

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the Complaint)	SUMMARY OF FACTS
Against Ron Tussing)	AND
)	STATEMENT OF FINDINGS

Al Garver filed a complaint alleging that Ron Tussing violated Montana campaign finance and practices laws.

SUMMARY OF FACTS

1. Ron Tussing was a candidate for mayor of Billings in the November 8, 2005 election. His opponent in the election was Al Garver. Tussing prevailed in the election and currently serves as mayor of Billings.

2. On Saturday, October 29, 2005, Tussing sent out an email that stated, in relevant part:

If we can compete financially, we can win. But if we are not seen or heard in this last 8 days, we could lose. We should spend \$3,000 on TV, \$500 on radio and \$1,000 on newspaper. *People who have maxed out on checks but still wish to do more may put cash in the hat at the fundraiser. . . .*

. . . We still have some folks that have not returned separate checks for too large of contributions [sic] and, as I said, we should still get some from our mailing and the saddle club event but that still leaves \$3,000. It may seem like a lot but it's only \$100 from 30 people or \$50 from 60 etc. (Emphasis added).

3. The email was sent to 15 of Tussing's campaign supporters. In addition, the email concludes by stating: "If you know anyone you could email this to, please do so."

4. The fundraiser mentioned in the email was scheduled to be held on the evening of Tuesday, November 1, 2005, at the Saddle Club located in Billings Heights.

5. Garver's complaint alleges that the email constitutes an attempt by Tussing to violate the campaign contribution limitations in § 13-37-216, MCA.

6. Shauna Kenney was the treasurer for Tussing's campaign, and one of the recipients of the email. Kennedy recalls reading the email on the evening of October 29 following a day of work at her full-time job. She read it quickly and then deleted it, and she does not recall that the content of the email caused her any concern when she read it. Kennedy said she basically "handled the books" for Tussing's campaign. She did not discuss campaign strategy with Tussing or give Tussing advice on compliance with campaign finance and practices laws and regulations.

7. On Monday, October 31, 2005, Garver received a copy of Tussing's email from one of Garver's campaign supporters. According to the complaint, Garver took a copy of the email to the Billings Gazette and requested that the Gazette investigate the authenticity and the content of the email.

8. On November 1, 2005 the Billings Gazette published an article with the headline: "Campaign advice may have violated law." Tussing was interviewed for the article. According to the article Tussing claimed he was unaware that persons who had contributed the maximum amount under the statute were prohibited from contributing additional money in a "pass the hat" collection at a fundraiser, as long as their contributions at the fundraiser were less than \$35.

The article quotes Tussing as follows: "I was told by our people that if there's cash in a hat, we don't have to account for it." The article notes that Tussing said he would tell supporters at that evening's fundraiser not to contribute any more money if they had already reached the statutory contribution limit.

9. Kennedy was also interviewed for the article. According to the article she stated that although what Tussing had asked donors to do was not right, she did not notice a problem when she read Tussing's email on Saturday evening, October 29. Kennedy is quoted as stating that she is always careful to make sure that people do not exceed the campaign contribution limitations.

10. When interviewed for this investigation, Tussing said that before he sent out the October 29 email he did not consult with anyone or have anyone review the email. He said he was aware that there is a \$130 contribution limit, but he did not realize how “meticulous” the office of the Commissioner of Political Practices expected candidates to be during “pass the hat” portions of a campaign fundraiser. Tussing said his understanding of the law was that because contributions of less than \$35 received at “pass the hat” events did not require identification of the contributor, those contributions could not count against a contributor’s \$130 maximum aggregate contribution limit.

11. Tussing said the purpose of his October 29 email was to “let the group know where I stood with stuff.” He then described the portion of the email stating “people who have maxed out on checks . . . may put cash in the hat at the fundraiser” as an “inside joke” between Tussing and Mary Jo Fox, one of his campaign volunteers. According to Tussing, at some point during the campaign someone had offered to make a \$500 contribution to the campaign. He and others in the campaign joked that they could invite those who wanted to make \$500 contributions to a “pass the hat” fundraiser. Tussing said he and his campaign supporters never actually held such a fundraiser – it was just discussed in a joking manner.

12. The Saddle Club fundraiser was held as scheduled on the evening of November 1, 2005. However, the planned “pass the hat” portion of the fundraiser was cancelled. Tussing said that after his email became public he decided there would be no “pass the hat” event at the fundraiser, and he communicated that decision to his campaign supporters. Tussing was concerned that following the Billings Gazette article it would be difficult to track contributions made during a “pass the hat” event to ensure that no one who had maxed out on contributions placed money in the hat.

13. Kennedy said that as treasurer of Tussing’s campaign she kept track of contributions to ensure that persons contributed only the maximum amount allowed by law. She sent checks that were over the \$130 maximum amount back to the contributors, with an explanation.

Kennedy said that during the Saddle Club fundraiser she had a reference list of contributors to Tussing's campaign. Kennedy agreed there was no "pass the hat" event at the fundraiser. Instead, Kennedy accepted contributions at the door, checking the name of the contributor against the names and amounts on her reference list, to ensure that no one contributed more than the maximum amount permitted by law.

14. Through his counsel, Tussing contends that Montana campaign finance and practices laws and regulations are vague and ambiguous, and that they can legitimately be interpreted in the manner claimed by Tussing. In other words, Tussing argues that a reasonable person could conclude that amounts less than \$35 contributed during "pass the hat" or mass collection fundraising events are not considered part of a person's "aggregate contributions."

15. Tussing also claims that he did not purposely or knowingly attempt to violate the campaign contribution limitations in § 13-37-216, MCA. He notes that he never accepted any contributions in excess of the statutory limits, and that he cancelled the "pass the hat" event at the Saddle Club fundraiser after his email became public. Tussing points to the second paragraph of his email quoted in Fact 2 as evidence that his campaign was aware of the limits and had already taken steps to return contributions that were over the limit.

STATEMENT OF FINDINGS

The complaint alleges that Tussing's October 29, 2005 email amounted to an attempt to accept contributions in excess of the limits in § 13-37-216, MCA. That statute establishes limits for campaign contributions to candidates:

Limitations on contributions. (1) (a) Aggregate contributions for each election in a campaign by a political committee or by an individual, other than the candidate, to a candidate are limited as follows:

(i) for candidates filed jointly for the office of governor and lieutenant governor, not to exceed \$500;

(ii) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed \$250;

(iii) for a candidate for any other public office, not to exceed \$130.

...

(4) A candidate may not accept any contributions in excess of the limits in this section.

(5) For purposes of this section, "election" means the general election or a primary election that involves two or more candidates for the same nomination. If there is not a contested primary, there is only one election to which the contribution limits apply. If there is a contested primary, then there are two elections to which the contribution limits apply.

Under subsection (1)(a)(iii) of the statute, contributions by a political committee or an individual to Tussing were limited to \$130 for each election. Tussing, like all candidates, was prohibited by subsection (4) of the statute from accepting contributions in excess of the limits.

§ 13-35-104, MCA, states: "An attempt, as defined in 45-4-103, to violate a provision of the elections laws of this state is itself a violation of the election laws and is punishable as provided in 45-4-103." § 45-4-103, MCA, provides:

Attempt. (1) A person commits the offense of attempt when, with the purpose to commit a specific offense, he does any act toward the commission of such offense.

(2) It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

(3) A person convicted of the offense of attempt shall be punished not to exceed the maximum provided for the offense attempted.

(4) A person shall not be liable under this section if, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, he avoided the commission of the offense attempted by abandoning his criminal effort.

(5) Proof of the completed offense does not bar conviction for the attempt.

Reading these statutes together, it is clear that to prove Tussing attempted to violate § 13-37-216, MCA, it would be necessary to establish 1) that he had the purpose to commit that specific offense, and 2) that he did an act toward the commission of the offense.

In construing the attempt statute, the Montana Supreme Court has described the circumstances that must be proven to establish the “act towards the commission of the offense” element of the crime:

1. An overt act “must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation,”
2. There “must be at least some appreciable fragment of the crime committed,” and
3. The crime “must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter.”

State v. Ribera, 183 Mont. 1, 15, 597 P.2d 1164, 1170 (1979). See also *State v. Mahoney*, 264 Mont. 89, 97, 870 P.2d 65, 70 (1994).

Ribera and Mahoney both relied on *State v. Rains*, 53 Mont. 424, 164 P. 540 (1917). In *Rains* the Montana Supreme Court considered a charge of attempted deliberate homicide. The defendant, armed with a loaded revolver, a loaded rifle, and poison, accosted the intended victim near her home, struck her in the face, and forced her to accompany him into her house. The defendant locked the door and kept the key in his possession. He then took a water pail, unlocked the door, and after locking the door behind him walked to a nearby spring to fill the pail with water.

While he was getting the water the intended victim escaped through a window on the opposite side of the house. The Supreme Court ordered that the charge of attempted deliberate homicide be dismissed. The Court found that while the facts alleged in the charging document may have established preparation for commission of the offense, there were insufficient allegations that some “appreciable fragment of the crime” had been committed. The Court relied in part on language from an older California case::

. . . [S]omething more than mere intention is necessary to constitute the

offense charged. Between preparation for attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made.

People v. Murray, 14 Cal. 159 (1859). See also State v. Tripp, 60 Mont. 421, 425, 199 P. 716, 717 (1921).

Under the circumstances of this case, I find that the single act of disseminating the October 29, 2005 email did not “reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation,” to the extent that “an appreciable fragment” of the offense was committed. While the email could be interpreted as evidence of intention or preparation for an attempt, there was no overt act amounting to movement toward commission of the offense.

In fact, as described in Facts 12 and 13, Tussing cancelled the “pass the hat” event that was planned for the Saddle Club fundraiser, and Kennedy monitored contributions at the door to ensure that no contributor went over the maximum. Thus, there is insufficient evidence that Tussing attempted to violate the contribution limits in § 13-37-216, MCA.

Although I find there was no violation, it is important to emphasize that a cash contribution made during a “pass the hat” event is considered part of a person’s aggregate contributions for purposes of the limitations in § 13-37-216, MCA. The term “aggregate contributions” in § 13-37-216, MCA, is defined by administrative rule as follows:

AGGREGATE CONTRIBUTIONS - DEFINITION, REPORTING (1)

For the purposes of sections 13-37-229 and 13-37-216, MCA, the term "aggregate contributions" means the total of all of the following contributions made by or received from a person for all elections in a campaign:

- (a) All contributions, as defined in ARM 44.10.321.
- (b) All earmarked contributions, as defined in ARM 44.10.519, subsection (1).
- (c) All expenditures encouraged in order to avoid a contribution, as specified in ARM 44.10.517.

...

ARM 44.10.321 states that the term “contribution,” as defined in § 13-1-101, MCA, includes, but is not limited to, each contribution listed in § 13-37-229, MCA, as well as other specific contributions described in the rule. Tussing, through his counsel, points out that § 13-37-229, MCA, lists various amounts that must be disclosed in campaign finance reports. He notes that subsections (2) and (8) of that statute make it clear that contributions of less than \$35 do not require identification of the contributor. From this he deduces that “mass collection” or “pass the hat” contributions of less than \$35 are not part of a person’s “aggregate contributions” for purposes of the statutory limitations.

Tussing’s argument is not persuasive. ARM 44.10.321 clearly provides that the term “contribution” is not limited to those listed in § 13-37-229, MCA. In fact, the basic statutory definition of the term is quite broad:

(7) (a) “Contribution” means:

(i) an advance, gift, loan, conveyance, deposit, payment, or distribution of money or anything of value to influence an election;

...

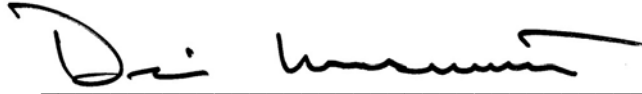
§ 13-1-101(7)(a), MCA. Clearly cash contributions made during mass collections or “pass the hat” events meet the statutory definition of the term “contribution,” and are therefore not excluded from the “aggregate contributions” referred to in § 13-37-216, MCA.

Candidates may not accept contributions in excess of the limitations in the statute. § 13-37-216(4), MCA. Candidates therefore have an obligation to employ whatever means are necessary to ensure that any contributions they receive do not exceed the statutory limitations. This may well require monitoring contributions received during mass collections or pass the hat events and instructing potential contributors that any such contributions of less than \$35 are part of the aggregate contributions that are limited by § 13-37-216, MCA.

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings there is insufficient evidence to conclude that Ron Tussing violated Montana campaign finance and practices laws.

Dated this 28th day of February, 2007.

A handwritten signature in black ink, appearing to read "Dennis Unsworth", written over a horizontal line.

Dennis Unsworth
Commissioner