

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Eaton v. McCarthy No. COPP 2018-CFP-033	DISMISSAL OF COMPLAINT BASED ON APPLICATION OF PRINCIPLE OF EXCUSABLE NEGLIGENCE
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On August 10, 2018, Jake Eaton of Billings, Montana filed a complaint against Kelly McCarthy of Missoula, Montana for failing to sufficiently detail expenditures on his 2016 campaign finance reports.

**SUBSTANTIVE ISSUES ADDRESSED**

This decision addresses the sufficiency of expense detail when reporting campaign expenditures and services. This Complaint will be dismissed for the same reasoning and analysis set forth in *Eaton v. Dunwell*, COPP-2018-018.

**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: Kelly McCarthy filed a hard-copy C-1 Statement of Candidate as a candidate for HD 49 in Yellowstone County with the COPP on July 20, 2015. (Commissioner's Records.)

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

## **DISCUSSION**

The complaint alleges failure to sufficiently detail six expenditures: 1) an expense in the amount of \$88.00 to Billings Times for thank you cards; 2) an expense in the amount of \$293.00 to Purple Snow Promotional for can coolers; 3) an expense in the amount of \$40.00 to Universal Awards for badges; 4) an expense in the amount of \$37.60 to USPs for stamps; 5) an expense in the amount of \$1000.00 to MDLCC for campaign services; 6) an expense in the amount of \$7.50 to University Awards for badges; and 7) an expense in the amount of \$934.73 to MTS for mailing services. The Commissioner dismisses allegations No. 6 as *de minimis*, as information excluded does not substantially affect disclosure.

Finding of Fact No. 4: Candidate McCarthy's 2016 campaign finance reports show 6 expenditures that lack sufficient detail (Commissioner's Records.)

The expenses described required 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 McCarthy 2016 campaign finance reports failed to disclose sufficient detail describing campaign expenditures (FOF No. 4).

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 (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 Complaint against candidate McCarthy will be dismissed for the same reasons and pursuant to the same two safeguards.

First, no later than November 15, 2018, Mr. McCarthy 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) Mr. McCarthy from a campaign practice violation for the deficiencies identified above based on the principle of excusable neglect.<sup>1</sup>

### **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 this Decision, to show that McCarthy’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*

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<sup>1</sup> The Commissioner notes that candidate McCarthy has agreed to amend the campaign’s 2016 finance reports to fulfill the requirements set out by the Commissioner for dismissal.

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 20<sup>th</sup> day of August 2018.



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