

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES
STATE OF MONTANA

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| In the Matter of the Complaint of) | FINDINGS OF FACT, |
| Davison for Governor Against) | CONCLUSIONS OF LAW, |
| Secretary of State Bob Brown) | AND MEMORANDUM |

I. BACKGROUND

Mr. Scot Crockett, Campaign Manager for Davison for Governor (hereinafter "Davison"), filed a complaint against Secretary of State Bob Brown (hereinafter "Brown") on or about April 7, 2004 alleging that Brown has violated Section 2-2-121(3)(a), MCA, of the Montana Code of Ethics. Section 2-2-121(3)(a), MCA, prohibits a public official or public employee from using "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 ... unless the use is ... authorized by law" or "properly incidental to another activity required or authorized by law, such as the function of an elected public officer ... [or] the officer's staff"

II. JURISDICTION

Article XIII, Section 4 of the Montana Constitution declares that the "legislature shall provide a code of ethics prohibiting conflict between public duty and private interest for members of the legislature and all state and local officers and employees." The Montana Legislature responded to this constitutional mandate by enacting Montana's Code of Ethics, Section 2-2-101, et seq., MCA. The Commissioner of Political Practices (hereinafter "Commissioner") has jurisdiction to hear and decide complaints filed under Montana's Code of Ethics, including allegations by Davison that

Brown violated Section 2-2-121(3)(a), MCA. Sections 2-2-136 and 2-2-103(4), MCA. Pursuant to Sections 2-2-136(1)(c), 2-4-603 and 2-4-604, MCA, the Commissioner conducted an informal contested case hearing on May 24, 2004 concerning the following contentions of the parties:

A. Davison's Contentions

1. Brown violated Section 2-2-121(3)(a), MCA, by using federal funds provided under the "Help America Vote Act of 2002," 42 USC § 15301, et seq. (hereinafter "HAVA") to run public service announcements (hereinafter "PSA's") and advertisements that were designed primarily to feature Bob Brown rather than to effectively educate the viewers and listeners regarding voting procedures; and

2. Brown violated 2-2-121(3)(a), MCA, by using HAVA funds to produce and run PSA's and advertisements that were designed to solicit support for Brown's campaign for governor and the PSA's and advertisements were not properly incidental to his duties as Montana's Secretary of State.

B. Brown's Contentions

1. Brown did not violate Section 2-2-121(3)(a), MCA, by using HAVA funds to produce and run PSA's and advertisements because Brown's appearance in the HAVA-funded PSA's and ads was non-partisan and there was no direct or implied endorsement, support, or promotion of any particular candidate, including Bob Brown. The HAVA-funded PSA's and advertisements only provided information about election rights, responsibilities, and changes in voting requirements.

2. Brown did not violate 2-2-121(3)(a), MCA, because he is Montana's chief election officer and the public official charged with the primary responsibility for

implementing HAVA in Montana. Brown also was authorized by law and the HAVA State Plan to use PSA's and advertising for the purpose of educating voters about voting procedures, voting rights, and voting technology.

III. FINDINGS OF FACT

1. Bob Brown was elected to a four-year term as Montana's Secretary of State in the November 2000 general election. Brown began serving his four-year term as Secretary of State in January of 2001. See Article VI, Section 1 of the Montana Constitution.

2. Montana law provides that Montana's Secretary of State is "the chief election officer" and that it is his "responsibility to obtain and maintain uniformity in the application, operation, and interpretation of the election laws" other than those election laws administered by the Commissioner (Title 13, chapters 35 and 37). See Section 13-1-201, MCA. Montana's Secretary of State also has been assigned other election-related responsibilities, including the duty to design election forms (13-1-202(2), MCA), evaluate voting system performance, accuracy, security and accessibility (13-1-202(4), MCA), distribute training materials to election judges (13-1-203(2), MCA), maintain current and accurate election records (13-1-204, MCA) and certify to the governor the names of those individuals who have won Montana's election contests (2-15-401(1)(f), MCA).

3. HAVA became federal law in October of 2002. HAVA was enacted to prevent a recurrence of the vote problems that plagued the 2000 presidential election. States, including Montana, will receive substantial federal funding under HAVA to improve the administration of elections. HAVA authorizes expenditures for educating voters about voting procedures, voting rights, and voting technology. See, e.g., 42 USC §

15301(b)(1)(C), Brown Ex. 1. Montana will ultimately receive approximately \$9.35 million to implement HAVA. Of this amount, Montana has budgeted 10% (\$930,000) for marketing and educational efforts.

4. The 2003 Montana Legislature authorized Brown, as Montana's Secretary of State, to administer and implement HAVA in Montana. Section 13-1-209, MCA, creates a "federal special account in the state treasury to the credit of the office of the secretary of state" and provides that HAVA funds must be deposited in the account and "used only for the purposes specified by the federal law under which the money was provided." In addition to Section 13-1-209, MCA, the 2003 Legislature enacted several other statutes substantially revising Montana's voting procedures. See, e.g., Davison Ex. 2, pp. 10-12 and Brown Ex. 8, pp. 10-12.

5. Brown hired Amy Sullivan on May 1, 2003 to implement and administer the HAVA program in the Secretary of State's office (her official job title is "HAVA Coordinator"). Ms. Sullivan, a Montana native, received both a bachelor's and master's degree in journalism from Northwestern University. Ms. Sullivan had previously worked on media relations' matters for Senator Conrad Burns and Representative Dennis Rehberg. Ms. Sullivan wrote the "Preliminary State Plan" that ultimately was used to implement HAVA in Montana. Ms. Sullivan also wrote the text of most of the PSA's and other advertisements used to educate the public about HAVA, including the PSA's in which Brown appeared. She was the key decision-maker in implementing the HAVA State Plan.

6. Brown announced the appointment of a 20-member "Election Reform Advisory Committee" on January 24, 2003. The Advisory Committee was comprised of

Democratic and Republican legislators, elected local government officials, and representatives of such disparate groups as the League of Women Voters, the Montana coordinator for the Americans with Disabilities Act, AARP, the State Advisory Committee on Civil Rights, a political science professor, Project Vote Smart, and the Montana Association for the Blind. The Advisory Committee was created to help Brown implement HAVA in Montana. See, e.g., Davison Ex. 2 and Brown Ex. 8.

7. The Election Reform Advisory Committee played an oversight role in implementing HAVA. The Advisory Committee reviewed the Preliminary State Plan to implement HAVA. A final State Plan was never written or proposed. The Preliminary State Plan became the State Plan and was used by the Secretary of State's office to implement HAVA.

8. The HAVA State Plan recognizes that extensive educational efforts would be necessary in Montana because of this state's large land area and rural demographics. The Plan states that the "secretary of state will use public service announcements as a way to inform voters of their rights and responsibilities under HAVA" and that the announcements "will be in audio or video format." Davison Ex. 2, p. 17 and Brown Ex. 8, p. 17. The State Plan also indicates that the secretary of state "will consider" taking out newspaper and magazine ads in addition to taking several other actions designed to educate the public about HAVA. Id.

9. Amy Sullivan testified that she was instructed by Brown to eliminate all "fluff" from the HAVA ads and "to make sure you follow the letter of the law" when writing the HAVA state plan and preparing PSA's. Brown also told Ms. Sullivan to make sure the HAVA advertisements were purely educational.

10. Ms. Sullivan testified that she made the decision to have Brown appear in the HAVA PSA's. She believed it was important that Montanans hear about the new voting requirements, especially the voter ID changes, from the public official responsible for administering and enforcing those changes.

11. Amy Sullivan discussed Brown's appearance in the HAVA PSA's with the Advisory Committee. No one on the Advisory Committee objected, but the Committee did advise Ms. Sullivan that other individuals should be included in the HAVA PSA's and ads in addition to Brown. Ms. Sullivan agreed and followed the Advisory Committee's recommendation.

12. Brown filed a "Statement of Candidate" (Form C-1) with the Commissioner's office on July 15, 2003. Brown's C-1 filing confirmed his decision to run for governor.

13. A HAVA radio PSA was prepared on or about June 3, 2003. See Davison Ex. 3, p. 1. The radio PSA featured Brown's voice and asked the public to review and comment on the HAVA State Plan prepared by Amy Sullivan and approved by the Advisory Committee. The Secretary of State's office spent \$13,755 airing the radio PSA's in June and July of 2003. Davison Ex. 6, p. 1 and Brown Ex. 2, p.1.

14. The Secretary of State's office issued a "Limited Solicitation" for a "Media Buyer and General PR Consultant" in July of 2003. Amy Sullivan prepared the Limited Solicitation, which indicates that it is "an informal procurement method for purchases between \$5,001 and \$25,000." Media buying and PR services were being sought to implement HAVA in Montana and the Limited Solicitation noted that Montana's State Plan had "identified an overall budget of \$930,000 to be used for marketing and educational efforts." The solicitation also stated that the "Secretary of State's Office has

elected to handle most of the public relations work internally." Davison Ex. 7, p. 1. The Secretary of State's office issued only one other Limited Solicitation for work on HAVA matters.

15. On or about September 23, 2003, Amy Sullivan contacted elected secretaries of state in other states to determine their opinions about the propriety of appearing in HAVA PSA's if the secretary was a candidate for re-election or higher office.

Four secretaries of state responded in writing as follows:

A. North Dakota's secretary indicated his HAVA ads "probably will not feature myself" because he did not want "to give the slightest hint of impropriety" and the HAVA ads could be effective without his personal appearance. Davison Ex. 5, p. 1.

B. Minnesota's secretary appeared in 2002 PSA's when she was running for re-election and "a couple of stations" called "to say they would not play them, but others did." She did not expect that her appearance in 2004 HAVA ads would be "a big deal" because she was not up for re-election in 2004. *Id.*, p. 3.

C. Missouri's secretary indicated that he would appear in HAVA PSA's but that decision was subject to change because he is considering running for higher office. He also indicated that he agreed that the "state's chief elections official should play a prominent role in the announcements under most circumstances." *Id.*, p. 4.

D. Nebraska's secretary responded by stating that he agreed PSA's featuring the chief elections officer were appropriate "but timing is the issue." He said he will want to have "a piece of the PSA's but balance it with youth, elderly, physically and

visually impaired" because then "it won't be JUST me showing up on the PSA." Id., p. 2.

16. Amy Sullivan emailed the Commissioner of Political Practices on October 2, 2003. Ms. Sullivan indicated she was making sure "we have left no stone unturned in making sure everything is done appropriately according to Montana and federal laws." Ms. Sullivan briefly described Brown's intended participation in the HAVA educational effort and indicated that the Secretary of State's office "originally intended to have ... Brown featured, along with other prominent Montanans, in all of our Television PSA's." Those plans, according to Ms. Sullivan, have been "scaled back" and Brown would be featured "in a select few of those PSA's." She went on to state that "it appears that the Secretary of State should be able to appear in the [HAVA] PSA's without reprisal from" the Commissioner's office. Brown Ex. 4.

17. The Commissioner responded to Amy Sullivan's October 2, 2003 email by indicating that "there is no prohibition in state law against Secretary of State Brown appearing in public service announcements, assuming his appearances in the PSA's are nonpartisan, and there is no direct or implied endorsement, support, or promotion of any particular candidate (including himself)."¹ Brown Ex. 5.

18. The Secretary of State's office ran HAVA newspaper ads featuring Brown in Montana's weekly papers the second week of November 2003. Davison Ex. 3, p. 2.

The newspaper ads were designed to look like an "op-ed" piece and contained a picture

¹ The Commissioner's office historically has attempted to respond to requests for guidance on how to comply with laws administered by the Commissioner of Political Practices. Such "informal" opinions are generally given subject to the following conditions: (1) the request for an informal opinion must be in writing; (2) the informal opinion is limited to the facts presented by the person requesting guidance from the Commissioner's office; and (3) the Commissioner advises the recipient of the informal opinion that the Commissioner reserves the right to investigate a properly filed complaint under the laws administered by the Commissioner and to determine whether a violation has occurred.

of Brown. The ad discussed recent federal and state voting changes, including the new voter identification requirements, and advised readers to visit Brown's Secretary of State web site or call his capitol office if they had questions about HAVA. *Id.* The Secretary of State used \$6,665 of HAVA funds to pay for the ads. Davison Ex. 6, p. 1 and Brown Ex., p. 1.

19. On November 13, 2003, Representative Larry Cyr of Butte wrote a letter to the Commissioner complaining about the HAVA newspaper advertisement. Representative Cyr stated that there is "absolutely no reason for Secretary Brown to use his picture and by-line in a Public Service Announcement" and pointed out that there is no indication of who paid for the ad. Brown Ex. 6, p. 1.

20. The Commissioner responded to Representative Cyr's letter on November 14, 2003. The Commissioner advised Representative Cyr that there was no language in the HAVA newspaper ad "that could be construed to constitute advocacy of the success or defeat of any candidate for any political office to include the office of governor for which Secretary Brown has indicated he will file." The Commissioner further advised that the ad "would not be construed to be 'election material' under the statutes over which this office has jurisdiction." Brown Ex. 6, p. 3.

21. Brown's chief of staff in the Secretary of State's office circulated an email to the Secretary's staff on November 19, 2003. The email indicated that the Federal Election Commission had just advised that "there is no federal prohibition on an elected official doing PSAs or paid PSAs at any time before an election" but that a PSA would trigger the Equal Time Rule "within 45 days of the primary and 60 days of the general

election." Ms. Haffey's memo stated that an opponent would "be able to buy air time at the same rate of the paid PSA." Brown Ex. 10.

22. Pat Davison, who is competing with Brown for the 2004 Republican gubernatorial nomination, wrote Brown on December 3, 2003 to request that Brown "immediately terminate the use of taxpayer dollars for advertising promoting you and your candidacy for Governor" Davison asked Brown to reimburse the taxpayers for the money already spent by the Secretary of State's office on the ads. Davison Ex. 1.

23. The first group of HAVA television PSA's were run from November 2003 through March 2004. The Group 1 TV PSA's consisted of five commercials. Brown personally appeared in four of the five Group1 PSA's. Former Attorney General Joe Mazurek was featured in the fifth Group 1 PSA. The Group 1 PSA's briefly identified changes in the voting process and technology. Davison Ex. 3 and 4 and Brown Ex. 2, Attachment 3. The Secretary of State's office spent \$162,049 to run the Group 1 HAVA television PSA's. Davison Ex. 6, p. 1 and Brown Ex. 2, p. 1.

24. In addition to the Group 1 television PSA's (Finding of Fact 23), the weekly newspaper ad (Finding of Fact 18), and the radio PSA (Finding of Fact 13), the following HAVA-funded PSA's and advertisements were produced and run by the Secretary of State's office:

A. A newspaper poll worker ad ran in March of 2004. The advertisement did not feature or reference Brown. The ad did indicate that additional information could be obtained from the Secretary of State's web site. A total of \$5,837 was spent on the poll worker newspaper advertisement. Davison Ex. 2 (Attachment 4), 3 and 4 and Brown Ex. 2 and 9.

B. Group II television PSA's were run from April through June 2004. None of the Group II PSA's feature or mention Brown. Two of the PSA's feature former Governor Marc Racicot and Carroll College football coach Mike Van Diest. The other Group II PSA's were created by the Montana Advocacy Program and the Montana Council on Developmental Disabilities. A total of \$91,248 was spent on the Group II PSA's. *Id.*, but see Attachment 5 to Davison Ex. 2.

C. A newspaper voter identification advertisement was run in May and June 2004. This ad did not feature or mention Brown. The advertisement does indicate that the Secretary of State's office can be contacted for additional information. A total of \$54,668 was spent on the voter ID advertisement. *Id.*, but see Attachment 6 to Davison Ex. 2.

D. Billboard voter identification ads were placed throughout Montana in May and June of 2004. Brown was not featured or mentioned in the billboard ads. A total of \$16,653 was spent on the billboard advertisements. *Id.*, but see Attachment 7 to Davison Ex. 2.

25. A total of \$350,875 was spent on PSA's and advertisements from June of 2003 through June of 2004. Brown appeared personally in four of the nine television PSA's. Expenditures for HAVA advertisements in which Brown personally appeared or was featured totaled \$150,059.20, approximately 42.7% of the amount spent on advertising and PSA's before the June 2004 primary election. The Secretary of State's office ceased running HAVA advertisements or PSA's featuring Brown 60 days before the primary election even though the Equal Time Provision for TV ads did not apply until 45 days before the June 8, 2004 primary.

26. Amy Sullivan testified that it was important to run the HAVA PSA's and ads early and often to make sure that voters understood the changes that had been made in Montana's voting laws. For example, HAVA was effective January 1, 2004 and Montana was one of six states to apply HAVA requirements to all elections. It was important, in Ms. Sullivan's opinion, to make sure all voters were aware that it would be necessary to have acceptable voter identification before they could vote in a school or water and sewer district election after January 1, 2004. Some Montana counties held elections as early as February 2004 and a total of seventeen Montana counties have held elections in 2004 as of the date of the hearing in this matter.

27. Susan Balter-Reitz testified as an expert witness for Davison. Dr. Reitz is a professor at Montana State University - Billings. She has a Ph. D. from the University of Washington in speech communication, a Master's Degree from the University of Wyoming in communication and mass media, and a bachelor's degree in communication from Eastern New Mexico University. Dr. Reitz reviewed the text of the PSA's and advertisements, the media buys, the HAVA State Plan and other documentation in this matter.

Her direct testimony included the following opinions:

A. The four Group I television PSA's in which Bob Brown personally appeared were visually and textually designed to feature Brown. Dr. Reitz testified that featuring Brown at the beginning and the end of the four TV PSA's was an attempt to place the focus on Brown and that is not necessary when conducting an educational campaign.

B. Dr. Reitz testified that spreading the TV PSA's evenly over a seven-month period was not the best way to educate the public. Instead, Dr. Reitz believes

educational efforts can be far more successful if media buys are concentrated right before the target event -- the June primary or the November general election. It is not necessary to have seven months of equal buys in each month.

C. It was not necessary to feature Brown in the PSA's and a different design of the ads would have been more effective.

D. The HAVA media buy was a buy for saturation and the saturation positively affected Brown's name recognition.

E. Because the HAVA PSA's were purchased, the ads had better "reach" than normal PSA's that are often donated.

28. During cross-examination, Dr. Reitz testified as follows:

A. The video PSA's all used the same format -- the spokesperson was featured at the beginning and the end of each ad regardless of whether Brown was featured in the PSA.

B. She was not aware that HAVA was effective on January 1, 2004.

C. Dr. Reitz agreed that the PSA's featuring Brown were not targeted at Republican dominated areas of the state and that the media buys were evenly distributed throughout Montana.

D. The television PSA's were uniform and consistent in the presentation of the HAVA message.

E. The HAVA PSA's did not advocate Brown for governor nor did they mention that Brown was a candidate for governor.

F. Brown is Montana's chief election officer.

29. Amy Sullivan addressed Dr. Reitz's testimony as follows:

A. Ms. Sullivan believed it was important to feature the public official responsible for enactment of HAVA-directed changes in Montana and the person responsible for implementing HAVA in Montana. The Secretary of State's office, at Brown's direction, presented HAVA legislation to the 2003 Montana Legislature. The HAVA legislation submitted by the Secretary of State's office ultimately was enacted by the Legislature. Brown also was given legislative authority to spend HAVA funds. Because of Brown's involvement in the 2003 HAVA legislative debate, Ms. Sullivan believed Brown was an appropriate spokesperson for the HAVA PSA's and advertisements. In Ms. Sullivan's opinion, it was important to have one primary spokesman to contact and hold accountable for the changes in Montana law. For example, she testified that the voter identification requirements mandated by HAVA were somewhat controversial and the voters should have someone to blame if they disliked having to show ID before being allowed to vote. Ms. Sullivan admitted, however, that the HAVA PSA's did not feature legislators who were the prime sponsors of the 2003 HAVA legislation.

B. Ms. Sullivan believed that the even distribution and airing of HAVA PSA's over a seven-month period was necessary because of HAVA's January 1, 2004 effective date and the early elections being held in some Montana counties. She disagreed with Dr. Reitz's assertion that the HAVA educational campaign would have been more effective if the ads had been concentrated in the weeks preceding the 2004 primary and general elections. According to Ms. Sullivan, Montana had to begin its voter education PSA's in late 2003 to ensure that voters involved in local elections held

as early as February of 2004 were aware they would have to bring identification to the polling place.

C. Amy Sullivan denied that the HAVA PSA's in which Brown appeared were designed to accomplish anything more than to educate the public about the significant changes in Montana's voting laws.

D. Ms. Sullivan testified that the HAVA PSA's and advertisements were effective and accomplished the goal of educating Montana's voters. In the first election to be held under the new HAVA procedures in Montana (a Lockwood Sewer District election held in February of 2004), only one voter forgot to enclose an acceptable identification in an absentee ballot. In the seventeen Montana counties in which early elections were held in 2004 (elections held before the May 24, 2004 hearing in this matter), there were only a limited number of disqualifications in eight of the seventeen counties.

IV. DISCUSSION AND MEMORANDUM

Brown is currently serving as Montana's Secretary of State and he is a "public officer" as defined in Montana's Code of Ethics. Sections 2-2-102(8) and 2-2-102(11), MCA; see also Article VI, Section 1 of the Montana Constitution. As a public officer, Brown 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 ... unless the use is ... authorized by law" or "properly incidental to another activity required or authorized by law, such as the function of an elected public officer ... [or] the officer's staff" Section 2-2121(3)(a), MCA. Davison alleges that Brown used the public time, facilities, equipment, supplies, personnel and

funds of the Secretary of State's office in a manner designed to solicit support for Brown's campaign for governor in violation of Section 2-2-121(3)(a), MCA.

Specifically, Davison alleges that:

1. Brown's HAVA PSA's were primarily designed to feature Brown rather than educate the voters; and

2. Brown used HAVA funds to make and run PSA's and advertisements designed to solicit support for Brown's gubernatorial campaign and the HAVA expenditures were not properly incidental to Brown's duties as Secretary of State.

Davison contention 1 is not a violation of Section 2-2-121(3)(a), MCA, even if true. Section 2-2-121(3)(a), MCA, prohibits the use of public resources and personnel to solicit support for or opposition to a candidate or ballot issue. Nothing in the plain meaning of the words in 2-2-121(3)(a), MCA, makes it illegal for a PSA to feature Brown or any other elected official unless the PSA is determined to be a solicitation of support or opposition to a candidate or ballot issue. Nothing in 2-2-121(3)(a), MCA, makes it illegal for a public officer to run PSA's that may have the effect of increasing the public officer's name recognition. The plain language of 2-2-121(3)(a), MCA, also does not suggest that Brown can be found to have committed an unethical act if the PSA's did not accomplish the intended goal of educating the public. Judging the effectiveness of PSA's does not fall within the Commissioner's jurisdiction under Section 2-2-121(3)(a), MCA. It should be noted, however, that there is substantial credible evidence in the record that the HAVA educational campaign was effective. See, e.g., Findings of Fact 8, 26, and 29. Even Davison's expert witness did not question the effectiveness of the HAVA educational program, which included the PSA's featuring Brown. Dr. Reitz only

asserted that the educational objectives of the HAVA State Plan could have been accomplished without featuring Brown and that the educational component would have been more effective if concentrated in the weeks preceding the primary and general elections rather than distributed evenly over a seven-month period.

The remaining Davison contention to be addressed is whether the HAVA PSA's featuring Brown constituted the use of public resources and personnel to "solicit support for" Brown's gubernatorial campaign in violation of Section 2-2-121(3)(a), MCA. There are no Montana court cases interpreting the "solicit support for" language of Section 2-2-121(3)(a), MCA. Similarly, there is no further definition of the phrase "solicit support for" in Montana's Code of Ethics. Conversely, there is substantial case law interpreting virtually identical "support for" language in federal and Montana laws regulating contributions and expenditures for candidate and ballot issue campaigns. See, e.g., 2 USC § 431 and Sections 13-1-101, 13-35-226, 13-37-101, et seq., MCA and ARM 44.10.101 et seq. Accordingly, the question of whether Brown's HAVA PSA's constituted solicitation of support for his gubernatorial candidacy must be based on the case law defining when the government may regulate political speech.

Brown asserts that the landmark U.S. Supreme Court decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) establishes that political expenditures only can be regulated if express words of support for or opposition to an identifiable candidate (e.g., "vote for" or "elect") are involved. *Id.*, at p. 44 and 45. See Brown's May 27, 2004 Section 2-2-121(3)(a) Brief, pp. 8-10. Brown then cites several U.S. circuit court decisions that have embraced the *Buckley* precedent. See, e.g., *Chamber of Commerce of U.S. v. Moore*, 288 F. 3d 187, 193 (5th Cir. 2002); and *Federal Election Commission v. Furgatch*, 807

F. 2d 857 (9th Cir. 1987). Brown discusses *Furgatch* because the 9th Circuit Court held that the context of political advertising could be considered in the absence of express advocacy but cautioned that the "context cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words." *Id.*, p.864. The *Furgatch* court also held that message in the ad must contain a "clear plan of action" and not be speech that is "merely informative." *Id.* Davison's June 1, 2004 Reply Brief cited no cases addressing Brown's express advocacy contentions.

Brown's reliance on the express advocacy cases is misplaced. The express advocacy cases cited in Brown's May 27, 2004 Brief apply to political expenditures by independent political committees and do not apply to expenditures "coordinated" by a candidate and his or her supporters. See *Buckley*, *supra*, p. 78; see also *Akins v. Federal Elections Commission*, 101 F. 3d 731, 741 and 742 (D.C. Cir. 1996). In other words, if the PSA expenditures were determined to be coordinated expenditures, such expenditures would be reportable as Brown campaign expenditures under Title 13, chapter 37, MCA, and could then trigger a potential ethics inquiry under Section 2-2-121(3)(a), MCA; however, Davison did not raise the coordinated expenditure issue in his prehearing contentions nor did Davison argue or present any evidence that the HAVA PSA's featuring Brown were coordinated political expenditures at the May 24, 2004 hearing concerning this issue. The decision in this matter must be based on the record and the coordinated expenditure issue was not raised or presented by Davison.²

² It must also be noted that Davison has not filed a complaint under Title 13, chapter 37, MCA, alleging that Brown has failed to report the cost of the HAVA PSA's featuring Brown as a coordinated gubernatorial campaign expenditure.

It must be stressed that the existing record in this matter contains extenuating facts indicating that the coordinated expenditure issue may be a non-issue. Brown's HAVA expenditures were clearly within the scope of duties historically assigned to secretaries of state by Montana law. The 2003 Legislature unequivocally gave Brown authority to implement HAVA and spend the HAVA funds made available in Montana. An independent and bi-partisan Advisory Committee discussed and did not object to Brown appearing in some HAVA PSA's. Brown's HAVA PSA's and advertisements explained the substantial revisions to Montana's voting laws dictated by Congress and mandated by the 2003 Montana Legislature. Brown's HAVA PSA's and advertisements do not solicit support for Brown's gubernatorial candidacy or even mention that Brown is a gubernatorial candidate. Although Davison's expert witness testified that Brown's HAVA expenditures positively affected Brown's name recognition at a time when he was an announced candidate for governor, Davison presented no evidence or arguments to establish that the HAVA PSA's featuring Brown were part of a coordinated expenditure strategy by the Brown campaign for governor. Davison's expert witness also conceded that the HAVA PSA's were uniformly scripted and evenly distributed throughout Montana. The HAVA PSA's featuring Brown (and all of the HAVA PSA's) did not target Republican-dominated areas of the State. Considering both the wording and context of the HAVA PSA's and advertisements, there is no factual basis to conclude that the HAVA advertising constituted solicitation of support for Brown's gubernatorial campaign. The only express advocacy in the HAVA PSA's and advertisements was that Montanans should vote!

Other testimony and facts in this matter reinforce the conclusion that Brown's HAVA expenditures did not violate Section 2-2-121(3)(a), MCA. Brown's expenditure of HAVA funds was mandated by federal law and authorized by the 2003 Montana Legislature. Brown's HAVA Coordinator, at Brown's direction, made a good faith and documented effort to ensure that the HAVA expenditures complied with applicable federal and state laws. The Secretary of State's office stopped running the HAVA PSA's featuring Brown two weeks before the deadline for triggering the "equal time" provisions of federal law (60 days before the June 8, 2004 primary). Davison's expert witness conceded that Brown is Montana's chief election officer and that Brown has a duty to administer and enforce Montana's election laws. Because the 2003 Legislature applied HAVA to all elections in Montana, it was necessary to begin running PSA's and other ads in November of 2003 so that voters in February of 2004 would know about the revisions in the voting laws. Brown created a bi-partisan Advisory Committee to review and approve the State Plan implementing HAVA. Brown acted responsibly in implementing HAVA and he sought appropriate oversight in performing his duties as Montana's chief election officer responsible for implementing HAVA.

Finally, the 2001 legislative amendments to Section 2-2-121(3)(a), MCA, require that Davison's expansive interpretation of this statutory provision be rejected. Before 2001, Section 2-2-121(3)(a), MCA, prohibited the use of public resources and personnel "for any campaign activity persuading or affecting a political decision." See Brown Ex. 7. The Commissioner's office sought the 2001 amendments to 2-2-121(3)(a), MCA, and other provisions of the Ethics Code because these provisions were overly broad and unenforceable. It was repeatedly suggested to the Commissioner's office before the

2001 amendments were adopted that a governor's appearance at a press conference in his office to express an opinion about a current political issue or a legislator writing a hometown newspaper column while on the job in Helena constituted a "campaign activity persuading or affecting a political decision." The present language of 2-2-121(3)(a), MCA, which was borrowed from Section 13-35-226(4), MCA, was necessary to avoid the over-breadth constitutional issues that existed under the pre-2001 language.

Based on the preceding, it is not necessary to examine two other Section 2-2-121(3)(a), MCA, issues -- whether HAVA PSA's and advertisements featuring Brown were authorized by law (2-2-121(3)(a)(i), MCA) or whether the HAVA PSA's and advertisements featuring Brown were properly incidental to another function performed by Brown as Secretary of State (2-2-121(3)(a)(ii) and (b), MCA). It should be noted, however, that Brown would have had credible and legitimate arguments that the "authorized by law" and "properly incidental" provisions of 2-2-121(3), MCA, would have excused otherwise illegal conduct based on the facts in this matter.³ HAVA was a federal law mandating that the states revise voting procedures. HAVA appropriated substantial federal dollars to educate each state's voters about the changes to be made in voting procedures. The 2003 Montana Legislature clearly and unequivocally authorized Brown to implement HAVA in Montana and to spend and use the HAVA funds as specified under federal law. As Montana's chief election officer, the delegation of HAVA functions to Brown was appropriate and consistent with the duties historically performed by Montana's Secretary of State. None of the HAVA PSA's and

³ If any of Brown's HAVA PSA's had expressly advocated support for Brown's gubernatorial candidacy, such expenditures would have been reportable as coordinated expenditures under Title 13, chapter 37, MCA.

advertisements featuring Brown suggested in any way that Brown was a candidate for governor or that a vote should be cast for Brown or any other candidate for public office.

Based on the record in this matter, this decision exonerates Brown of any wrongdoing under Section 2-2-121(3)(a), MCA. It may be time, however, for the Montana Legislature to create a bi-partisan committee to address the increasing use of PSA's in election years by both Democratic and Republican elected officials. Such a bi-partisan legislative examination should consider a host of complex issues including whether standards other than those described in this decision can or should be applied to the use of public or private funds for PSA's when a public official is also a candidate. For example, an elected official seeking re-election or election to another office may have few if any First Amendment rights when appearing in PSA's in an election year. In striking a balance between an elected official's public duties and the First Amendment, it may be legally permissible for the Legislature to prohibit an elected official from using public funds to personally appear in or use his or her name in PSA's after the elected official has announced his or her candidacy for re-election or election to another office. A careful and bi-partisan legislative balancing of an elected official's duty to perform his or her public service obligations and the First Amendment may minimize or eliminate future disputes over the use of PSA's by elected officials in an election year.

It also must be emphasized that Montana's elected officials who choose to run PSA's in election years will be subject to greater scrutiny as a result of this decision. The coordinated expenditure issue should be carefully examined by elected officials, because a determination by the Commissioner's office that PSA's are part of a coordinated campaign expenditure will have potential adverse consequences for the

elected official under both Title 13, chapter 37, MCA, and the Code of Ethics. That is especially true where, unlike Brown's implementation of HAVA, the elected official has not received express legislative authorization to make expenditures involving PSA's.

V. COSTS

Section 2-2-136(2), MCA, provides that the Commissioner may assess the costs of an ethics proceeding against the person bringing the charges if the Commissioner determines that a violation did not occur. I have determined that costs should not be assessed against Davison in this matter. See the more detailed discussion of the assessment of costs issue in the June 2, 2004 Order Granting Summary Judgment Regarding Section 2-2-121(2), MCA, issued simultaneously with this decision.

VI. CONCLUSIONS OF LAW

1. Brown, as Montana's duly elected Secretary of State, is a public officer as defined in Montana's Code of Ethics. See Sections 2-2-102(8) and 2-2-102(11), MCA, and Article VI, Sections 1 through 4 of the Montana Constitution.

2. As a public officer under Montana's Code of Ethics, Brown is subject to the prohibitions, requirements and penalties of the Code. Sections 2-2-101, 2-2-102(8), 2-2-102(11), 2-2-103, 2-2-104, 2-2-105, 2-2-121, 2-2-131 and 2-2-136, MCA.

3. Brown did not violate Section 2-2-121(3)(a), MCA.

4. Costs should not be assessed against Davison in this matter. Each party shall be responsible for payment of their respective costs and attorney fees in this matter.

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DATED this 2nd day of June, 2004.

Linda L. Vaughey
Commissioner of Political Practices

NOTICE:

This is a final decision in a contested case. Any party to this proceeding may seek judicial review of this decision as provided in Section 2-2-136(3), MCA, and Title 2, chapter 4, part 7 of the Montana Administrative Procedure Act.