BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the Complaint	)	**SUMMARY OF FACTS**
Against Bradley Molnar	)	**AND**
and John E. Olsen	)	**STATEMENT OF FINDINGS**

Russell L. Doty filed two complaints alleging that Bradley Molnar and John E. Olsen violated Montana Code Annotated § 13-37-131 by making false statements regarding matters that were relevant to the issues in a campaign. The first complaint was filed against Bradley Molnar, alleging that he made 15 false statements during his campaign against Doty when they were competing candidates for the Public Service Commission. The second complaint was filed against Bradley Molnar and John E. Olsen, and alleges that they each made various false statements or misrepresentations during the campaign. This decision addresses both complaints.

SUMMARY OF FACTS

1. Russell L. Doty, the complainant in this matter, was the Democratic candidate for a seat on the Public Service Commission, District 2, in the 2004 election. His opponent in the general election was Republican Bradley Molnar. Molnar ultimately won the election, and currently serves on the Public Service Commission.

2. Prior to the election Molnar filed a campaign finance and practices complaint against Doty with the office of the Commissioner of Political Practices (Commissioner), alleging that Doty committed the offense of false swearing when he registered to vote in Montana and filed to run for the Public Service Commission. In a decision issued on April 4, 2006, this office found insufficient evidence to conclude that Doty violated campaign finance and practices laws.

3. Doty filed two campaign finance and practices complaints with the Commissioner. Doty's first complaint, which was filed only against Molnar, alleges that a number of the written statements that Molnar made in his campaign finance and practices complaint filed against Doty are false. The first complaint also alleges that other public

statements made by Molnar, not included in Molnar's complaint filed against Doty, are false. Doty's second complaint was filed against Molnar and John E. Olsen, a supporter of Molnar in his campaign for the Public Service Commission. The second complaint alleges that various statements made by Molnar and Olsen in public settings are false. To the extent that the facts and findings in the April 4, 2006 decision are relevant to the issues in this case, that decision is adopted and incorporated by reference herein.

4. In his first complaint Doty alleges that the following statements contained in the complaint that Molnar filed against him are false. Doty designates these as false claims (FC) 1 through 8:

FC 1. Doty registered to vote in Montana on March 24, 2004, while he was still registered to vote in Colorado.

FC 2. Doty had been away from Montana for over a third of a century.

FC 3. When Doty registered to vote and filed to run for public office in Montana, he was employed by the U.S. Post Office in Denver.

FC 4. When Doty registered to vote and filed to run for public office in Montana, his vehicle was registered in Colorado. (In a written statement submitted during the investigation of this matter, Doty asked that this alleged false statement be withdrawn from his complaint).

FC 5. After Doty filed to run for public office in Montana, he returned to live and work in Colorado.

FC 6. Doty never had his mail forwarded to 1330 Lonesome Pine Lane in Billings, because he knew he was not living there. Instead, he continued to have his bills sent to Colorado.

FC 7. Doty has not put his Denver residence up for sale.

FC 8. Doty tried to disguise the true nature of his residency at every opportunity.

5. In his first complaint Doty also lists the following additional alleged statements that Molnar made in other settings (not in the complaint that Molnar filed against Doty). He designates these as false claims 9 through 15:

FC 9. "You [sic] findings and conclusions all indicate that it is a good thing you have been a career bureaurcrat [sic]. You never would have made it in the real world." (Doty alleges that Molnar made this statement on the Billings Outpost[1] blog).

FC 10-15. "We have 4 staff attorneys at the Public Service Commission. Do we need one sitting on the Commission who hasn't been in the state for 35 years? Who never served on the Public Service Commission or worked for the Public Service Commission? He worked for the Railroad & Public Service Commission when none of those things were germane. And he worked there for 500 days. And the reason for leaving is awfully interesting. Went to the public service Commission [sic] in Minnesota and handled phone bill complaints for 500 days and left. Worked for the Pollution Control people for 90 days and left, and worked for the post office [sic] for 30 days." (Doty alleges Molnar made these statements at the Green Party/AARP debate broadcast on Public Radio).

6. In his second complaint, filed against Molnar and Olsen, Doty alleges that the following public statements made by Molnar are false. Doty designates these as misrepresentations (M) 1 through 7:

M 1. In an October 21, 2004 letter to the Billings Outpost, Molnar claimed that the Western Resource Advocates Balanced Energy Plan (WRA Plan) supported by Doty "shows . . . nuclear up 11 percent and hydro up 30 percent . . . ."

M 2. In a Green Party/AARP debate broadcast by Public Radio, Molnar stated that the WRA Plan "calls for 900% more cogeneration, which currently is 500% more expensive right here. It's from waste steam out at the refinery." Doty contends that Molnar made similar claims in an October 23, 2004 letter to the Billings Outpost, using the figure of 800% with reference to cogeneration.

M 3. In an October 21, 2004 letter to the Billings Outpost, Molnar made statements to the effect that the WRA plan advocated by Doty will fall "30 percent short of keeping the lights

[1] The Billings Outpost is a free weekly newspaper published in the Billings area.

on," that the plan will result in "25% less electricity than required for the region . . ." and that power would be "50% short intermittently . . . ."

M 4. At the Green Party/AARP debate Molnar stated that under the WRA Plan there would be "brownouts" and "shutdowns" when the wind doesn't blow at sufficient speed or consistency; and that at a farmers' market Doty told him "we might have to shut down Colstrip 2, 3, and 4, but we can always burn cow manure."

M 5. Doty claims that Molnar told the office of the Commissioner he would bring his allegedly illegal campaign signs into compliance, but he failed to do so.

M 6. In his October 21, 2004 letter to the Billings Outpost, Molnar stated: "Actually, in order to become dangerous Doty would have to inspire a majority of voters to triple their own utility rates and flush the highest paying jobs in Montana."

M 7. During the Green Party/AARP debate broadcast by Public Radio, Molnar made the following statements: "21% is the reduction of coal that Russ [Doty] told the AFL-CIO that was needed to do [sic]. That's one in five miners that gets laid off, one in five in generation that gets laid off, that's one in five guys who haul the coal gets laid off, massive unemployment if we go to wind just because a glacier is melting even if we don't know why it is melting. 10 to 15% unemployment. That would crush Colstrip. That would crush Forsyth. An economic ripple that would be felt in Miles City and Billings."

7. Doty's second complaint alleges that the following statements made in a letter to the editor written by John E. Olsen, dated October 25, 2004, are false. Doty designates these statements as misrepresentations (M) 8 through 11.

M 8. "For the last 30 years, Doty has worked for the Post Office in Denver."

M 9. "Doty brags he wrote the book 'Poles Apart.' The 'book' is actually a college thesis bound by the University Press. Of its 108 pages, 54 are footnotes."

M 10. "Doty says he was an attorney for the Public Service Commission. False. He worked for the Railroad and Public Service Commission. . . . Doty' [sic] supporters claim he was

an assistant attorney general. 'Assistant attorney general' was the title of new staff attorneys for the Railroad and Public Service Commission."

M 11. "Doty constantly brags that he was an administrative law judge, handling electric gas and phone rate cases. That was for the Minnesota Public Service Commission a third of a century ago. He handled 60 cases during his 18 months of employment. Only two were worth appealing. People don't often appeal their phone bills."

8. Molnar submitted a written response to the two complaints, and also made himself available for an interview during the investigation. He responded to the alleged false claims (FC 1-15) as follows.

- Molnar contends that most of the statements he made about Doty were based on Doty's own statements during debates or contained in Doty's campaign brochures.
- Molnar did not believe Doty was a resident of Montana when Doty filed to run as a candidate for the Public Service Commission. Molnar notes that Doty registered to vote using an address where, by his own admission, he never resided (1330 Lonesome Pine Lane), indicating that Doty never intended to live there. Molnar believed that Doty was trying to hide the fact that he really was a resident of Colorado.
- Molnar recalls Doty stating, after he filed to run for office, that he had to go back to Colorado to "wrap things up." Molnar contends he assumed this could have included working in Colorado, or receiving vacation time credit for his position with the U.S. Postal Service. Regarding his claim that Doty was still working in Colorado, Molnar points to Doty's resume, which states that he has worked for several law firms from 1976 to the present.
- Molnar claims that based on the debates he had with Doty, he learned that Doty had been away from Montana for a number of years. He calculated the time in his head and provided estimates, stating that Doty had been away from Montana for "a third of a century" and "35 years."

- Molnar worked for the Billings Outpost, and he said that Doty had the bills for his political advertising sent to his Colorado address. Thus, Molnar assumed that Doty was still maintaining a household in Colorado.
- Molnar emphasizes he stated that to "the best of his knowledge" Doty did not put his Colorado house up for sale. He also notes that at one point during the campaign Doty had complained he had to make a house payment in Colorado as well as in Montana.
- Molnar insists that when Doty worked for the Public Service Commission, in the 1970's, it was called the Railroad and Public Service Commission. Therefore, Molnar concludes that Doty never worked for the "Public Service Commission" as he claimed.

9. Molnar responded to alleged misrepresentations (M) 1 through 7 as follows.

- He disagrees with the positions and conclusions stated by Doty with respect to the various campaign issues described in Doty's alleged misrepresentations 1 through 4, 6 and 7 (see Fact 6). Molnar contends that the disputed statements reflect nothing more than political discourse and disagreements between the candidates on legitimate campaign issues.
- In response to alleged misrepresentation 5, Molnar contends that his campaign signs all complied with the law. He claims that when an issue regarding sign compliance was raised, he telephoned the Commissioner's office and was told that signs that stated "Vote for Brad Molnar" must include an attribution stating "paid for by Brad Molnar." Molnar contends that he painted the appropriate attribution on the "Vote for Brad Molnar" signs, and that any such signs that were made following his conversation with the Commissioner's office included the appropriate attribution.

10. Molnar contends he never intended to misrepresent anything or to mislead anyone with his public statements. He also contends that none of his statements rise to the level of political civil libel, and his statements are protected by the First Amendment.

11. John E. Olsen submitted a written response to the second Doty complaint, and also made himself available for an interview during the investigation. He responded to the alleged misrepresentations involving his statements (M 8-11) as follows.

- Olsen has been friends with Molnar for 10 years or so, and he supported Molnar's candidacy for the Public Service Commission. Olsen wrote a letter to the editor that was published in the Billings Gazette on October 25, 2004. Olsen obtained much of the information for the letter from talking with Molnar, looking at Doty's campaign brochures, reviewing Doty's newspaper advertisements, and searching the Internet. He compiled the information he obtained from the various sources and "boiled it down" into the letter to the editor.
- In response to alleged misrepresentation (M) 8, Olsen notes that Doty has admitted that during his college years he spent three Christmases working at the Post Office in Great Falls. Thus, Olsen concludes that Doty has worked off and on for the Postal Service for over 30 years.
- Regarding the book "Poles Apart," (M 9) Olsen contends that in many public forums Doty referred to the book as his "thesis" that was printed by the University Press. He states that whether the forward and bibliography should be counted as pages is not a proper subject of a campaign finance and practices complaint. Olsen stated that he might have "casually" looked at the book, or gotten the information off the Internet, prior to writing his letter.
- In response to M 10, Olsen states that he spoke with Molnar and reviewed Doty's campaign brochures, and came to the conclusion that during the mid – 1970's Doty worked for the Railroad and Public Service Commission, rather than the Public Service Commission.
- In response to M 11, Olsen states that he obtained information about Doty's work for the Minnesota Public Service Commission by reviewing Doty's political brochures and

advertisements. He contends that the writer of a letter to the editor "is under no obligation to go into the minutia of background" when he writes about a candidate.

12. Olsen also contends that there is no proof that any of his statements were intentionally misleading or made "with a careless disregard of the truth." He claims that punitive action against him would have a chilling effect on First Amendment rights, and that letters to the editor should not be censored.

13. There were communications between the Commissioner's office and Molnar regarding his campaign signs during his 2004 campaign for the Public Service Commission. Following reports that some of Molnar's signs did not comply with Mont. Code Ann. § 13-35-225, an employee of the Commissioner's office contacted Molnar and advised him that he was required to bring his signs into compliance. Molnar subsequently had several conversations with an employee of the Commissioners office, and he stated he would do what was necessary to bring the signs into compliance. As described in Fact 9, Molnar contends he made the effort to bring his signs into compliance based on his understanding of the requirements of the statute, following his discussions with the Commissioner's office.

14. Photos submitted by Doty show a number of Molnar campaign signs, some of which do not appear to contain the appropriate attribution. Some of the signs in the photographs, however, contain the Republican Party symbol (an elephant). Doty contends he took most of the photographs in late October and early November, 2004.

15. The normal practice in the Commissioner's office when there is a report that signs are not in compliance is to contact the candidate or the candidate's campaign workers and work with them to bring the signs into compliance. As described in Fact 13, that process was followed with respect to the alleged deficiencies in Molnar's campaign signs.

16. During the investigation of this matter Doty provided a copy of his book "Poles Apart." The book, containing seven chapters, is 118 pages long. There are 310 footnotes.

17. Doty provided documentation showing that he worked for the United States Postal Service during the following time periods:

December 1 through December 31, 1960

December 1 through December 31, 1962

December 1 through December 31, 1964

December 1 through December 25, 1966

June 26, 1993 through March 22, 2004

18. Doty states he was in private law practice in Minnesota when he obtained contracts with the State Office of Hearing Examiners. The contracts covered the period from 1977 to 1982. Doty contends that as a contract hearing examiner he presided over hearings for a number of Minnesota state agencies, including 60 cases for the Minnesota Public Utilities Commission. Some of the issues in those cases involved telephone rates and services, trucking service, railroad rates, grain elevators, electric utilities, and natural gas rates.

19. Doty worked as an attorney for the Montana Public Service Commission in 1975 and 1976. In 1907 the Montana Legislature created the Board of Railroad Commissioners. In 1913 the Legislature created the Public Service Commission, and provided that the Railroad Commissioners "shall be ex officio the Public Service Commission." In 1971 the Department of Public Service Regulation was created, with the Public Service Commission as its head, and the Board of Railroad Commissioners was abolished.

STATEMENT OF FINDINGS

Molnar and Olsen are accused of violating Montana Code Annotated § 13-37-131(1), which provides:

> **Misrepresentation of voting record -- political civil libel.** (1) It is unlawful for a person to misrepresent 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 a reckless disregard of whether or not the assertion is false.

To establish a violation of this statute, it would be necessary to prove that Molnar or Olsen misrepresented a "matter that is relevant to the issues of the campaign," and either did so "with

knowledge that the assertion is false" or "with a reckless disregard of whether or not the assertion is false."

The mental state requirement in the statute is derived from the seminal case of New York Times v. Sullivan, 376 U.S. 254 (1964). In that case the United States Supreme Court held that a public official could not recover on a claim for defamation brought against a newspaper unless he proved "actual malice," which the Court defined as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." Id., 376 U.S. at 279-80. The Court based its decision on the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." Id., 376 U.S. at 270. The high degree of First Amendment protection afforded by the New York Times rule is underscored by the requirement that actual malice must be proven with "convincing clarity." Id., 376 U.S. at 285-86.[2]

While Doty was not a "public official" at the time of the allegedly libelous statements made by Molnar and Olsen, the Supreme Court has held that the New York Times standard also applies to candidates for public office. In several later opinions the Court applied the standard in libel actions brought by two candidates against newspapers that had printed allegedly defamatory statements about them. Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971). In Monitor Patriot Co. the Supreme Court stated:

> [P]ublications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office. That New York Times itself was intended to apply to candidates, in spite of the use of the more restricted "public official" terminology, is readily apparent from that opinion's text and citations to case law. And if it be conceded that the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," [citation omitted], then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

[2] In Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974), the Supreme Court noted that the New York Times rule calls for "clear and convincing proof that the defamatory falsehood was made with knowledge of a falsity or with reckless disregard for the truth."

Monitor Patriot Co., 401 U.S. at 271-72.

While the standard enunciated by the Supreme Court in New York Times and related cases developed in libel actions, the standard also applies to statutes authorizing penalties for violation of election laws that limit campaign speech:

> Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount.

Brown v. Hartlage, 456 U.S. 45, 61 (1982). In Vanasco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) (three-judge court), *summarily aff'd sub. nom*, Schwartz v. Pastel, 423 U.S. 1041 (1976), Riccio, a political candidate who lost an election to Ferris, complained to the New York State Board of Elections that Ferris had misrepresented Riccio's voting record in a handbill distributed prior to the election. The statute at issue, which was somewhat similar to Montana's, provided:

> No person, . . . during the course of any campaign for nomination or election to public office . . . shall . . . engage in or commit any of the following:
>
> Misrepresentation of any candidate's position including, . . . misrepresentation as to political issues or his voting record . . .

Vanasco, 401 F. Supp. At 101. The court found the statute unconstitutional because it did not include the New York Times actual malice mental state requirement. The court also noted that proof by "clear and convincing" evidence is a constitutional requirement, and a standard of proof requiring only "substantial evidence" would be insufficient. Vanasco, 401 F. Supp. At 99.

It is important to note that the "clear and convincing" standard of proof is a "more exacting measure of persuasion" than the standard burden of proof by a preponderance of the evidence in typical civil actions. John W. Strong, et al., *McCormick on Evidence* § 340 at 575 (4th Ed. 1992). Moreover, the "actual malice" standard requires application of a subjective, rather than an objective test. In St. Amant v. Thompson 390 U.S. 727 (1968), the Supreme Court considered a case where a political candidate (St. Amant) made allegedly defamatory statements about his opponent. The Louisiana Supreme Court had applied an objective test of

recklessness in finding that St. Amant violated the "reckless disregard of the truth" standard when making his statements. Rejecting this analysis, the United States Supreme Court held that proof of actual malice requires proof of "an awareness . . of the probable falsity" of the statement. St. Amant, 390 U.S. at 732. As the Court explained, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion *that the defendant in fact entertained serious doubts as to the truth of his publication*." Id., 390 U.S. at 731 (emphasis added). See also Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n. 6 (1974).

Of course, the New York Times standard itself reflects the principle that not all speech made during the course of a political campaign is protected by the First Amendment. The Supreme Court made this clear in Garrison v. Louisiana, 379 U.S. 64, 75 (1964), when it stated:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of a known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Thus, while there is no question that speech uttered during political campaigns is entitled to considerable protection under the First Amendment, it is equally clear that candidates are not entitled to deliberately lie, or use "calculated falsehoods" in their campaigns.

The question for resolution in this case is whether any of the public statements made or published by Molnar and Olsen meets the New York Times actual malice standard, thereby constituting a violation of Montana Code Annotated § 13-37-131(1). Upon review of the summary of facts, there is not "clear and convincing evidence" that any of the statements meets that standard.

Regarding the alleged false statements made by Molnar in the campaign finance and practices complaint that Molnar filed against Doty (FC 1 through FC 8 described in Fact 4), it is also necessary to review Mont. Code Ann. §§ 27-1-801 through 27-1-821, which establish statutory requirements for civil libel and slander actions seeking damages. To prove a charge of libel or slander, one must establish the publication of a false *and unprivileged* publication. In libel actions, "[t]ruth has become an absolute defense in almost all cases, and privileges designed to foster free communication are almost universally recognized." Curtis Publishing Co. v. Butts, 388 U.S. 130, 151-52 (1967). See Mont. Code Ann. §§ 27-1-802 and 27-1-803. Mont. Code Ann. § 27-1-804 lists privileged communications, including a communication made "in any legislative or judicial proceeding or in any other official proceeding authorized by law." The Montana Supreme Court has adopted a fairly broad interpretation of the phrase "official proceeding authorized by law," holding that statements made during a city commission meeting were absolutely privileged. Skinner v. Pistoria, 194 Mont. 257, 633 P.2d 672 (1981). Certainly allegations made in a formal campaign finance and practices complaint filed with the office of the Commissioner are similarly privileged..

In any event, applying the New York Times standard, it is clear that none of the statements allegedly made by Molnar and Olsen (whether made in the campaign finance and practices complaint or in other settings) meet the high standard of proof necessary to establish a violation of Mont. Code Ann. § 13-27-131. All of the alleged false statements and misrepresentations have been carefully reviewed, and the explanations offered by Molnar and Olsen have been considered. Some of the statements appear to reflect nothing more than good faith disagreements between two candidates on various campaign issues. See, e.g., M 1 through M 4, M 6, and M 7 described in Fact 6. Regarding the other alleged statements, unquestionably both Molnar and Olsen made certain representations without conducting adequate research or fact checking, and some of those statements turned out to be false, or at the very least, misleading. However, the evidence is less than "clear and convincing" that either Molnar or Olsen misrepresented a matter that was relevant to the issues in the campaign with

subjective knowledge that the assertion was false or with reckless disregard of whether or not the assertion was false.

As noted previously, the New York Times standard for actual malice is subjective. A close review of the alleged statements and the circumstances in which they were made leads me to conclude there is insufficient evidence that either Molnar or Olsen had an "awareness . . of the probable falsity" of any of the representations they made, or that they "in fact entertained serious doubts as to the truth" of the statements. St. Amant, 390 U.S. at 731 and 732. I found no evidence of calculated falsehoods or deliberate lies of the type recognized by the Supreme Court in Garrison v. Louisiana, 379 U.S. 64, 75 (1964) as not entitled to constitutional protection. While both Molnar and Olsen displayed remarkable carelessness in failing to verify the information upon which some of their statements were based prior to making them, carelessness or negligence falls short of the requisite New York Times standard of actual malice. Parisot v. Argenbright, Montana First Judicial District, Cause No. CDV-96-1555 (June 2, 1997). As the Supreme Court has noted, "since '. . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the breathing space that they need to survive . . . ," [citation omitted], only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions." Garrison, 379 U.S. at 74 (some internal quotation marks removed).

Given the high bar established by the United States Supreme Court in New York Times and subsequent decisions, and the Supreme Court's consistent recognition that First Amendment free speech rights are paramount in political campaigns, I have concluded that there is insufficient evidence in this case to prove a violation of Montana Code Annotated § 13-37-131(1).

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings there is insufficient evidence to conclude that either Bradley Molnar or John E. Olsen violated Montana campaign finance and practices laws.

Dated this _____ day of April, 2006.

_____
Gordon Higgins
Commissioner