

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

|   |                               |
|---|-------------------------------|
| Royston v. Tinsley, Malone and<br>Durgan<br><br>No. COPP 2014-CFP-039 | <u>Dismissal of Complaint</u> |
|---|-------------------------------|

On October 6, 2014, Shelia Royston, a resident of Wilsall, Montana filed a complaint against the county commissioners of Park County, those being Clint Tinsley, Marty Malone and Jim Durgan. Ms. Royston's complaint alleged that the Park County Commissioners violated Montana campaign practice laws by appointing Nels Swandal (a 2014 candidate for election to the Montana legislature from Senate District 30) as interim Park County Attorney and, later, agreeing to Swandal's appointment of Bruce Becker, a 2014 Park County Attorney candidate, as Special Deputy County Attorney.<sup>1</sup>

---

<sup>1</sup> The appointments were made to fill the seat of Park County Attorney Brett Linneweber, who resigned February of 2014 to take a position with the Yellowstone County Attorney's Office.

## **SUBSTANTIVE ISSUES ADDRESSED**

The substantive areas of campaign practice law addressed by this decision are recusal of the Commissioner and whether particular actions by an agency of government can be construed as a violation of §13-35-214 MCA.

## **FINDINGS OF FACT**

The foundational facts necessary for this Decision is as follows:

Finding of Fact No. 1: Park County, Montana falls within the legislative district boundaries of Montana Senate District 30. The position of senator for SD 30 is a partisan position with a four year term. Nels Swandal (Republican) and Mary Murphy (Democrat) are candidates for election from SD30 in the November 2014 general election. (Secretary of State's website, Commissioners records).

Finding of Fact No. 2: Park County Attorney is a non-partisan elected position with a term of four years. The 2014 general election candidates for Park County Attorney are Bruce Becker (current Livingston City Attorney) and Kathy Carrick, the current Deputy Park County Attorney. (Commissioner's records, Secretary of State's website).

Finding of Fact No. 3: Brett Linneweber held the position of Park County Attorney since appointment in 2005. Mr. Linneweber was elected to the position in 2006 and again in 2010. Mr. Linneweber resigned from the position as Park County Attorney as of February 2014. (Park County Clerk & Recorder's Office, Park County Commission meeting minutes).

Finding of Fact No. 4: On Wednesday, February 5, 2014 the Park County Commissioners appointed Nels Swandal as interim Park County Attorney effective February 24, 2014. (Park County Commission meeting minutes, week of February 3, 2014, Livingston Enterprise article February 5, 2014).

Finding of Fact No. 5: On March 6, 2014, 10 days after taking office, Interim Park County Attorney, Nels Swandal, appointed five “Special Deputy County Attorneys”:

1. Bruce Becker - current Livingston City Attorney and 2014 candidate for Park County Attorney.
2. Rebecca Swandal – Mr. Swandal’s daughter and his partner at Swandal Law Office, PLLC.
3. Kendra Anderson – Mr. Swandal’s partner at Swandal Law Office, PLLC.
4. Patrick Dringman, current Sweet Grass County Attorney.
5. Kimberly Deschene, current Meagher County Attorney.

The Resolutions approving each appointment state, in part, “Be it further resolved: That Park County shall provide no fees for this service, but shall provide, as needed, secretarial assistance and investigative assistance.” (Commissioner’s records).

## **DISCUSSION**

Respondents filed their response to the complaint yesterday, October 29, 2014. The response first requests that Commissioner Motl act to recuse or separate himself from this Decision. The recusal standard cited is that §13-37-111(3) MCA. That statute directs that:

If the commissioner determines that considering a matter would give rise to the appearance of impropriety or a conflict of interest, the commissioner is recused from participating in the matter.

This recusal standard does not trigger the attorney general referral process of §13-37-111(5) MCA. Accordingly, the Commissioner may and does resolve this request through this Decision.

The response points to the Commissioner’s positive public description of the complainant, Ms. Royston, as a “gadfly” as the reason for recusal. The

American Heritage Dictionary 2<sup>nd</sup> College Edition defines gadfly as “one that acts as a constructively provocative stimulus”.<sup>2</sup> The Commissioner’s observation as to the nature of the complaints filed by Ms. Royston does not mean that the Commissioner has a bias leading to a conflict of interest, nor do any of the Decisions cited in footnote 2 indicate any sort of a bias.

Lastly, and most importantly, the nature of this Office and its work load dictate that the Commissioner must sparingly use recusal. First, the COPP is a small office with a limited budget such that it cannot afford to hire a replacement contract professional to write Decisions. Second, the work of the COPP concerns campaigns and is therefore imbued with time urgency. The Commissioner can act consistent with urgency in a manner that could not be replicated by outside contract counsel. Primarily for these latter reasons the request for recusal is rejected.<sup>3</sup>

#### 1. There is No Campaign Related Financial Inducement

The Complaint alleges a violation of §13-35-214 MCA. For over 100 years Montana has prohibited acts that amount to “vote buying.” 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, and

---

<sup>2</sup> In the judgment of the Commissioner, this description fits some of Ms. Royston’s past complaints with this Office: *Royston v. Crosby*, No. COPP-2012-CFP-041; *Royston v. Malone*, No. COPP-2012-CFP-050; *Royston v. Livingston Fire Fighters PAC*, No. COPP-2013-CFP-031. The Commissioner notes that he has never met Ms. Royston and therefore his impressions stem solely from the content of the complaints she has filed.

<sup>3</sup> See *Ponte v. Gallik*, No. COPP 2014-CFP-009 also citing to budget motivation for a desire to decline a potential recusal and keep the matter as work performed by in-house COPP people.

221 MCA.

The complaint particularly alleges that the certain deputy county attorney appointments arranged by County Attorney Swandal and approved by the Board of County Commissioners (see FOF No. 5) violated Montana's "vote buying" statute §13-35-214 MCA:

A person may not, directly or indirectly, individually or through any other person, for any election, in order to induce any elector to vote or refrain from voting or to vote for or against any particular candidate, political party ticket, or ballot issue:

- (1) give, lend, agree to give or lend, offer or promise any money, liquor, or valuable consideration or promise or endeavor to procure any money, liquor, or valuable consideration;
- (2) promise to appoint another person or promise to secure or aid in securing the appointment, nomination, or election of another person to a public or private position ...

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. Sections 13-35-214 and 13-35-221 MCA are not among the Chapter 35 provisions that can be civilly enforced. This means that a violation of these sections of law, if found, are enforced 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.

In the context of a greater evidentiary scrutiny afforded a complaint that must be enforced under a criminal statute, the Commissioner is guided by the decisions of prior Commissioners who have uniformly dismissed similar

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).

Further, the Commissioner looks to *Tipton v Sands*, 103 Mont. 1, 60 P. 2d 662 (1936) wherein 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 salary 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." (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.

With the above authority in mind, the Commissioner determines that County Attorney Swandal's action in securing no-cost deputy county attorneys serves the performance of the Park County Attorney office's functions. Any cost savings is related to that Office and cannot be carried over and applied to the legislative candidacy of Mr. Swandal (FOF No. 1) or the Park County

Attorney candidacy of Mr. Becker (FOF No. 2). *Tipton v. Sands* is not applicable on facts for this reason.

Based on the above reasoning the Commissioner determines that the circumstances of appointment of the deputy county attorneys do not create sufficient facts to implicate the County Commissioners in any violation of §13-35-214 MCA.

2. There is No Violation Because of a Creation of Title

As a related issue the complaint alleges that the Park County Commissioners also violated §13-35-214 MCA by imbuing Candidates Becker and Swandal with a title of office (see FOF Nos. 4 and 5). The Commissioner notes that the authority and process of the appointments are not challenged. Accordingly, the Commissioner determines that the appointments are legitimate and the titles appropriately placed.

With the above in mind, a title, once placed, is an accouterment that may be used during an election campaign without assigning a “value” for contribution purposes. Attorney General Opinion, Vol. 51, No. 1 (January 31, 2005), defining election related use of a title or uniform; Advisory Opinion, COPP-2014-AO-002, defining use of a Sheriff’s name on a patrol car; *Fasbender v. Toole* (Deputy Commissioner Honzel), Ethics Opinion, February 21, 2012, defining use of a public facility for campaign publicity purposes.

There being no issue with the authority and process of appointment and no campaign issue with the use of title following appointment the Commissioner dismisses the portion of the complaint related to this issue.

**DECISION**

This Commissioner, having duly considered the matters raised in the Complaint hereby dismisses this complaint.

DATED this 30th day of October, 2014.



Jonathan R. Motl  
Commissioner of Political Practices  
Of the State of Montana  
P. O. Box 202401  
1205 8<sup>th</sup> Avenue  
Helena, MT 59620  
Phone: (406)-444-4622