

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Eaton v. Malek  No. COPP 2018-CFP-039	DISMISSAL OF COMPLAINT BASED ON APPLICATION OF PRINCIPLE OF EXCUSABLE NEGLIGENCE FINDING OF SUFFICIENT FACTS SUPPORT A CAMPAIGN FINANCE VIOLATION
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On August 27, 2018, Jake Eaton of Billings filed a campaign practices complaint against Sue Malek of Missoula. The complaint alleged that candidate Malek failed to provide the proper level of reporting detail to describe thirteen campaign expenditures made and three debts owed by her 2016 campaign, and that candidate Malek failed to properly report one campaign obligation as a debt owed by the campaign.

**SUBSTANTIVE ISSUES ADDRESSED**

This decision addresses the sufficiency of expense detail when reporting campaign expenditures and services. A portion of this Complaint will be dismissed for the same reasoning and analysis set forth in *Eaton v. Dunwell*, COPP-2018-018. The timely reporting of campaign debts is also addressed.

## FINDINGS OF FACT

The foundational fact necessary for the Decision is as follows:

Finding of Fact No. 1: Sue Malek filed a C-1 Statement of Candidate as a 2016 candidate for Senate District 46 in Missoula County with the COPP on January 07, 2014. All 2016 campaign financial reports were timely filed by candidate Malek. (Commissioner's Records.)

## DISCUSSION

The Complaint asserts that expenditures and debts reported by candidate Malek failed to include sufficient detail. The Commissioner reviewed candidate Malek's 2016 campaign finance reports, including the allegations of insufficient detail outlined in the complaint. The Commissioner dismisses the allegation of five expenditure entries requiring additional detail as *de minimis*, as information excluded does not substantially affect disclosure (see Table 0).

**Table 0:** The Commissioner determines the following five entries requiring additional detail are dismissed as *de minimus*.

Entity	Date	Purpose	Amount
US Postal Service	12/01/2015	Stamps	\$31.36
FedEx	02/12/2016	Copies	\$11.00
FedEx Office	09/14/2016	Copies	\$10.56
Office City	09/07/2016	Envelopes	\$22.50
USPS	09/14/2016	STAMPS	\$23.50

Senator Malek reported expenditures on her 2016 campaign finance reports in the following detail:

Finding of Fact No. 2: On her initial campaign finance report dated September 09, 2015 through April 28, 2016, candidate Malek did not provide the required level of reporting detail to describe campaign expenditures on two occasions (see Table 1). (Commissioner's Records.)

**Table 1:** Expenditures as reported by candidate Malek on her September 9, 2015 through April 28, 2016 campaign financial report that did not contain the required level of reporting detail.

<b>Entity</b>	<b>Date</b>	<b>Purpose</b>	<b>Amount</b>
USPS	02/12/2016	Stamps	\$49.00
USPS	02/12/2016	Stamps	\$49.00

Finding of Fact No. 3: On her periodic campaign finance report dated April 29, 2016 through May 21, 2016, candidate Malek did not provide the required level of reporting detail to describe campaign expenditures on one occasion (see Table 2). (Commissioner’s Records.)

**Table 2:** Expenditures as reported by candidate Malek on her April 29, 2016 through May 21, 2016 campaign financial report that did not contain the required level of reporting detail.

<b>Entity</b>	<b>Date</b>	<b>Purpose</b>	<b>Amount</b>
USPS	05/10/2016	Stamps	\$47.00

Finding of Fact No. 4: On her periodic campaign finance report dated May 22, 2016 through June 24, 2016, candidate Malek did not provide the required level of reporting detail to describe campaign expenditures on two occasions (see Table 3), including a June 6, 2016 expenditure to Artcraft Printers for ‘6000 Walking Cards + Shipping’. (Commissioner’s Records.)

**Table 3:** Expenditures as reported by candidate Malek on her May 22, 2016 through June 24, 2016 campaign financial report that did not contain the required level of reporting detail.

<b>Entity</b>	<b>Date</b>	<b>Purpose</b>	<b>Amount</b>
USPS	06/03/2016	Stamps	\$47.00
Artcraft Printers	06/06/2016	6000 Walking Cards + Shipping	\$889.24

Finding of Fact No. 5: On her periodic campaign finance report dated June 25, 2016 through September 29, 2016, candidate Malek did not provide the required level of reporting detail to describe campaign expenditures or debts owed by the campaign on five occasions (see Table 4), including a June 12, 2016 expenditure to the MDLCC described only as “walking cards”. (Commissioner’s Records.)

**Table 4:** Expenditures and Debts as reported by candidate Malek on her June 25, 2016 through September 29, 2016 campaign financial report that did not contain the required level of reporting detail.

<b>Entity</b>	<b>Date</b>	<b>Purpose</b>	<b>Amount</b>
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Alphagraphics	09/13/2016	Yard signs	\$791.21
MDLCC	07/12/2016	Walking cards	\$50.00
Artcraft Printers*	09/29/2016	Printing costs- 5100 pcs	\$675.00
Element + L Design*	09/29/2016	Design services	\$50.00
MTS Mailing Service*	09/29/2016	Mailing costs	\$1,349.04

\*Debt

Finding of Fact No. 6: On her periodic campaign finance report dated September 30, 2016 through October 22, 2016, candidate Malek did not provide the required level of reporting detail to describe campaign expenditures on one occasion (see Table 5). (Commissioner’s Records.)

**Table 5:** Expenditures as reported by candidate Malek on her September 30, 2016 through October 22, 2016 campaign financial report that did not contain the required level of reporting detail.

Entity	Date	Purpose	Amount
MTS Mailing Service	10/14/2016	Mailing 1586 pcs	\$615.40

The expenses and loans described in the foregoing Tables require additional detail. Such generic expenditure descriptions are more akin to a list or category 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 Malek 2016 campaign finance reports failed to disclose sufficient detail describing campaign expenditures (FOF No. 2, 3).

Similar problems of insufficient detail in expenditure reporting under the current rules and statutes was first substantively addressed on October 3, 2016 in *MDP v. MRLCC*, COPP-2016-CFP-029, by then-Commissioner Jonathan Motl. While MRLCC's lack of expenditure reporting detail was a violation, such a finding was, at the time of the 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.

The Commissioner incorporates herein by reference the in-depth review of the *MDP v. MRLCC* decision recently set out in *Eaton v. Dunwell*, 2018-CFP-018. This allegation against Rep. Malek will be dismissed for the same reasons and pursuant to the same two safeguards.

As Senator Malek has amended and filed her 2016 campaign finance reports with the detail information as requested during this investigative period,<sup>1</sup> it is unnecessary to set the contingency found in *Eaton v. Dunwell*, 2018-CFP-018. The Commissioner hereby excuses (dismisses) Senator Malek from a campaign practice violation for the deficiencies in detail identified above based on the principle of excusable neglect.

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<sup>1</sup> The Commissioner notes that Senator Malek has provided the expenditure detail as required as part of her complaint response and has amended her campaign's 2016 finance reports to fulfill the requirements set out by the Commissioner for dismissal.

The Commissioner further examined candidate Malek's campaign finance reports and her subsequent responses to the complaint regarding the allegation the campaign failed to properly report a debt.

Finding of Fact No. 4: Candidate Malek's response to the complaint stated that the June 12, 2016 expenditure to the MDLCC was for the design of "Sue works for a strong Montana Economy" walking cards and that the June 6, 2016 expenditure to Artcraft was for the printing and shipping of 6,000 of the "Sue works for a strong Montana Economy" walking cards designed by the MDLCC. (Commissioner's Records.)

Finding of Fact No. 5: On October 11, 2018, candidate Malek provided a follow-up email response to this complaint that stated that the MDLCC provided design services for the "Sue works for a strong Montana Economy" cards on May 15, 2016. (Commissioner's Records.)

Candidate Malek stated the walk cards were designed by the MDLCC on May 15, 2016 for the "Sue works for a strong Montana Economy" cards (FOF No. 5).

Candidate Malek was obligated to report the design fee at the time the expense was incurred, 44.11.502(2), ARM. As payment was not made until July 11 and the service was provided on May 15, candidate Malek should have reported the design fee as a debt owed to the MDLCC on her May 22 through June 24, 2016 financial report.

"An obligation to pay for a campaign expenditure is incurred on the date the obligation is made, and shall be reported as a debt of the campaign until the campaign pays the obligation by making an expenditure." ARM 44.11.502(2). Further, "[a]n expenditure is made on the date payment is made, or in the case of an in-kind expenditure, on the date the consideration is

given.” *Id.*, at (3). “The date of each expenditure shall be reported in the reporting period during which it is made.” *Id.*, at 503(4).

Sufficiency Finding No. 2: There are sufficient facts to show that the Malek campaign failed to timely report a debt in the amount of \$50.00 on her June 25, 2016 campaign finance report (FOF Nos. 4, 5).

Candidate Malek failed to timely report a debt as required by Montana law. The Commissioner notes while the expenditure was reported, it was not reported as a debt when incurred. The Commissioner finds Candidate Malek violated Montana campaign finance law.

### **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 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 the Decision, to show that Candidate Malek’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 there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to Sufficiency Finding No. 2, a civil fine is justified. § 13-37-124, MCA. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying a civil fine or civil enforcement of Candidate Malek. Because of the nature of the violation, this matter is referred to the County Attorney of Lewis & Clark County for his consideration as to prosecution. *Id.*, at (1). Should the County Attorney waive the right to prosecute (*id.*, at (2)) or fail to prosecute within 30 days (*id.*, at (1)) this Matter returns to this Commissioner for possible prosecution.

Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that the Matter is waived back, this Finding and Decision does not necessarily lead to civil prosecution as the Commissioner has discretion (“may then initiate” *see id.*) in regard to a legal action. Instead,



most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In setting that fine the Commissioner will consider matters affecting mitigation, including the timely reporting of the expenditure and cooperation in correcting issues raised in the Complaint.

While it is expected that a fine amount can be negotiated and paid, in the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of campaign practice law, including those of § 13-37-225, MCA. *See id.*, at § 13-37-128. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

DATED this  8  day of November 2018.



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