

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

| | | |
|---------------------------------|---|------------------------------|
| In the Matter of the Complaint |) | SUMMARY OF FACTS |
| Against the Darby Public School |) | AND |
| District No. 9. |) | STATEMENT OF FINDINGS |

Nathan Mentzer filed a complaint against the Darby Public School District No. 9 (hereinafter "Darby Schools") on May 5, 2004. The complaint alleges the Darby Schools violated Section 13-35-226(4), MCA, of the Montana Campaign Finance and Practices Act by placing an endorsement of two school board candidates on the Darby Schools' web site and that the endorsement constituted an unlawful solicitation of support for a candidate by a public employee while on the job or at the place of employment.

SUMMARY OF FACTS

1. The Darby Schools held an election for two seats on the Darby School Board on May 4, 2004.

2. In the months preceding the 2004 Darby School Board election, the Board was embroiled in a contentious public debate about a proposed policy that would have required the Darby Schools' science teachers to question the theory of evolution and to analyze its strengths and weaknesses. The proposed Darby Schools' policy was named "objective origins" and involved issues similar to the national debate about "intelligent design."

3. The Darby School Board preliminarily voted 3-2 in February of 2004 to adopt the objective origins policy. Board members Gina Schallenberger, Doug Banks, and Elisabeth Bender voted in favor of adopting the policy. Bob Wetzsteon and Mary Lovejoy voted against the proposed objective origins policy.

4. Under applicable Board procedures, the objective origins policy could not be implemented until it was adopted on second reading. Because of significant local, state, and national interest in the proposed policy, the Board conducted several public meetings to receive

public comment on the policy. The second reading vote was postponed until after the May 4, 2004 election.

5. The May 4, 2004 election pitted two advocates of the objective origins policy against two opponents of the policy.

6. Gina Schallenberger, the Board's chair, and candidate Robert House campaigned as supporters of the objective origins policy.

7. Bob Wetzsteon, an incumbent Board member, and newcomer Erik Abrahamsen campaigned for Board seats as opponents of the objective origins policy.

8. Trevor Howe was a teacher in the Darby Schools in 2003-04. Mr. Howe also had a contract with the Darby Schools to serve as the "technology specialist," which included responsibility for establishing and maintaining the Darby Schools' web site. Howe was awarded the technology specialist contract after the individual who performed those functions for the Darby Schools was called away to military service in Iraq. Howe was paid by the hour for services performed under his technology specialist contract.

9. The complainant, Mr. Mentzer, was a teacher in the Darby Schools in 2003-04.

10. Jack Eggensperger was the Darby Schools' superintendent in 2003-04.

11. On or about April 30, 2004 (a Friday), a 17-page "pop-up" containing answers to five questions (hereinafter "Five Answers") about the proposed objective origins policy was posted on the Darby Schools' web site. The pop-up also included a 22-page sample curriculum taken from the Ohio Department of Education.

12. The Five Answers contained quotes from the three Board members who voted to adopt the objective origins policy and statements by other state and national advocates for the policy. The Five Answers advocated adoption of the objective origins policy based on local control of schools, academic freedom, and other scientific and public policy rationales.

13. The supporters of the objective origins policy (Schallenberger, Banks, Bender, and House) were repeatedly praised in the Five Answers because they were, according to the pop-

up, "willing to stand and fight for what is right."

14. The Five Answers contained the following statement about the Board members and candidates who supported adoption of the objective origins policy:

"Join us as we say THANK YOU to Doug Banks and Elisabeth Bender, as we elect Robert House to the Darby School Board and as we re-elect Gina Schallenberger. Robert House for school board, "long on experience, strong on local control," and Gina Schallenberger, "the conviction to know what's right and the courage to stand and fight!"

15. The Five Answers pop-up contained information and statements virtually identical to five advertisements that had been run in the *Ravalli Republic* in support of the objective origins policy. The newspaper advertisements were published in late April and early May of 2004. The ads were paid for by "Montana Advocates for True Science," Franks/Larsen Treasurers, P.O. Box 788, Darby, Montana 59829.

16. Superintendent Eggensperger learned about the posting of the Five Answers on the Darby Schools' web site late Friday afternoon, April 30, 2004. He immediately contacted Trevor Howe and directed Howe to come to the Darby Schools' office on Saturday morning, May 1, 2004.

17. Eggensperger and Darby High School Principal Lloyd Rennaker met with Howe at approximately 9:00 a.m. on Saturday morning, May 1, 2004. Eggensperger directed Howe to immediately delete the Five Answers pop-up from the Darby Schools' web site. Eggensperger watched as Howe deleted the Five Answers pop-up from the web site and the pop-up was removed by 9:30 a.m. on Saturday, May 1, 2004.

18. On May 3, 2004, the *Ravalli Republic* published a news article about the Five Answers pop-up and Superintendent Eggensperger's actions to remove the pop-up from the school web site. The news article reported that the Five Answers pop-up included the endorsement language identified in Summary of Fact 14 and that the pop-up went "so far as to advocate for candidates Gina Schallenberger and Robert House."

19. Howe sent an e-mail to the Darby Schools' staff on May 3, 2004, in response to the

Ravalli Republic news article. Howe's e-mail stated that there was no "political agenda" in posting the Five Answers and that the pop-up only contained "public information." Howe denied that the Five Answers pop-up contained the phrase "Join us as we say thank you to Doug Banks and Elisabeth Bender, as we elect Robert House to the Darby School Board and as we re-elect Gina Schallenberger." Howe's e-mail urged his fellow staff members not to "spread lies like the *Ravalli Republic* ... without ever reading or seeing the pop-up yourself."

20. In a May 3, 2004 letter requested by Board Chair Schallenberger and filed with the Darby Schools' clerk, Howe admitted that he had posted the Five Answers pop-up on the school web site and stated that he was not "told to do so by the district or anyone else for that matter." Consistent with Howe's e-mail to the Darby Schools' staff, Howe insisted that the web site pop-up was posted strictly for informational and not political purposes.

21. Eggensperger and Rennaker had no advance knowledge of Howe's posting of the Five Answers pop-up and deny that Howe sought or received authorization to post the pop-up. In a May 25, 2004 letter to my office regarding this complaint, Eggensperger, on behalf of the Darby Schools, stated that Howe "acted totally on his own without any direction from district administration." Eggensperger's letter also stated that Howe "was disciplined accordingly" and that Howe should be "held personally liable."

22. The three Board members who supported the objective origins policy (Schallenberger, Banks, and Bender) and candidate House denied that they asked Howe to post the Five Answers pop-up on the Darby Schools' web site. They also denied any advance knowledge of Mr. Howe's decision to post the Five Answers on the web site.

23. Eggensperger's disciplinary action against Howe was approved by the Board. A letter of reprimand was placed in Howe's personnel file and Howe was not paid his hourly technology specialist fee for two days of services performed under his technology specialist contract. However, none of Howe's teacher's salary was withheld as a result of the disciplinary action imposed.

24. Complainant Mentzer, Superintendent Eggensperger, Principal Rennaker, and several Board members saw the Five Answers pop-up posted by Howe and it contained the "Join us" language referenced in Summary of Fact 14.

25. The Darby Schools had no official policy establishing a procedure for the advance review and approval of web site postings before the objective origins debate. Howe's May 3, 2004 letter to the Board stated he had been "in charge" of web site postings and that he had been responsible for "putting 98% of the entire website online." Howe told the Board he "never had to get permission to put anything online."

26. After the objective origins controversy, the Darby School Board adopted a policy requiring written approval by a Darby School administrator for web site postings, except for Board meeting agendas, minutes of Board meetings, and such items as lesson plans.

27. More than 50% of the eligible voters cast ballots in the May 4, 2004 Darby School Board election. The opponents of the objective origins policy (Wetzsteon and Abrahamsen) defeated the proponents of the policy (Schallenberger and House) by a two-to-one margin.

28. In July of 2004, the new Darby School Board voted 3-2 to reject the objective origins policy (Banks and Bender cast the dissenting votes).

29. Eggensperger, who was a thirteen year employee of the Darby Schools in May of 2004, resigned as Superintendent effective at the end of the 2003-04 school year. Eggensperger says one reason he resigned was his disagreement with the Board about the objective origins policy.

30. Howe now lives in Minnesota and he ignored repeated attempts to contact him during the investigation of this matter.

STATEMENT OF FINDINGS

The Complainant alleges that the Darby Schools violated Section 13-35-226(4), MCA, which makes it unlawful for a "public employee" to "solicit support for or opposition to ... the nomination or election of any person to public office...." Montana's campaign finance and

practices statutes do not define the term "public employee." See Section 13-1-101, MCA. The term is defined in Montana's Code of Ethics and Section 13-35-226(4), MCA, references Section 2-2-121, MCA, of the Code of Ethics. Montana's rules of statutory construction provide that when "the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears."

Section 1-2-107, MCA; see also *Dept. of Revenue v. Gallatin Outpatient Clinic*, 234 Mont. 425, 430, 763 P.3d 1128 (1988). My predecessor, Commissioner Linda Vaughey, has already ruled that the statutory definition of the term "public employee" in the Code of Ethics applies to the same term used in Section 13-35-226(4), MCA. See *Matter of the Complaint Against Dennis Paxinos, Yellowstone County Attorney*, May 16, 2000 Summary of Facts and Statement of Findings, pp. 13-15 (hereinafter "*Paxinos Decision*"). I concur in that interpretation.

A "pubic employee" under Sections 2-2-102(7) and 13-35-226(4), MCA, includes "any temporary or permanent employee of a local government." Section 2-2-102(7), MCA. A "local government" under the Code of Ethics includes a "school district." Section 2-2-102(4), MCA.

It is uncontroverted that:

1. Trevor Howe, a teacher and technology specialist for the Darby Schools in April and May of 2004, was a public employee subject to the prohibitions of Section 13-35-226(3), MCA. See *Paxinos Decision*, p. 13-15.

2. Trevor Howe posted the Five Answers pop-up on the Darby Schools' web site while on the job, while being paid by a publicly funded local government entity (the Darby Schools), and by using the Darby Schools' equipment and office space.

3. The Five Answers pop-up contained express language soliciting the election of and votes for the two school board candidates who supported adoption of the objective origins policy. See Summary of Fact 14.

Trevor Howe, contrary to the express prohibitions of Section 13-35-226(4), MCA,

solicited electoral support for the Darby School Board candidates who were advocating adoption of the objective origins policy while he was on the job and at his place of public employment. Mr. Howe's assertion that the pop-up was only intended to be "informational" and not political lacks any credibility. The Five Answers pop-up was almost a verbatim reproduction of newspaper advertisements being simultaneously run by a citizens group advocating adoption of the objective origins policy. The newspaper ads and the pop-up contained repeated and profuse praise for the school board members and candidates who supported the policy. Noticeably missing from the pop-up were any articles or statements written by those opposing the objective origins policy. But worst of all, the Five Answers pop-up contained an express request that the readers join the advocates of the objective origins policy in electing the two candidates who supported the policy. Howe then squandered any credibility he might have had on the "informational, not political" assertion by falsely representing in an e-mail to his Darby Schools' colleagues that the Five Answers pop-up did not contain the vote solicitation language in Summary of Fact 14.

Trevor Howe can only escape a finding that he violated Section 13-35-226(4), MCA, if his web site posting was, subject to Section 2-2-121, MCA, "properly incidental to another activity required or authorized by law or to express personal political views." These statutory exemptions do not apply to Mr. Howe's conduct in this matter.

My predecessors have consistently and correctly ruled that the right of a public employee to express personal political views while on the job or at work under 13-35-226(4), MCA, is limited to the personal expression of preference for a candidate or ballot issue so long as the expression of personal political views does not become solicitation. *See, e.g., Paxinos Decision*, pp. 10-11. Howe's Five Answers pop-up crossed the line into solicitation of electoral support for the objective origins candidates in the May 2004 school board election. He was not simply expressing a personal preference for the objective origins candidates while on the job or at work. Howe used the official Darby Schools' web site to urge its users, which included both

the employees and the public, to elect and vote for the objective origins candidates. Such express solicitation, complete with the appearance of being an official endorsement by the Darby Schools on the Schools' official web site, violates Section 13-35-226(4), MCA.

Howe also cannot argue that his solicitation of votes for the objective origins candidates is "properly incidental to another activity required or authorized by law."¹ Nothing in Montana law remotely suggests that Howe's solicitation of votes for or the election of candidates on the official school web site is an activity required or authorized by law. In fact, the opposite is true. Section 13-35-226(4), MCA, prohibits public employees from soliciting support for candidates and ballot issues while at work or on the job.

During this investigation, it was suggested by several individuals that Mr. Howe would not have posted the Five Answers pop-up and its blatant solicitation of support for the objective origins candidates without the encouragement or support of others. Despite this suggestion, there is no credible evidence that Howe's unlawful web site posting occurred at the request of or in concert with any other individual employed by or affiliated with the Darby Schools.

There is no evidence that the Darby Schools' administrators were aware of, encouraged, or approved of Mr. Howe's unlawful web site posting. Superintendent Eggensperger and Principal Rennaker took immediate action to remove the Five Answers pop-up from the school web site as soon as they learned of its posting. Howe was disciplined for posting the pop-up. Eggensperger says he resigned, at least in part, because of his disagreements with the Board over the policy. Howe told the school board that he acted alone and not at the request of anyone else. See Summary of Fact 20. Eggensperger's written response on behalf of the Darby Schools in this matter states that Howe "acted entirely on his own and with no authorization from his superiors." See Eggensperger's May 25, 2004 Letter to Commissioner

¹ See 51 Op. Att'y. Gen. No. 1 (2005) for an interpretation of Section 2-2-121, MCA (when is political speech "properly incidental to another activity required or authorized by law"). The Attorney General ruled that a public employee or public official may engage in political speech so long as the speech does not involve the use of public time, facilities, equipment, supplies, personnel, or funds.

Vaughey.

The Board members who voted to adopt the objective origins policy and candidate House (who ran as a proponent of the policy) all denied asking Howe to post the pop-up or any advance knowledge of Howe's unlawful actions. Howe's May 3, 2004 letter to the Darby Schools' clerk stated that he was not told to post the Five Answers pop-up "by the district or anyone else for that matter." Shortly after Mr. Mentzer filed his complaint, Board member Elisabeth Bender, a supporter of the objective origins policy, advised Mentzer that no one from the Board collaborated with Howe to put the Five Answers pop-up on the web site. There is no credible evidence that the Board members and candidates who supported adoption of the objective origins policy asked or forced Howe to post the Five Answers pop-up on the Darby Schools' web site. Even if such credible evidence existed, elected school board members are not public employees subject to the prohibitions of Section 13-35-226(4), MCA. See *Paxinos Decision*, p. 15.²

The Darby Schools and the community decisively chose to end the objective origins policy debate in 2004. The voters overwhelmingly rejected the school board candidates who advocated adoption of the objective origins policy in the May 2004 election. The "new" school board voted to reject the policy at its July 2004 meeting. Mr. Howe's unlawful solicitation of electoral support for the objective origins candidates appeared to have little, if any, impact. During the investigation of this matter, both supporters and opponents of the objective origins policy stated that the investigation was opening up old and deep wounds created by the 2004 objective origins debate. It is my sincere hope that this decision will bring some closure to the 2004 debate and enable the Darby Schools and its public employees to avoid future violations of Section 13-35-226(4), MCA.

² My predecessor, Commissioner Vaughey, recognized that use of the term "public employee" in Section 13-35-226(4), MCA, means that elected state and local government officials and directors of state agencies are not subject to the prohibitions of 13-35-226(4), MCA. Commissioner Vaughey urged the Legislature to correct this oversight but no corrective legislation has been adopted as of this date.

CONCLUSION

1. Trevor Howe violated Section 13-35-226(4), MCA, when he posted the Five Answers pop-up on the Darby Schools' web site on or about April 30, 2004. An individual who violates Section 13-35-226(4), MCA, may be held liable in a civil action filed under Section 13-37-128, MCA. Section 13-35-226(5), MCA. A successful civil action under 13-37-128, MCA, could result in the imposition of a civil penalty of not to exceed \$500 or "three times the amount" of an illegal contribution or expenditure, whichever is greater. Even if Mr. Howe's unlawful web site posting was an illegal in-kind contribution, its minimal value makes it unlikely that a substantial civil penalty would be assessed under the treble penalty provisions of 13-37-128, MCA (the posting was on the web site for less than 24 hours and the objective origins candidates lost the election by more than a 2-to-1 margin). In this case, in consideration of the amount of the potential civil penalty that could be awarded in a successful prosecution, and the costs associated with a prosecution, I have determined that it would not be in the best interests of the State of Montana to pursue a civil prosecution against Mr. Howe. The added unlikelihood that Mr. Howe will ever cooperate with the Commissioner's office in this matter and the fact that Mr. Howe resides in Minnesota, suggests that pursuing this complaint any further would not result in an outcome that adds to the public's understanding of campaign practices law.

2. There is no credible evidence that any other Darby Schools' employee violated or conspired with Mr. Howe to violate Section 13-35-226(4), MCA.

3. I urge the Legislature to substantially increase the civil penalties that a District Court may assess for violations of Section 13-35-226(4), MCA.

4. I urge the Legislature to make Section 13-35-226(4), MCA, applicable to elected state and local government officials and appointed department directors and administrators of state and local government agencies.

DATED this 31st day of July, 2006.

Gordon Higgins
Commissioner of Political Practices