

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Eaton v. Dunwell No. COPP 2018-CFP-018	DISMISSAL OF COMPLAINT BASED ON APPLICATION OF PRINCIPLE OF EXCUSABLE NEGLIGENCE
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On June 4, 2018, Jake Eaton of Billings, Montana filed a complaint against Representative Mary Ann Dunwell of Helena, Montana for failing to sufficiently detail expenditures on her 2016 campaign finance reports.

**SUBSTANTIVE ISSUES ADDRESSED**

This decision addresses the sufficiency of expense detail when reporting campaign expenditures and services.

**FINDINGS OF FACT**

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: Montana's 2016 general election was held on Tuesday, November 8, 2016. (Montana Secretary of State.)

Finding of Fact No. 2: Mary Ann Dunwell filed a C-1 Statement of Candidate as a Democratic candidate for State Representative, House District 84 on June 24, 2015. (Commissioner's Records.)

Finding of Fact No. 3: Mary Ann Dunwell timely filed the required C-5 campaign finance reports throughout the 2016 election cycle. (Commissioner's Records.)

## DISCUSSION

The Complaint asserts that a number of expenditures reported by candidate Dunwell failed to include sufficient detail. The Commissioner thus examines candidate Dunwell's campaign finance reports. Representative Dunwell reported expenditures on her 2016 campaign finance reports in the following detail:

Finding of Fact No. 4: Rep. Dunwell's 2016 campaign finance reports show 17 expenditures that lack sufficient detail (see Tables 1-4). (Commissioner's Records.)

Table 1: Expenditures as reported by candidate Dunwell on her July 1, 2015 through April 28, 2016 initial campaign finance report that did not contain the required level of reporting detail. Report was amended and filed November 28, 2016.

Entity	Date	Purpose	Amount
US Postal Service	12/03/2016	Stamps for communicating with voters	\$147.00
US Postal Service	03/21/2016	Mailing #2 postage	\$164.25
US Postal Service	02/25/2016	Bulk Mailing postage	\$76.33
US Postal Service	04/06/2016	Postage for mailing	\$94.69

Table 2: Expenditures as reported by candidate Dunwell on her June 23, 2016 through September 29, 2016 campaign finance report that did not contain the required level of reporting detail. Report was originally filed October 4, 2016. Information contained within this table was obtained from a version of the report as amended and filed on November 28, 2016 (which was also included with the Complaint).

Entity	Date	Purpose	Amount
US Postal Service	09/26/2016	Postage for fundraising letters to previous donors	\$133.01
US Postal Service	07/07/2016	Stamps for communicating with voters	\$67.40
US Postal Service	09/08/2016	Postcard stamps for communicating with voters	\$34.00
Artcraft Printers*	09/29/2016	GOTV Mailer card for absentee and poll voters (not yet invoiced)	\$657.00
Mailing Technical Services*	09/29/2016	Mailing services for six card mailings (not yet invoiced)	\$2,154.06

\*Reported as debt of the campaign, not an Expenditure

Table 3: Expenditures as reported by candidate Dunwell on her September 30, 2016 through October 22, 2016 campaign finance report that did not contain the required level of reporting detail. Report was originally filed on October 27, 2016. Information contained within this table was obtained from a version of this report as amended and filed on November 28, 2016 (which was also included with the Complaint).

Entity	Date	Purpose	Amount
US Postal Service	10/17/2016	Bulk mail and East Helena absentee	\$481.29
US Postal Service	10/18/2016	Stamps for GOTV absentee	\$28.20
US Postal Service	10/19/2016	Stamps for GOTV absentee	\$47.00
US Postal Service	10/14/2016	Postcard stamps neighbor to neighbor cards	\$47.60
US Postal Service	10/19/2016	Postcard stamps GOTV absentee	\$68.00
Mailing Technical Services*	10/21/2016	Estimated Mailer Expenses	\$627.80

\*Reported as a Debt of the campaign, not an Expenditure

Table 4: Expenditures as reported by candidate Dunwell on her October 23, 2016 through November 23, 2016 campaign finance report that did not contain the required level of reporting detail. Report was originally filed on November 28, 2016. Information contained within this table was obtained from a version of the report as amended and filed November 28, 2016 (which was also included with the Complaint).

Entity	Date	Purpose	Amount
Lincini Print Shop	11/05/2016	Print mailer (\$911) plus additional 500 6X11 postcards	\$1,137.50
US Postal Service	10/28/2016	Postage for absentee mailing	\$47.00

The expenses described in the foregoing Tables required additional detail. Such generic expenditure descriptions are more akin to a list than a description and do not provide the “purpose, quantity, subject matter” of the expense which are the details required to be reported by 44.11.502(7), ARM. Nor, do the listings meet Montana’s statutory requirement of detail required for expenditures to consultants, or other persons who perform services for or on behalf of a candidate; the law requires that such expenditures “must be itemized and described in sufficient detail to disclose the specific services

performed by the entity to which payment or reimbursement was made.”

§ 13-37-229(2)(b), MCA.

Sufficiency Finding No. 1: There are sufficient facts to show that Dunwell’s 2016 campaign finance reports failed to disclose sufficient detail describing campaign expenditures (FOF No. 4).

The issue of sufficient detail was addressed on October 3, 2016 in *MDP v. MRLCC*, COPP-2016-CFP-029, by then-Commissioner Jonathan Motl.

Although he found MRLCC’s reporting detail failed to comply with 44.11.502(7), ARM, he also added the following observations which are relevant here:

This Decision marks the first time that the COPP has examined a single word (or group of words) listing a campaign expense in a campaign finance report and determined whether the word or group of words provided “sufficient detail” of the expense as required by law.<sup>1</sup> Prior COPP Decisions, have looked at narrow issues of campaign finance report disclosure such as whether: 1) the disclosure failed to report the expense at all; or, 2) the disclosure failed to report a particular activity, as revealed by examination of receipts or other documents showing the detail of that particular expense.

These previous COPP Decisions determined a campaign practice violation by a political committee or candidate for failure to report in-kind value of paid staff or vendors providing services to the campaign.<sup>2</sup> Other Decisions determined a campaign practice

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<sup>1</sup> The COPP touched on this issue in *O’Hara v. Pinocci*, COPP-2014-CFP-027 (Initial and Final Decisions) with those Decisions focusing on the general deficiency of the method and manner of reporting, rather than the lack of “sufficient detail” stemming from the use of a single word like “consultant.” The COPP came closest to this issue in *Clark v. Datsopoulos*, COPP-2014-CFP-033B wherein the COPP investigator retrieved a “detailed invoice” from the campaign consultant. The COPP then compared the campaign reporting to the invoice and determined that the campaign finance report was deficient because it failed to disclose the “mailing, printing, radio and management services” listed in the invoice.

<sup>2</sup> “The COPP has a 20 year-plus history of interpreting Montana’s contribution [expense] law ...to require reporting and disclosure of the in-kind value of express advocacy use of paid staff by any entity involved in a campaign.” *Hamlett v. MGN*, COPP-2012-CFP-053. See also *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Clark v. Bannan*, COPP 2010-CFP-023; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; *Bonogofsky v. Wittich*, COPP-2010-CFP-031; *Madin v. Sales*, COPP-2010-CFP-029; *Bonogofsky v. Prouse*, COPP-2010-CFP-033; *Bonogofsky v. Wagman*, COPP-2010-CFP-035; *Petrini v. Houck*, COPP-2015-CFP-011; and *Clark v. Datsopoulos*, COPP-2014-CFP-033B.

violation by a political committee for failure to itemize expenditures according to each candidate served by the expenditures.<sup>3</sup> Still other Decisions determined a campaign practice violation by a candidate for failure to disclose any part of the name, mailing address, occupation or employer of a contributor to their campaign.<sup>4</sup>

Based on the facts of this Matter, the Commissioner reaches the next issue – that is, that there is an affirmative duty on the part of a candidate or committee to use a word or words in their campaign finance report that provide “sufficient detail to disclose the specific services” covered by the expenditure. In this Matter, the use of the word or words “bookkeeping” or “bookkeeping and compliance reporting” sufficiently describe and thereby disclose the specific services provided by Marilyn Miller to the MRLCC (FOF No. 4). In contrast, the use of the words “consulting”, “fundraising” or “reimbursement” are not sufficient to describe or disclose the specific services of the “The Political Company” (FOF No. 4).

*Id.*, at 5-7.<sup>5</sup> While the lack of expenditure reporting detail was a violation, such a finding was, at the time (2016 election cycle) a further application of the rule and statute at issue. Thus, the violation was dismissed under the “excusable neglect” principle:

[G]iven the first time nature of this determination and the likelihood that there are other candidates and committees in a similarly deficient reporting status.

*Id.*, at 7.

As this Complaint, and several others recently filed by Mr. Eaton, demonstrate—Commissioner Motl’s prediction was correct. In order to be fair to all 2016 candidates and committees who are in the “similarly deficient

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<sup>3</sup> *Gibson v. Montana Democratic Party*, COPP 2014-CFP-053; *Shellnutt v. Planned Parenthood*, COPP-2014-CFP-058; *Perea v. MDP*, COPP-2014-CFP-055; *Buttrey v. MDP*, COPP-2014-CFP-050; *Kary v. MDP*, COPP-2014-CFP-059; and *Gibson v. MDP*, COPP-2014-CFP-062.

<sup>4</sup> *O’Hara v. Erb*, COPP 2016-CFP-012; *Essman v Patients for Reform*, COPP-2012-CFP-034; and *Adams v. Brown*, COPP-2015-CFP-005.

<sup>5</sup> Notes 1-4 above appears as notes 6-9 in *MDP v. MRLCC*, 2016-CFP-029.

reporting status” in regard to expenditure detail reporting as discussed in this decision, the Commissioner applies the same determination and safeguards found in *MDC v. MRLCC*, COPP-2016-CFP-029.

The Commissioner incorporates the two safeguards of *MDC v. MRLCC* into this Decision. First, no later than September 28, 2018,<sup>6</sup> Representative Dunwell is directed to file amended campaign finance reports providing the required “sufficient detail” for the specific expenditures noted in this decision. Second, contingent on amended campaign finance reports being filed, the Commissioner hereby excuses (dismisses) Representative Dunwell from a campaign practice violation for the deficiencies examined above based on the principle of excusable neglect (see discussion, below).<sup>7</sup>

The Commissioner notes Representative Dunwell has provided the expenditure detail as required as part of her complaint response and has agreed to amend the campaign’s 2016 finance reports to fulfill the requirements set out by the Commissioner for dismissal.

### **DECISION**

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner “shall investigate” any alleged violation of campaign practices law. §13-37-111(2)(a), MCA. The mandate to investigate is followed by a mandate to take action; if

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<sup>6</sup> In *MDC v. MRLCC*, Commissioner Motl requested of the respondent they “immediately file” an amended report. As some 20+ months have passed since the end of the 2016 election cycle, the Commissioner will provide the respondent (and any other candidate or committee found in similar status) 90 days to submit an amended report.

<sup>7</sup> Excusable neglect was similarly applied in *Thomas v. Gianforte*, COPP-2016-CFP-001.

there is “sufficient evidence” of a violation the Commissioner must (“shall notify,” see §13-37-124, MCA) initiate consideration for prosecution.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence, as set out in this Decision, to show that Dunwell’s 2016 campaign practices violated Montana’s campaign practice laws, including, but not limited to the laws set out in the Decision. Having determined that sufficient evidence of a campaign practice violation exists, the next step is to determine whether there are circumstances or explanations that may affect prosecution of the violation and/or the amount of the fine.

The failure to fully and timely report and disclose cannot generally be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law as it relates to failures to file and report. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009. In this Matter, however, application of excusable neglect is appropriate for the reasons set out above and is therefore applied to dismiss Sufficiency Finding No. 1.

Because the findings of violation are excused by application of excusable neglect principles, this Matter is dismissed in its entirety.

DATED this 10<sup>th</sup> day of June 2018.



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