would accept only \$6,000 of the \$7,500 then being paid to Supreme Court Justices. The Court (while excusing the case on other grounds) noted that

“...statements published by candidates for a public office that they will, if elected, serve at less salaries or for less fees than those fixed by law are in violation of ...statute, and constitute bribery under the common law.” (internal citations omitted) *Id.* 103 Mont. 12, 60 P. 2d 668. The basis for this finding is that the promise to save taxpayers money by turning down a fixed salary is a direct inducement or vote buying.

Finally, in *Trushin v. the State of Florida, Fla. Ap. Ct., 3rd D., 384 So. 2d 668* (1980), *Aff. Florida S.C. 425 S. 2d 1126* (1982), a lawyer, Mr. Trushin, was convicted of a felony offense for attempted vote buying. Mr. Trushin had prepared and circulated a handbill wherein he offered to prepare a free will to anyone who would pledge to vote for Mr. Trushin’s preferred judicial candidates. Mr. Trushin asserted that he was unaware his offer was illegal and also asserted he never collected a pledge from any person for whom he actually prepared a will in response to the handbill. In sustaining the felony conviction the Florida Court of Appeals concluded:

Some might consider that the facts of this case demonstrate that Trushin may have acted stupidly and unethically in circulating his offer to bribe by handbill, but do not merit his conviction of a felony. We do not agree with such a characterization of the defendant’s conduct. The “bottom line” is that he offered to purchase votes in return for services rendered.

Id. 384 So. 2d 680.

Based on the above precedent, this Commissioner determines that Candidate Halver’s actions do show the necessary connection between value

sought and an improper election result. Candidate Halver knowingly initiated and pursued the opportunity for a job, using his candidacy as an enhancement for award of the job. Candidate Halver may claim he was unaware of the prohibition placed on this sort of activity. Ignorance of the law provides no excuse for its violation. *Wiard v. Liberty N.W. Ins. Corp.*, 2003 MT 295, ¶ 32, 318 Mont. 132, ¶ 32, 79 P.3d 281, ¶ 32. The Supreme Court of Nebraska considered this precise issue of intent/knowing as applied to Nebraska's version of the Corrupt Practices Act and found:

It is the violation of the [corrupt practices] law by the commission of the prohibited act that is condemned. The intent or good faith of the wrong-doer is not an element in the offense, nor a defense to the objections filed, when the wrongful act is established. A want of improper motive does not alleviate the subversive result prohibited by the state. An enlightened public policy requires that candidates for public office in this country be elected on the basis of fitness for the office and not on that of bargain and sale.

Burkett v. State of Nebraska, 137 Neb. 704, 708, 291 N. W. 481, 484 (1940).

See also, *Trushin v. the State of Florida*, Fla. Ap. Ct., 3rd D., 384 So. 2d 668 (1980), Aff. Florida S.C. 425 S. 2d 1126 (1982). Emphasis added.

Clumsy or not, Candidate Halver's attempt to bargain with his candidacy for a job goes to the very public trust foundation inherent in a public election. It is true that section 13-35-103 MCA requires that Candidate Halver "...knowingly violates a provision of the election laws..." But, an attempt to violate can be regarded as the same as an actual violation; See §13-35-104 MCA, incorporating therein the requirements of §45-4-103 MCA. Further,

Candidate Halver argued extensively for his hiring at the April 9, 2014 meeting and then on April 15, 2014 followed with the following e-mail:

Deb, (Debra Brown, Chair Broadwater County Republican Central Committee)

This is Roger Halver. I have lost your cell phone number and we need to talk NOW. I need to talk to you about Rep. Central Comm. Supporting Laura Obert in the election for county comm., my becoming the Chief Administrative Officer for Broadwater County and a recall of Frank Slifka. We, Laura and I, need support at the Monday CC meeting. Please call 406-227-7529.

Candidate Halver's actions demonstrate several overt acts taken in a manner that distinguish this Matter from *Garver v. Tussing*, February 28, 2007 (Commissioner Unsworth). In *Garver v. Tussing* Commissioner Unsworth considered the interplay of §13-35-104 and §45-4-103 MCA as part of criminal enforcement of §13-35-214 MCA and noted "...it would be necessary to establish 1) that he had the purpose to commit the specific offense, and 2) that he did an act toward the commission of the offense" *Id.* p. 6.

In *Tussing* the candidate had planned to take an act (use an anonymous "pass the hat" cash contribution) that would, if carried out, have caused a violation of the contribution limit. *Tussing*, however, cancelled the planned act before it led to movement toward any violation. Because "there was no overt act amounting to movement toward commission of the offense" the Commissioner found no violation (*Id.* p. 7).

Candidate Halver, in contrast, made at least one further "overt act" toward commission of an offense. Candidate Halver engaged in an email follow-up to his explicit statement tying his continued active candidacy to consideration of

the commission to award him a public job. There are sufficient facts to show a violation of §13-35-221 MCA by Candidate Halver. The reader should note, however, that prosecution of Candidate Halver will not be pursued upon application of the *de minimis* principle. See this Decision, Pages 14-16.

c. Commissioner Obert Did Not Violate §13-35-221 MCA

The complaint was also filed against Commissioner Obert. The review by the Commissioner of Political Practices investigator did not show that Commissioner Obert joined in any act of Candidate Halver leading to a violation of §13-35-221 MCA. Commissioner Obert's initial reaction to Candidate Halver's proposal (at the April 9, 2014 meeting) was as follows:

- Commissioner Obert stated that because she and Mr. Halver are opponents, she feels that she must recuse herself from the vote (on the CEO position). The other two commissioners agreed. Candidate Halver stated, "I think that is wise." Commissioner Graveley stated, "People might say, well if she voted to put him in there, that is one less opponent" and Commissioner Obert stated, "Right, right." Commissioner Obert went on to say:
 - I will say this for the record. I would actually love a race with Roger and I going to the general (election) and the reason for that is, I think it would be healthy for this county to have two extremely well-qualified persons for this job. I think that would send a very positive message to the rest of Montana as well as to the citizens of this county. So I guess I'm recusing myself on both sides. It could be too that if I vote against it, it'd be because I want Roger as my opponent.

When the Halver employment issue was next raised (at the April 21, 2014 regular Commissioner's meeting) Commissioner Obert stated the following:

- Bill Kearns was the only member of the public there that day (of the proposal)
- It is a salacious rumor. For the past 3 months the commissioners have been discussing a new type of position since the finance officer left

- They looked into contracting HR duties, but that idea did not get through the commission so Mr. Halver brought another idea to us so we listened.
- NO DECISION has been made and nothing has been advertised yet
- The commissioner is not going to hire anyone for anything unless they go through the regular hiring process, even though by law they could hire exempt without that
- There is no new position open at this time and if there is in the future, we will go through regular protocol
- The only reason Mr. Halver was allowed to speak was because it was a Wednesday and there was no regular agenda
- We do not do here what happened in the olden days. (hiring buddies). It's a new day, we follow a science.

At the very least the “no overt act” reasoning of *Garver v. Tussing* applies to the complaint against Commissioner Obert. In *Tussing*, the candidate planned to take an act (use an anonymous “pass the hat” cash contribution) that would, if carried out, have caused a violation of the contribution limit. Tussing, however, cancelled the planned act before taking any action that might have led to any violation. Because “there was no overt act amounting to movement toward commission of the offense” the Commissioner found no violation. *Garver v. Tussing, supra*, p. 7.

There are no facts showing that the Commissioner Obert was in any way involved in the proposal put forth by Candidate Halver. Further, even if Commissioner Obert could be said to be involved by listening to the proposal, her actions on April 21, 2014 removed her from any overt act in support of the proposal. *Garver v. Tussing*. The Commissioner determines that a lack of sufficient facts to support a finding of a violation by Commissioner Obert. The claim against Commissioner Obert is dismissed in full

ENFORCEMENT

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner generally cannot avoid, but must investigate a complaint alleging a violation of campaign practices law: “shall investigate,” See, §13-37-111(2)(a) MCA. The mandate to investigate is followed by a mandate to take action as the law requires that if there is “sufficient evidence” of a violation the Commissioner must (“shall notify”, See §13-37-124 MCA) initiate consideration for prosecution.

This Commissioner, having been charged to investigate and decide, hereby determines that Candidate Halver has, as a matter of law, violated Montana’s campaign practice laws, specifically §13-35-221 MCA. Having determined that a campaign practice violation has occurred, 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.

Candidate Halver engaged in substantial words and deeds in making and pursuing employment entangled with his candidacy. His actions were deliberate and not accidental. Excusable neglect cannot be applied to Candidate Halver’s actions. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

The Commissioner determines, however, that the concept of a *de minimis*, however, does apply to limit enforcement. The *de minimis* exception to civil enforcement of a violation of Montana’s campaign practice law is set out and defined by the 9th circuit court of appeals in *Canyon Ferry Rd. Baptist Church of*

E. Helena, Inc. v. Unsworth, 556 F. 3d 1021, 1028-29 (9th Cir. 2009). In *Canyon Ferry* the 9th circuit prohibited civil enforcement of Montana’s campaign finance disclosure requirements, as applied to limited or “*de minimis*” ballot issue activity (limited photocopying, limited staff use and limited use of church property) carried out in support of a ballot initiative. The Commissioner has further applied *de minimis* to an expenditure by an incidental committee. *Raffiani v. Montana Shrugged*, COPP-2010-CFP-17.

Both *Canyon Ferry* and *Raffiani* involved incidental committee activity. However, this Office has also applied the incidental committee *de minimis* standards to candidate election expenditures. See *In the Matter of the Fitzpatrick Complaint*, COPP-CFP-2011-014; *Royston v. Crosby*, COPP-2012-CFP-041. The Commissioner hereby applies the *de minimis* concept to Candidate Halver’s campaign practice activity. The reasons for this application are as follows:

First, Candidate Halver was engaged in a local government race and the Montana legislature has established a *de minimis* approach to local races in the \$500 reporting threshold; §13-37-226(4) MCA.

Second, the time span between the two Candidate Halver overt actions was short, unlike the campaign-long overt actions listed in the Court cases cited in this Decision.

Third, there was no possibility of Candidate Halver’s overt actions being taken seriously enough to change the candidate mix. As Commissioner Obert

put it at the next Commissioner's meeting: "We do not do here what happened in the olden days. (hiring buddies). It's a new day, we follow a science."

The short period of time between the initiation and the end of Candidate Halver's overt actions, combined with the lack of possibility of acceptance means that little harm to the public resulted from Candidate Halver's actions. While there was some harm (several citizens appeared in protest at the April 9, 2014 Commission meeting), the Commissioner determines that the clear and abrupt rejection of the Halver proposal by the Broadwater County commission kept the harm within the *de minimis* principle that the legislature and Courts have set for local government elections. The Commissioner hereby applies *de minimis* and determines that the violations are excused such that prosecution is not justified and will not be pursued. Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, criminal prosecution under §13-35-103 MCA is not justified (See §13-37-124 MCA).

CONCLUSION

Based on the preceding discussion as Commissioner I find and decide that sufficient evidence is lacking to show any violation by Commissioner and Candidate Obert. The complaint against Commissioner/Candidate Obert is dismissed.

Based on the preceding discussion as Commissioner I find and decide that there is sufficient evidence to show that Candidate Halver violated Montana's

campaign practices laws, specifically §13-35-221 MCA. As to enforcement against Candidate Halver, I find and decide that by application of the *de minimis* principle, prosecution is not justified and will not be pursued. The complaint against Candidate Halver is dismissed on that basis by the Commissioner.

DATED this 13th day of May, 2014.



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