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August 21, 2008

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In Re: The Complaint of the Montana Republican Party Concerning Governor Brian Schweitzer

Gentlemen:

Enclosed is my Proposal for Decision in this case. The Final Decision will be made by the Commissioner. If either or both parties want to appeal my Proposal, you are to notify the Commissioner of your intent within 10 days of the date of this letter. In the event of an appeal, exceptions and briefs are to be filed with the Commissioner within 30 days of the date of this letter.

Regarding the ex parte contacts matter, within a few days, the Commissioner will place in the Record of this matter all written and oral communications he had with Mr. Stern. Each party will receive a copy of these contacts.

It was a pleasure to work with each of you. With kind regards,

Sincerely,



William L. Corbett
Hearing Examiner

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES
STATE OF MONTANA

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POLITICAL PRACTICES

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In Re the Complaint of the Montana
Republican Party, Charging Party,
Concerning Governor Brian
Schweitzer, Respondent.]
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PROPOSAL FOR
DECISION

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I. BACKGROUND

The Commissioner of Political Practices for the State of Montana is authorized by law to receive ethics violation complaints against Montana public officials and employees. On April 8, 2008, Jacob Eaton, the Executive Director of the Montana Republican Party, (hereinafter referred to as "the Charging Party"), filed such a complaint with the Commissioner against Governor Brian Schweitzer, (hereinafter referred to as "the Respondent.") The complaint alleges that the Respondent violated an ethics law by, after becoming a candidate for re-election, preparing and distributing two public service announcements (PSAs) that aired on several Montana radio stations.

After the complaint was filed, the Respondent filed a "Motion for Summary Judgment" acknowledging the preparation and distribution of two PSAs that were ultimately aired by several Montana radio stations. In his Motion, the Respondent argued that, based on these facts, there was no violation of law, and because the relevant facts are clear and undisputed, there is no reason to hold an evidentiary hearing in this matter.

Initially, in response to the Respondent's motion, the Charging Party argued that the motion should be denied. It argued that the relevant facts surrounding the event were not clear and that a hearing should be held to present the relevant evidence. It also argued that even based on the undisputed facts, the Respondent's production and distribution of the PSAs was unlawful.

On August 1, 2008, a hearing was held on the Respondent's Motion for Summary Judgment. At that hearing, the Respondent again pressed his claim that all the relevant facts surrounding the incident were undisputed and that, as a matter of law, judgment should be rendered in his favor. The Charging Party again argued that certain relevant facts were in dispute, but asserted that even under the undisputed facts, the Respondent's production and distribution of the PSAs was unlawful.

This dispute comes before the Commissioner on Cross Motions for Summary Judgment. The issue is whether, under the undisputed facts, the Respondent's production and distribution of the PSAs was a violation of law.

II. FACTS

For the purpose of the Cross Motions for Summary Judgment, the following facts are undisputed:

1. The Charging Party is the Montana Republican Party.
2. Ron Zellar is the Public Information Officer for the Montana Department of Agriculture and is employed by the State of Montana.
3. KXLO is a radio station in Lewiston, Montana.
4. In late February or early March of 2008, Mr. Zellar spoke to a representative of KXLO regarding having the Respondent produce and distribute PSAs in support of agriculture in Montana.
5. Respondent, Brian Schweitzer, is Governor of the State of Montana.
6. Sara Elliott is the Governor's Communication Director and is employed by the State of Montana.
7. In early March 2008, Mr. Zellar informed Sara Elliott about the PSAs.
8. On March 4, 2008, the Respondent filed for re-election.
9. On March 5, 2008, the Respondent, Sara Elliott and Ron Zellar spent an undisclosed amount of time producing two versions of the PSA (a 30-second version and a 60-second version) promoting agriculture in Montana.
10. The messages were recorded at the Respondent's official state office.
11. The time spent producing the recorded messages was during the normal work day for Ms. Elliott and Mr. Zellar and they were both compensated by the State of Montana for their services.
12. State of Montana supplies, equipment, and facilities were used in recording the messages.
13. After the production of the PSAs, Mr. Zellar sent them to a number of news and advertising editors statewide.

14. State of Montana supplies, equipment, and facilities were used in distributing the PSAs.
15. Either or both of the PSAs were broadcast by Montana radio stations.
16. The PSAs were not produced or distributed pursuant to a state or national emergency.
17. The PSAs used the voice and name of the Respondent.
18. The 30-second spot read:

Agriculture is Montana's largest industry and we're working with producers in our agricultural industry to continue growing. This is a farmer and your governor, Brian Schweitzer, and Montana is on the move.

Montana farmers and ranchers have *always* produced top quality grains and beef, as well as hay, peas, honey, lamb and a host of other products. We're working to add *value* to Montana commodities. It is an exciting time in Montana Agriculture. Take the time to buy local products and say thank you to a farmer during this: The National Agricultural month.

20. The 60-second spot read:

Agriculture is Montana's largest industry and we're working with producers in our agricultural industry to continue to grow. This is a farmer and your governor, Brian Schweitzer, and Montana is on the move.

Montana farmers and ranchers have *always* produced top quality grains and beef, as well as hay, peas, honey, lamb and a host of other products. We're working to add value to Montana commodities. Montana is a *leader* in producing certified organic grains for buyers in the United States and overseas. Beef breeders have found markets in Brazil and Argentina and around the world. A livestock team from Russia will arrive later this year to discuss a partnership that would use Montana genetics in rebuilding their beef industry. In the future, large and small firms plan to process Montana oil seed into biofuels with a side benefit of supplying protein rich feed to livestock. It's an exciting time in Montana Agriculture. Take the time to buy local products and say thank you to a farmer during this: The National Agricultural month.

III. APPLICABLE LAW

The Respondent is charged with violating Section 2-2-121(4) of the Montana Code Annotated. That provision states:

A candidate, as defined in 13-1-101(6)(a), may not use or permit the use of *state funds* for any advertisement or public service announcement in a newspaper, on radio, or on television that contains the candidate's name, picture, or voice except in the case of a state or national emergency and then only if the announcement is reasonably necessary to the candidate's official functions. Emphasis added.

IV. ISSUE

The issue is whether the production and distribution of the PSAs by the Respondent, using state facilities, equipment, supplies and personnel constituted the use of "state funds" under Section 2-2-121(4) MCA.

V. POSITION OF THE PARTIES

A. Position of the Charging Party

The Charging Party alleges that the Respondent's use of Montana State equipment, supplies, facilities, and employee time in making and distributing the PSAs constituted the use of state funds under Section 2-2-121(4) MCA. It states that the statutory prohibition from using "state funds" reaches the direct expenditure of state money as well as the indirect use of state money by using state equipment, supplies, facilities, employee time, etc.

B. Position of the Respondent

The Respondent states that the prohibition in question, Section 2-2-121(4) MCA, only precluded him, as a candidate, from using state money to purchase the PSAs. He argues that there was no violation of law because he did not use state money for this purpose. He states that the statutory prohibition does not prohibit public officials, as candidates, from using state owned equipment, supplies, facilities, and employee time to produce and distribute PSAs.

In making this argument, the Respondent states that Montana law prohibits all public officers and public employees from using "public time, facilities, equipment, supplies, personnel, or funds" for any private business purpose (§2-2-121(2) MCA) or to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue (§2-2-121(2) MCA), but he contends that Montana law does not preclude office holders, as candidates, from using public time, facilities, equipment, supplies, or personnel for advertisements or public service announcements using their names, pictures or voices.

The Respondent states that he is on duty 24/7, that the issuance of press releases, speeches, or his help in communicating matters relating to Montana constituencies, in this case, farmers, is a normal part of his job, and the job of his staff. He states that the scope of the prohibition urged by the Charging Party would unreasonably limit his ability to perform his job and that this was not

intended by the Legislature. If the Legislature wanted to prohibit office holder candidates from using state resources other than money, it would have said so.

VI. CONCLUSIONS OF LAW

1. Upon filing for re-election, the Respondent became a "candidate," as defined in Section 13-1-101(6)(a) MCA. That section defines a candidate as "an individual who has filed a declaration or petition for nomination, acceptance of nomination, or appointment as a candidate for public office as required by law..." It is undisputed that on March 4, 2008, the Respondent filed for re-election. It is also undisputed that the PSAs in question were made on March 5, 2008, and thereafter distributed and aired. Therefore, the PSAs were made, distributed and aired after the Respondent became a candidate for re-election.
2. The parties agree that the recorded and distributed messages were PSAs within the language of Section 2-2-121(4). They were recorded and distributed as PSAs and were thereafter aired by radio stations as PSAs.
3. The Respondent's production and distribution of the two PSAs violated Section 2-2-121(4) of the Montana Code Annotated.

VII. REASONING IN SUPPORT OF THE CONCLUSION THAT THE RESPONDENT VIOLATED § 2-2-121(4) MCA

The portion of § 2-2-121(4) MCA that is relevant here prohibits a public official or public employee, as a candidate for elective office, to use or permit the use of "state funds" for a PSA that contains the candidate's name, picture, or voice. The Respondent was a "candidate" for re-election at the time he produced and distributed two "public service announcements." The only remaining question is whether the production and distribution of the PSAs constituted the use of "state funds." Unfortunately, the statute does not define the meaning of "state funds." Consequently, the meaning of the term must be determined by means other than reference to a specific legislative definition.

It is well settled that a statute is to be construed consistent with the intent of the enacting legislative body, and that when the language of the statute is clear and unambiguous, a court, administrative agency, or an arbitrator is to take the clear meaning and apply it to the facts. *Mont. Dept of Rev. v. Am. Smelting & Refining Co.*, 173 Mont. 316, 324 (1977). Only when the statutory language is ambiguous is it proper to go beyond the language of the statute and attempt to discern the intent of the enacting legislative body.

Here it is concluded that the statutory term "state funds," as used in § 2-2-121(4) is ambiguous. Consequently, the intent of the legislature must be determined by looking beyond the statute itself.

A. The Statutory Term “State Funds” is Ambiguous

The statutory prohibition under consideration, § 2-2-212(4) MCA, is part of a larger subsection of the Montana Ethics Code. The larger subsection prohibits three critical activities:

- 2(a) A public officer or public employee from using “public time, facilities, equipment, supplies, personnel, or funds for the officer’s or employee’s private business.”
- 3(a) A public officer 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, or the passage of a ballot issue”
- 4 [a public officer or public employee as a] candidate from using or permitting the use of “state funds for any advertisement or public service announcement ... that contains the candidate’s name, picture or voice.....”

The ambiguity of subsection 4, the prohibition applicable here, is that it prohibits “candidates” from using “state funds,” whereas the two earlier subsections prohibit “public officers and public employees” from using “public time, facilities, equipment, supplies, personnel, or funds”

The Respondent argues that had the legislature intended subsection 4 to prohibit a candidate from using public time, facilities, equipment, supplies, or personnel, it would have said so. The Respondent states that the failure of the legislature to include the broader prohibition indicates its intent not to do so.

It is clear that the role of the judge is not to insert in a statute what the legislature omitted. See, e.g., § 1-2-101, MCA; *Pinnow v. Mont. State Fund*, 340 Mont. 217, 228 (2007). Thus, one reading of the prohibition is that the legislature did not intend the term “state funds” to include the use of state funded facilities, equipment, supplies, personnel etc. Thus, the legislature’s expression of one thing (funds) may properly imply the exclusion of another (public time, facilities, equipment, supplies, personnel.) *McCormick v. Brevig*, 338 Mont. 370, 381 (2007).

Alternatively, the prohibition against public officials and public employees, as candidates, from using public funds could reasonably be intended to preclude the use of all state resources, not just state money. Subsection (2)(a), (prohibiting a public officer or public employee from using public time, facilities, equipment, supplies, personnel, or funds for his or her private business purpose) and subsection (3)(a), (prohibiting a public officer or public employee from using public time facilities, equipment, supplies, personnel, or funds for political purposes) address different subjects than subsection 4. Subsection 2(a) and 3(a) were enacted much earlier than the more recently enacted subsection 4. Additionally, subsection 4 is based on a completely different source.

Subsections (2)(a) and 3(a) address public officers and public employees using public money and other resources for their private businesses or for political activity. These two subsections speak generally to public officials and employees. Whereas, subsection 4 does not speak generally to public officials and employees, but to a limited subset of such employees, those that become candidates for political office. Subsection 4 was enacted more recently and it is reasonable to conclude that it was to address something different than the two earlier subsections. Indeed, unlike the earlier subsections, subsection 4 was taken from a North Carolina Statute that also prohibits public officials, as candidates, from using state funds for PSAs. North Carolina General Statute § 163-278.16A.¹

Thus, there is no reason to assume that the legislature intended that subsection 4 be read in reference to subsection 2(a) and 3(a). Alternatively, the legislative purpose of subsection 4 is revealed by looking at the context from which the legislation grew, the intent of the sponsor of the legislation, and the dialog that occurred in legislative committees that considered the legislation.

B. The Legislative History Is Determinative

It is clear that legislative intent may be determined by considering the context from which the legislation grew,² the intent of the sponsor,³ and the dialog of the legislators,⁴ in committee, who passed upon what ultimately became law.

¹ The statute reads:

.....no declared candidate for ...State office shall use or permit the use of State funds for any advertisement or public service announcement in a newspaper, on radio, or on television that contains that declared candidate's name, picture, or voice, except in case of State or national emergency and only if the announcement is reasonably necessary to that candidate's official function...."

Like the Montana statute, the North Carolina statute does not define the term "state funds" and there appears to be no court decisions defining the term.

² *Third National Bank v. Impac Limited*, 432 U.S. 312, 316-318 (1977) (The events that were occurring at the time that could have affected the legislature's state of mind and its' choice of language when voting.)

³ E.g. *North Haven Board of Education v. Bell*, 456 U.S. 512, 522-529 (1982), *United Steel Workers of America v. Webber*, 443 U.S. 193, 202-208 (1979).

⁴ *Bush v. Gore*, 531 U.S. 98, 154 (2000) (Breyer dissenting).

First, the context of subsection 4. During the election cycle that preceded the legislation in question, at least two state officials, running for elective office, used PSAs that featured their names, voices and pictures. Some Montanans considered that these PSAs were, in whole or in part, taxpayer-sponsored political electioneering and that the office holders in question should not have that political advantage. The PSAs provided the candidates with name recognition and placed them in a positive light before the electorate. Indeed, the constituents of Senator Joe Tropilla, (Democrat, Great Falls), complained of this conduct.

Second, the legislative history of subsection 4. After the election, it was Senator Tropilla who sponsored SB 16, the bill that ultimately became subsection 4. In proposing the bill, he said that its purpose was to prohibit directors and state officials, after becoming candidates for public office, from using state resourced PSAs to further their political careers. Transcript of House Committee Hearing, March 2, 2005, p.4. He told his fellow legislators that when going door-to-door in his senate district, “the first thing people started telling me is why are these guys on television all the time promoting themselves and the guy is doing a public service?” Transcript of House Committee Hearing, March 2, 2005, p. 4.

Thus, the sponsor of the legislation in question was responding to his constituents’ concerns that public officials, as candidates, should not be using PSAs to promote themselves. Senator Tropilla and his constituents were not making fine distinctions between these candidates’ use of taxpayer money or the use of other taxpayer resources. Their concern was that state officials, as candidates, should not be using any state resources for their PSAs.

Secretary of State Brad Johnson, in testimony before the legislative committee, said that the use of PSAs by public officials, who had become candidates for public office, were:

rapidly eroding public confidence in government at all levels ... The integrity of the electoral process is far too important to have politicians smugly promote themselves with taxpayers’ money under the guise of public service. This bill seeks to help *level the political playing field*. The power of the incumbency is strong enough, and challengers should not be put at an even greater disadvantage. Emphasis added.

Written Statement of Secretary of State Johnson before the Senate Committee on State Administration, January 7, 2005, p. 4.

The Secretary of State also said that “a public servant should be elected and re-elected, because they have shown a sense of public responsibility [not by running PSAs at the taxpayers’ expense]. Oral testimony of Secretary of State Johnson before the Senate Committee on State Administration, January 7, 2005, p. 4.

From the above legislative history, the legislation had dual purposes: to prohibit public officials, once they became candidates for office, from running PSAs at taxpayer expense, and to level the playing field between these public official candidates and their non-official candidate

counterparts. While the bill uses the term “state funds,” (borrowed from North Carolina), the purpose of the bill was to prohibit the use of all public resources for this purpose. Leveling the playing field was not limited to prohibiting office holder candidates from using state money to pay for PSAs, but from also drawing on any and all state provided resources not available to the non-office holder candidates. This conclusion is supported by the above and an amendment that was proposed to SB 16.

During the committee’s consideration of SB 16, the Department of Commerce presented a proposed amendment to the bill that would allow a governor, when he was a candidate for public office, to continue to make PSAs using his name, voice or picture to promote Montana travel. This amendment was rejected by the committee.

The committee’s rejection of the amendment was because it did not want public official candidates, even a governor, to use state resources even for a legitimate purpose like promoting state travel. This was the judgment of the committee even if the cost of the PSAs or advertisements was incurred prior to the governor becoming a candidate. See transcript of executive action in the Senate Committee, January 14, 2005, pp. 2-4. See also transcript of the March 2, 2005, House Committee hearing, testimony of Betsy Baumgart, urging amendment to allow exception for travel promotions using the “influence” of the governor’s office.

The House Committee rejected the proposed amendment stating that public policy was best served by providing no exceptions. Transcript of the March 8, 2005, House Committee executive action, p. 2. As Senator Tropilla had said, state officials running for office have three years to put out ads and PSA’s, but once they file for office, they have to stop doing so. See Senator Tropilla’s response to Senator Liable’s comments and questions. Senate Committee executive session, pp. 4-5.

The clear intent of the bill was to prohibit state officials, once they became candidates, from using state resources on PSAs and ads which feature their names, pictures or voices, and also to level the playing field between government officials as candidates and their non-government opponents. The legislature was not drawing fine distinctions between the use of state money as opposed to the use of other state resources on these PSAs and ads.

C. This Construction Does Not Unreasonably Interfere With the Respondent’s Legitimate Functions

Respondent states that he is on duty 24/7, and that as Chief Executive Officer for Montana, he is constantly called upon to make statements of public importance -- in this case, the importance of Montana agriculture – to Montanans. He states that the scope of the prohibition urged by the Charging Party would result in an outright ban on office holder candidates from appearing in ads or PSAs related to official public business, and if the Legislature intended such a limitation, it should have said so directly.

Respondent's essential functions argument is not that he should be excused from the requirements of the law, but that if the legislature had intended such a result, it would have clearly said so. While the statute, as construed, will prohibit the Respondent, as a candidate, from using PSAs like the one in question, this limitation will have little impact on his ability to communicate to Montanans or others. The Respondent may continue to use press releases, press interviews, press conferences, opinion-editorial page pieces, personal appearances, and engage in all things, as governor, that may attract media attention. The only limitation is reliance on PSAs produced and distributed using state resources featuring his name, picture or voice. Consequently, the legislation, as construed, will have a negligible impact on the Respondent's ability, as Governor, to communicate during a campaign. What the construction of subsection 4 will accomplish is what the legislature intended, prohibiting the use of state resources for such purposes and leveling the playing field between government officials and non-officials who square off in a campaign.

VIII. THE SANCTION

Section 2-2-136 (2) provides that if "a violation has occurred, the commissioner may impose an administrative penalty of not less than \$50 or more than \$1,000..... [and] may assess the cost of the proceeding"

As previously determined, the statutory prohibition that the Respondent violated was ambiguous. This is a case of first impression; there are no previous cases interpreting the intent of the legislature on this matter. Indeed, the Respondent's read of the legislative prohibition, while incorrect, was not unreasonable. Given these considerations, there is certainly not cause to impose the maximum sanction on the Respondent. The gravity of the sanction must not exceed the gravity of the offense.


However, to assure that the Code of Ethics is treated seriously by public officials and public employees, the sanction must be sufficient to affirm the strong public policy of accountability. All public officials and public employees must act in accord with the Code.

Accordingly, it is determined that Respondent pay an administrative penalty of Seven Hundred Fifty Dollars (\$750.00) and not suffer the costs of the proceeding.

The Charging Party's Motion for Summary Judgment is GRANTED.

SO ORDERED.

DATED this 18th day of August, 2008.



William L. Corbett, Hearings Examiner