

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the Complaint)
Against Excellence in Voting)
) **SUMMARY OF FACTS**
) **AND**
) **STATEMENT OF FINDINGS**

Senator Jim Elliott filed a complaint alleging that Excellence in Voting violated Montana campaign finance and practices laws.

SUMMARY OF FACTS

1. Senator Jim Elliott was the Democratic candidate for District 7 of the Montana State Senate in the 2004 election. His opponent was Fred Carl, a Republican. Senator Elliott prevailed in the election.
2. Following the election Senator Elliott filed a campaign finance and practices complaint based on a campaign ad that was produced by a political committee known as Excellence in Voting (EIV). Senator Elliott's complaint alleges that the ad misrepresented Senator Elliott's votes on several matters in the 2003 regular session of the Montana Legislature.
3. William Franks is the Treasurer of EIV. Ray Thompson is the Chairman of EIV. Bryce Lathrop is a Kalispell ad publicist.
4. Bryce Lathrop had previously worked on campaign ads for the Flathead County Republican Central Committee. Ray Thompson saw the ads and sent Mr. Lathrop a folder containing information regarding voting records of Montana legislators

obtained from the Montana Wildlife Federation. Mr. Thompson also sent Mr. Lathrop some ads that EIV had created but had not yet published.

5. EIV hired Mr. Lathrop to create campaign ads reflecting the voting records of several Democratic legislators, including Senator Elliott, on several matters. Mr. Lathrop created the ad by “cutting and pasting” from previous ads he had created, and using information he had obtained from the Montana Wildlife Federation and from EIV.

6. The EIV ad was published in the October 21, 2004 Daily Inter Lake, a Kalispell daily newspaper, and ran only one day. The ad contained the following text:

Of the most significant legislative action that enhances hunting in Montana over the next several years, Northwest Montana Democrats were not supportive.

In fact, Jim Elliott from Trout Creek was the only Senator that voted in favor of the wolf over Montanans!

The ad then listed votes of five legislators on several bills and resolutions, including:

House Bill 42 – passed 64-36 in House and 45-5 in Senate. Require management of wildlife to be sustainable in its [sic] habitat.

Joey Jayne – D Arlee	VOTED NO
Paul Clark – D Trout Creek	VOTED NO
Tim Dowell – D Kalispell	VOTED NO
Eileen Carney – D Libby	VOTED NO
Jim Elliott – D Trout Creek	VOTED NO

House Joint Resolution 32 – Passed 79-21 in House and 49-1 in Senate. Resolution urging wolf delisting.

Joey Jayne – D Arlee	VOTED NO
Paul Clark – D Trout Creek	VOTED NO
Tim Dowell – D Kalispell	VOTED NO
Eileen Carney – D Libby	VOTED NO
Jim Elliott – D Trout Creek	VOTED NO

The ad also contained representations regarding the voting records of the five listed legislators on SB 395. The ad concluded with the statement: “100% of NW Montana Republican Legislators Voted Yes!”

7. The EIV ad that ran October 21, 2004 did not include a statement verifying the accuracy of the representations regarding the voting records. The ad also did not disclose any contrasting votes on the same issue or issues.

8. House Bill (HB) 42, introduced in the 2003 Montana Legislature, was a bill to require management of certain wildlife populations in a sustainable manner. Contrary to the representation in the EIV campaign ad, every recorded vote on HB 42 in the Senate shows Senator Elliott voted in favor of the bill. The bill was passed and enacted into law.

9. House Joint Resolution (HJ) 32, introduced in the 2003 Montana Legislature, urged Montana and federal officials to seek immediate delisting of the gray wolf. Contrary to the representation in the EIV campaign ad, Senator Elliott and Representative Paul Clark voted in favor of HJ 32, which was passed and filed with the Secretary of State on April 15, 2003.

10. Senate Joint Resolution (SJ) 4, introduced in the 2003 Montana Legislature, requested delisting of the wolf pursuant to the federal Endangered Species Act. Senator Elliott and Representative Clark both voted in favor of the resolution. SJ 4 was passed and filed with the Secretary of State on April 10, 2003.

11. Mr. Lathrop contends that the mistakes were made when he was cutting and pasting as he composed the ad. He states that eight or nine other people reviewed the ad before it was published, and no one caught the mistakes.

12. Mr. Lathrop said that after he created the ad he was contacted by Representative Verdell Jackson, who advised him of the mistakes in the ad. Mr. Lathrop contacted the Daily Inter Lake to cancel the ad, but it was too late. The ad ran in the October 21, 2004 edition of the Daily Inter Lake.

13. EIV ran a corrected campaign ad in the Daily Inter Lake on October 25 and 26, 2004. The corrected ad included the following statement: “NOTE: This ad ran previously on 10/21 in the Daily Inter Lake not showing correct final votes on HJR 32 and HB 42.” The corrected ad accurately represented Senator Elliott’s “yes” votes on HB 42 and HJ 32, and Representative Clark’s “yes” vote on HJ 32. The corrected ad did not contain a statement verifying that the information about the voting records is accurate and true.

14. On October 26, 2004 Mr. Lathrop telephoned Senator Elliott and Representative Clark and apologized for the incorrect statements in the EIV ad.

15. On October 30, 2004 Mr. Lathrop contacted the office of the Commissioner of Political Practices (Commissioner) and advised Program and Data Technician Mary Baker of the inaccurate ad. He emailed Ms. Baker and included copies of the original EIV ad that ran on October 21, 2004, and the corrected ad that ran on October 25 and 26, 2004.

16. On November 1, 2004, EIV Treasurer William Franks sent a written statement to the Commissioner’s office stating:

It was brought to my attention today that a statement was needed for three ads that ran in the Daily Interlake [sic] which contained voting records of candidates.

I had assumed that the following disclaimer was sufficient:

Ad paid for by Excellence in Voting, William B. Franks, Treasurer, 159
Arbour Dr., Kalispell, MT 59901

However, I noted Section 3(iii) of Montana Statutes [sic] 13-35-225 and
provide the following statement:

Statement: To the best of my knowledge, the statements made about the
candidates' Voting records in the attached ads are accurate and true.

William B. Franks, Treasurer of Excellence in Voting.

16. Senator Elliott contends that the October 21, 2004 EIV ad misstates his
votes on HB 42 and HJ 32. He also contends that the ads containing representations
regarding his vote on HJ 32 did not disclose contrasting votes on the same issue –
specifically SJ 4, in violation of § 13-35-225(3), MCA. Senator Elliott also alleges that
the ad violates the same subsection because it does not include a verification statement.
Senator Elliott does not complain about the accuracy of the representations in the ad
regarding his votes on SB 395.

STATEMENT OF FINDINGS

§ 13-35-225, MCA provides:

Election materials not to be anonymous -- statement of accuracy. (1)
All communications advocating the success or defeat of a candidate,
political party, or ballot issue through any broadcasting station, newspaper,
magazine, outdoor advertising facility, direct mailing, poster, handbill,
bumper sticker, internet website, or other form of general political
advertising must clearly and conspicuously include the attribution "paid for
by" followed by the name and address of the person who made or financed
the expenditure for the communication. When a candidate or a candidate's
campaign finances the expenditure, the attribution must be the name and
the address of the candidate or the candidate's campaign. In the case of a
political committee, the attribution must be the name of the committee, the

name of the committee treasurer, and the address of the committee or the committee treasurer.

(2) Communications in a partisan election financed by a candidate or a political committee organized on the candidate's behalf must state the candidate's party affiliation or include the party symbol.

(3) (a) Printed election material described in subsection (1) that includes information about another candidate's voting record must include:

(i) a reference to the particular vote or votes upon which the information is based;

(ii) a disclosure of contrasting votes known to have been made by the candidate on the same issue if closely related in time; and

(iii) a statement, signed as provided in subsection (3)(b), that to the best of the signer's knowledge, the statements made about the other candidate's voting record are accurate and true.

(b) The statement required under subsection (3)(a) must be signed:

(i) by the candidate if the election material was prepared for the candidate or the candidate's political committee and includes information about another candidate's voting record; or

(ii) by the person financing the communication or the person's legal agent if the election material was not prepared for a candidate or a candidate's political committee.

(4) If a document or other article of advertising is too small for the requirements of subsections (1) through (3) to be conveniently included, the candidate responsible for the material or the person financing the communication shall file a copy of the article with the commissioner of political practices, together with the required information or statement, at the time of its public distribution.

(5) If information required in subsections (1) through (3) is omitted or not printed, upon discovery of or notification about the omission, the candidate responsible for the material or the person financing the communication shall:

- (a) file notification of the omission with the commissioner of political practices within 5 days of the discovery or notification;
- (b) bring the material into compliance with subsections (1) through (3);
and
- (c) withdraw any noncompliant communication from circulation as soon as reasonably possible.

The campaign ads created by EIV clearly qualify as communications advocating the success or defeat of candidates or a political party. The ads fail to comply with subsection (3) of the statute. The ads do not reference the particular vote or votes upon which the information represented in the ads are based. § 13-35-225(3)(a)(i), MCA. The ads also does not include a statement, signed by the person financing the communication, stating that to the best of the person's knowledge the statements concerning the candidates' voting records are accurate and true. §§ 13-35-225(3)(a)(iii) and 13-35-225(3)(b)(i), MCA.

Senator Elliott's complaint alleges that the campaign ad also fails to comply with § 13-35-225(3)(b)(ii), MCA, because it fails to disclose "contrasting votes known to have been made by the candidate on the same issue if closely related in time." As noted in Fact 6, the ad references Senator Elliot's vote on HJ 32 in the 2003 session of the Montana Legislature, involving delisting of wolves. Senator Elliott also sponsored and voted in favor of SJ 4 in the 2003 session. SJ 4 requested delisting of the wolf pursuant to the federal Endangered Species Act of 1973. HJ 32 was passed and filed on April 15, 2003, and SJ 4 was passed and filed on April 10, 2003. Thus, the "contrasting" votes (at least with respect to the incorrect representation in the ad that ran on October 21, 2004)

were “closely related in time.” The EIV campaign ad that ran on October 21, 2004 with the inaccurate representation regarding Senator Elliott’s vote on HJ 32 should have included a disclosure of Senator Elliott’s vote in favor of SJ 4.

§ 13-35-225(5), MCA states that if the information required in subsections (1) through (3) of the statute is omitted or not printed, upon discovery of or notification about the omission the person financing the communication shall 1) file notification of the omission with the Commissioner within five days; 2) bring the material into compliance; and 3) withdraw any noncompliant communication from circulation. I note that Mr. Lathrop and Mr. Franks appear to have made a good faith effort to comply with at least some of the requirements of § 13-35-225, MCA. See Facts 12, 14, and 15. Under the circumstances it was not possible to bring the ad that ran on October 21, 2004 into compliance or to withdraw that ad from circulation. EIV representatives did, however, notify the Commissioner’s office and publish a corrected ad in the Daily Inter Lake. However, the notification provided to the Commissioner’s office did not reference the particular vote or votes upon which the information represented in the ads was based, and it did not disclose contrasting votes on SJ 4. It is also important to note that compliance or attempted compliance with the requirements of § 13-35-225(5), MCA does not cure a violation of the provisions of the statute, nor does it prohibit an action seeking a civil penalty if appropriate.

Finally, while Senator Elliott’s complaint does not allege that EIV violated any other campaign finance and practices laws, he does allege that there were misrepresentations in the campaign ad relating to Senator Elliott’s and Representative

Clark's voting records. As noted in Facts 6 through 10, certain representations in the ad were inaccurate. Mr. Lathrop contends he relied on the information that was provided to him by EIV and he did not confirm the accuracy of the information. He also contends that the errors must have resulted when he was "cutting and pasting" to compose the ad. Further, no one else who reviewed the ad before it was published on October 21, 2004 noticed the errors.

§ 13-37-131, MCA prohibits a person from misrepresenting a candidate's public voting record or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with reckless disregard of whether or not the assertion is false. The facts established in this case do not support a finding that EIV, its Treasurer, its Chairman, or Mr. Lathrop knowingly made the misrepresentations in the ad published on October 21, 2004. In addition, there is insufficient evidence that anyone acted with reckless disregard, since there is no clear and convincing proof that they subjectively entertained serious doubts as to the truth of the representations when they were published. See discussion in the decision issued by this office in the [Matter of the Complaint Against Bradley Molnar and John E. Olsen](#) (April 4, 2006). Thus, while the actions that led to the creation and publication of the October 21, 2004 ad certainly appear to reflect a certain amount of carelessness, there is insufficient evidence to prove a violation of § 13-37-131, MCA.

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings there is sufficient evidence to conclude that Excellence in Voting and the individual Treasurer and other officers and committee members of Excellence in Voting violated Montana campaign finance and practices laws.

Dated this 1st day of November, 2006.

A handwritten signature in black ink, appearing to read "Dennis Unsworth". The signature is fluid and cursive, with a long horizontal stroke at the end.

Dennis Unsworth
Commissioner