

**BEFORE THE COMMISSIONER
OF POLITICAL PRACTICES
STATE OF MONTANA**

IN THE MATTER OF THE ETHICS	)	FINAL ORDER
COMPLAINT OF MICHAEL FASBENDER	)	and
AGAINST KEN TOOLE	)	DECISION
	)	

Complainant Michael Fasbender (Fasbender) has filed an ethics complaint against Respondent Ken Toole (Toole), alleging that Toole violated Section 2-2-121(3)(a), MCA. The facts are not in dispute and the case has been submitted on briefs. Having fully considered the matter, I conclude that Toole did not violate the statute.

BACKGROUND

On August 20, 2010, Fasbender filed his complaint against Toole who was running for reelection to the Montana Public Service Commission (PSC). By letter dated September 16, 2010, Dennis Unsworth, who was the Commissioner of Political Practices, notified both Fasbender and Toole that the complaint appeared to meet the requirements of 44.10.604 and 44.10.607, ARM, and that an informal contested case proceeding would be initiated in conformance with 44.10.607, ARM. Nothing further was done until August 23, 2011, when David B. Gallik, who then was the Commissioner of Political Practices, appointed me Deputy Commissioner/Hearing Examiner for this case because he had a conflict of interest. At the scheduling conference held

November 29, 2011, the parties agreed that the facts are not in dispute and that the matter could be submitted on briefs. Throughout the proceedings, each party has represented himself.

FACTS

In 2010, Toole was the duly elected Commissioner for PSC District Number Five. He was also the Commission's Vice-Chairman. On February 6, 2010, Toole sent out a press release announcing that he was filing for reelection.

Toole used the PSC conference room to take photographs for use in his reelection campaign. One of the photographs was used in Toole's campaign brochure. The photograph depicts Toole sitting at the chair he used while the Commission was meeting. The photograph includes a portion of the Commissioners' table, Toole's nameplate with the vice-chair designation, and a gavel.

The photograph was taken during the hours the PSC is normally open, but the Commission was not meeting at the time. As an elected official Toole was not required to keep track of his hours and he did not receive accrued vacation time or comp-time. No public employee time and no public equipment or supplies were used in taking the photograph. Toole paid for the brochure and the photographer with campaign funds.

DISCUSSION

The issue is whether Toole's use of the PSC conference room to take a photograph which he included in his campaign brochure

violated Section 2-2-121(3)(a), MCA. That section states:

(3) (a) Except as provided in subsection (3)(b), a public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to 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 unless the use is:

(i) authorized by law; or
(ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.

(b) As used in this subsection (3), "properly incidental to another activity required or authorized by law" does not include any activities related to solicitation of support for or opposition to the nomination or election of a person to public office or political committees organized to support or oppose a candidate or candidates for public office.

In 2010 Toole was a public officer. The PSC conference room is a public facility. Campaign brochures are produced and used to garner support for a candidate's election. That, however, does not necessarily lead to the conclusion that the inclusion of a photograph, such as the one here, in an incumbent's campaign brochure automatically constitutes a violation of Section 2-2-121(3)(a), MCA.

The purpose of the Code of Ethics is set out in Section 2-2-101, MCA.

The purpose of this part is to set forth a code of ethics prohibiting conflict between public duty and private interest as required by the constitution of Montana. This code recognizes distinctions between legislators, other officers and employees of state government, and officers and employees of local government and prescribes some standards of conduct common to all categories and some standards of conduct adapted to each category. The provisions of this part recognize that some actions are

conflicts per se between public and private interest while other actions may or may not pose such conflicts depending upon the surrounding circumstances.

An elected officer who is running for reelection or an elected public officer who is running for another elected office can and is expected to run on his/her record. As Toole points out, it is common in Montana for elected officers who are seeking reelection or running for a different office to use photographs of themselves in or in front of a public building such as the state Capitol or a county courthouse. He has attached to his brief several examples of this campaign practice.

The examples submitted by Toole all involve legislators. Fasbender contends that those campaign materials are not relevant because legislators are not subject to Section 2-2-121(3)(a), MCA. Section 2-2-111, MCA, the section on rules of conduct for legislators, does not contain the proscription contained in Section 2-2-121(3)(a), MCA. However, while legislators are not included in Section 2-2-121(3)(a), MCA, public employees are. There are legislators who are also public employees and thus would be subject to the statute.

Just like any other candidate, a public employee who is running for an elective office can emphasize those things in his/her background and experiences that qualify him or her for the position sought. One of the examples submitted by Toole is

from the campaign materials of a current state senator who is running for attorney general. Included in those materials is a photograph of him on the Senate floor. There certainly is nothing wrong with that. However, another candidate is an assistant attorney general. Under the position advocated by Fasbender, she would be precluded from using a photograph of herself in the Attorney General's office, the State Justice Building, or a courtroom.

At the local level, it probably would not be uncommon for a clerk in a county treasurer's office to run for that office if the incumbent decided not to run. She, however, could not use a photograph of herself in the courthouse, but her opponent could. Similarly, an attorney running against an incumbent county attorney could use a photograph of himself in the courtroom, but the incumbent could not.

As these examples illustrate, a photograph of a public officer or public employee taken in a public building where the officer or employee works would not equate to using a public facility to solicit support for the person's election to a public office. The photograph would be no different than a legislator using a picture of him or herself in the Capitol or a legislative chamber in his/her campaign materials.

While the photograph Toole used pointed out that he was the incumbent and the Commission's vice-chairman, those were facts

and he was entitled to run on them. Moreover, there is nothing to show that Toole was in any way running his campaign out of his PSC office.

For these reasons, I conclude that Toole did not violate Section 2-2-121(3)(a), MCA, and that Fasbender's complaint should be dismissed.

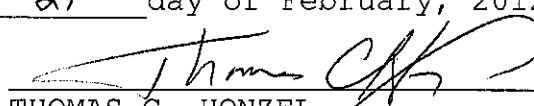
COSTS

Section 2-2-136(2), MCA, provides that "the commissioner may assess costs of the proceeding against the person bringing the charges if the commissioner determines that a violation did not occur." During these proceedings, Toole has represented himself, and it appears that if he incurred any costs they would be minimal. Therefore, costs will not be assessed against Fasbender.

ORDER

IT IS ORDERED that the complaint filed by Michael Fasbender against Ken Toole is **DISMISSED**.

DATED this 21st day of February, 2012.


THOMAS C. HONZEL

Deputy Commissioner of Political Practices

NOTICE: This is a final decision in a contested case. The parties have the right to seek judicial review of this decision pursuant to the provisions of Sections 2-4-701 through 2-4-711, MCA.

c: Michael Fasbender
Ken Toole