

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES
OF THE STATE OF MONTANA

IN THE MATTER OF THE)	
COMPLAINT AGAINST)	SUMMARY OF FACTS AND
WILLIAM FLEINER, Lewis and)	STATEMENT OF FINDINGS
Clark County Undersheriff,)	
Helena, Montana)	

Ed Schild of Helena, Montana, in a complaint filed with this office on April 17, 1990, alleges violation of an election law by William Fleiner, Lewis and Clark County Undersheriff, Helena, Montana. Specifically, Schild asserts that Fleiner violated a campaign practice statute by " . . . wearing a hat that had printed on it in big letters, 'Re-Elect Sheriff Chuck O'Reilly'" while being interviewed by a television newsperson at the site of a fire in the Helena Valley on Saturday, April 14, 1990. The fire story, which included the interview with Fleiner, aired on April 15, 1990, on KTVH as part of its 10 p.m. newscast.

The statute applicable to the violation alleged by Schild is section 13-35-226, Montana Code Annotated (MCA), which provides, in pertinent part:

(3) No public employee may 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 his place of employment. However, nothing in this section is intended to restrict the right of a public employee to express his personal political views. [Emphasis added.]

The results of an investigation of the alleged violation, conducted between May 2 and 11, 1990, are set forth in the following summary of facts.

SUMMARY OF FACTS

1. When interviewed on May 2, 1990, Fleiner stated that on Saturday, April 14, 1990, he was off duty and spent the day, along with Don Delka, doing campaign work on behalf of Sheriff Chuck O'Reilly, a candidate for re-election to the office of sheriff.

2. Although he was off duty on April 14, Fleiner indicated that he is always on call, which is typical of law enforcement people.

3. Fleiner said that when he went to Delka's house Saturday around 8:30 a.m. he was already wearing the cap at that time and that he and Delka used Delka's truck to do campaign work.

4. Fleiner said he and Delka happened to be in the truck when they heard over Delka's two-way radio, some time around 11:30 a.m., a report of a fire in or near the maintenance building owned by the Helena Valley Irrigation District on North Montana and of hazardous materials near the fire.

5. Fleiner said he responded to the call about the fire by making a radio call to say he was on his way to the site.

6. Although the radio call reporting the fire was not directed specifically to Fleiner, he said that it was his duty to go to the fire because part of his job as undersheriff is that of assistant rural fire warden (O'Reilly is the rural fire warden and appointed Fleiner as assistant) and that, in any case, someone (probably the "watch commander") would have called or paged him and would have told him to go to the site.

7. Fleiner said the first thing he did on arriving at the fire scene was to meet with Tom Leonard, fire chief for the West

Helena Valley Fire Department, who said the fire had been brought under control, was nearly out, and had not reached the hazardous materials.

8. Fleiner stated that he then assisted Leonard in responding to the media at the scene, a typical activity for Fleiner at such occurrences.

9. Fleiner said that he did not deliberately put on the O'Reilly cap just before the interview. He said that he had been wearing the cap ever since he had put it on early that morning and never gave a thought to its still being on his head as he spoke briefly with television reporters.

10. After the interview was over, Fleiner said that the newsman (Mark Garay) commented, "Nice hat." Fleiner said that he responded, "Do we need to do this interview over?" and heard Garay say, "No."

11. When questioned, Mark Garay said that he did recall saying, "Nice hat," to Fleiner after the interview; however, Garay did not recall Fleiner's asking whether the interview needed to be done over although he cannot deny that Fleiner may have asked the question. Garay simply did not remember its being asked; however, even if Fleiner had asked the question, Garay said that he would not have associated it with his comment about the cap. Rather, Garay would have assumed some technical reason for needing to do the interview again.

12. Garay, who was both shooting film and asking questions, said he is "eighty percent sure he [Fleiner] was wearing the hat when he showed up at the fire." However, Garay said it really did

not register with him that Fleiner was wearing the cap until the interview was over.

13. Delka, who is captain of the sheriff's reserve, a volunteer organization, and who is "on page" 24 hours of the day, said that Fleiner appeared at his door Saturday morning, April 14, wearing an O'Reilly cap and it "never left his head" the rest of the day.

14. Delka said that he cannot remember anyone's taking note of the cap before the KTVH interview.

15. Delka said that he was not within earshot of the interview, so he heard nothing of the interview itself or of any conversation that might have taken place between Fleiner and Garay.

16. When questioned, Fire Chief Leonard said that it "didn't really register at the time" about the kind of cap Fleiner was wearing or even that he was wearing a cap. Leonard said he was under a lot of pressure in dealing with the fire and its attendant danger, so he never consciously made note of the cap when Fleiner arrived on the scene.

17. Leonard also said that he did not notice the cap during the interview because he was looking at the news reporters, not at Fleiner.

18. Leonard said that he became aware of the cap after the interview. He also recalled hearing someone remark, "Nice hat," or words to that effect.

19. Leonard did not hear Fleiner ask anybody about doing the interview over.

20. Laura Tisher, the other KTVH newsperson at the fire

scene, said that she was not consciously aware of the cap Fleiner was wearing. She remembered, when asked to recall, that it was a baseball-type cap; but she could not say what lettering was on the cap, if any.

21. Tisher does not recall hearing Garay's comment about the hat or any other conversation that might have occurred between Garay and Fleiner after the interview. She said that her attention was focused on the aspects of the fire and television equipment.

22. The story of the fire took up a little under two minutes of the KTVH newscast that was broadcast between 10 and 10:30 p.m. on Sunday, April 15, 1990. Fleiner was on camera for approximately eight seconds of that time.

23. During the story, Fleiner's voice could be heard just before he was seen; then the upper part of his body, with the cap on his head, came into view. While he was on camera, Fleiner said ". . . particularly when it starts out an unknown related fire, then there's always cause for concern. Usually the first thing that comes to mind is hazardous materials."

24. During the time the camera was focused on him, Fleiner made no gesture or any other kind of movement to draw attention to the cap he was wearing.

25. This viewer's close and critical review, at the KTVH studios, of that portion of the taped news program devoted to the fire reveals Fleiner wearing a green, baseball-type cap with some white lettering on it. That very close inspection of the tape shows the cap to bear some indistinguishable lettering and possibly something else to the side of what appears to be a star followed

by words that with some real effort can be distinguished to read:

O'Reilly
for
Sheriff

26. A person cued to look for the message on the cap was unable to do so when she first viewed the tape of the fire story at the KTVH studios. On a repeat look at the tape, she finally could make out the word "O'Reilly," but nothing else.

27. Four other disinterested persons were asked to view the tape of the entire fire story, also at the KTVH studios, in the manner in which they might be watching the news at home. They were given no hint as to what they should be looking for prior to viewing the tape. When asked afterwards, none of the four noted that Fleiner was wearing a cap, let alone what was printed on it. They indicated that they were focusing on the story and watching the faces of people in the newscast. After re-running the tape for these four people, who then knew they needed to be looking for something on the cap, one still could not discern the writing on the cap although he saw what appeared to be a star (and thought it might be for a new casino in town); three could make out the word "O'Reilly"; and one of those three also could discern the word "sheriff."

28. An inspection of the actual cap shows that it reads as follows:

VOTE
O'REILLY
for
SHERIFF

The word "vote" is placed in the middle of some lines emanating from the star to its left, much like rays, and no doubt accounts for the fact that it could not be read by any of the persons viewing the taped newscast.

STATEMENT OF FINDINGS

Undeniably, Undersheriff William Fleiner was wearing a cap which supports O'Reilly's re-election as sheriff while he was being interviewed and filmed by KTVH newsmen at the site of a fire in the Helena Valley on Saturday, April 14, 1990. The fire was reported as part of the news broadcast by KTVH on Sunday, April 15, 1990; and an approximate eight second segment of the nearly two minute fire story featured Fleiner wearing the cap.

Fleiner is a full-time employee of the Lewis and Clark County Sheriff's Department. Under the law, he is, therefore, a public employee within the meaning of section 13-35-226(3), MCA, supra.

Two questions then arise. (1) Was Fleiner "on the job" when he went to the scene of the fire? (2) If so, did his appearance in a "VOTE O'REILLY for SHERIFF" cap on a television newscast that covered the fire constitute a solicitation in violation of section 13-35-226(3), MCA?

The facts show that Fleiner is "on call" even when he is off duty, a circumstance that is typical of law enforcement people, fire fighters and others who are employed in occupations that require quick responses to emergencies or other exigencies. If Fleiner, while off duty, received a call asking him to respond to some situation within his area of responsibilities and he did so,

then he would be back on duty--that is, he would be on the job.

It was Fleiner's day off on Saturday, April 14, 1990, when he and Delka began, about 8:30 in the morning, a day of doing campaign work on behalf of O'Reilly. When Fleiner and Delka heard the report of the fire over the radio in Delka's truck, Fleiner considered it his duty to go to the scene of the fire.

In this particular circumstance, Fleiner did not receive a call directing him to go to the fire; therefore, it could be argued that he was not on the job when, on his own volition, he went to the fire scene. But, as already stated, Fleiner maintains that it was his duty to go, even though not specifically called to do so, and that he inevitably would have been called to go to the fire. However he arrived at the scene, I conclude that his going to the fire to be of assistance put Fleiner back on duty and, hence, on the job.

The second issue is whether or not Fleiner's appearance on television wearing the O'Reilly cap constitutes a solicitation of ". . . support for . . . the nomination or election of any person to public office . . ." by a public employee who, as established, was on the job.

Because a number of people--both those who were cued and those who were not--could not read the full written message on the cap, especially the critical word "vote," the question of whether any solicitation took place during the newscast is largely academic. Based on the responses of the people who viewed and re-viewed the taped fire story, it is reasonable to conclude that the ordinary person who viewed the actual telecast on Sunday, April 15, 1990,

likewise either would not have taken note of the cap at all or, if noted, would not have gleaned the message on the cap.

Even if some keen-eyed viewers of the telecast did indeed read the message "VOTE O'REILLY for SHERIFF," I nevertheless conclude that a solicitation in violation of section 13-35-226(3), MCA, did not take place. The story of the fire was obviously not a politically motivated one. None of the key participants--Leonard, the KTVH newspeople nor Fleiner himself--was conscious of the fact that Fleiner was wearing an O'Reilly cap. Understandably, their immediate and continuing attentions were on the fire which, had it reached nearby hazardous materials, would have been cause for greater alarm and evacuation of the area.

Moreover, Fleiner never during the interview did anything to call attention to the cap he was wearing. In fact, he had forgotten that he was wearing it. Clearly, it was not his intent to take advantage of the fire reportage to make a political statement. He was doing his job as he saw it--that is, dealing with an emergency situation--without thought to his attire.

Section 13-35-226(3), MCA, prohibits solicitation of support for the election of a person to public office by public employees while on the job or at their places of employment. Webster's New World Dictionary, second college edition (1978), defines "solicit" as meaning "to ask or seek earnestly or pleadingly; appeal to or for." Based on that definition, Fleiner's activities did not amount to a solicitation of support for the election of Sheriff O'Reilly. The evidence appears undisputed, in fact, that in all probability he was unaware he was wearing the cap with the campaign

message while being interviewed on camera.

CONCLUSION

Based on the facts and these findings, I conclude that Undersheriff William Fleiner did not violate the campaign practice law that prohibits a public employee from soliciting support for a candidate while on the job.

Dated this 15th day of May, 1990.

Dolores Colburg

DOLORES COLBURG
Commissioner of Political Practices