

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Perkins v. Downing No. COPP 2020-CFP-018	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION
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On May 28, 2020, John Perkins of Helena, MT filed a campaign practices complaint against Troy Downing of Bozeman. The complaint alleged that candidate Downing failed to properly provide opposing candidates with a copy of a new campaign advertisement specifically mentioning his primary opponents within ten days of Montana’s Primary election, and that candidate Downing failed to properly report this campaign expenditure activity.

SUBSTANTIVE ISSUES ADDRESSED

This decision addresses the Fair Notice Provision of Montana’s Clean Campaign Act and the proper reporting of an expenditure.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: This Complaint included a copy of a campaign ad supporting candidate Downing that utilized the name and image of both Scott Tuxbury and Nelly Nicol. A screenshot of the ad was taken from candidate Downing’s campaign Facebook page, and was accompanied by a post stating (in part) “Have you seen our newest ad?”. The post was dated May 25, 2020. (Commissioner’s Records).

Finding of Fact No. 2: Troy Downing filed a C-1 Statement of Candidate as a Republican candidate for State Auditor with the COPP on June 26, 2019. (Commissioner's Records).

Finding of Fact No. 2A: Nelly Nicol filed a C-1 Statement of Candidate as a Republican candidate for State Auditor with the COPP on October 2, 2019. (Commissioner's Records).

Finding of Fact No. 2B: Scott Tuxbury filed a C-1 Statement of Candidate as a candidate for State Auditor with the COPP on February 18, 2020. (Commissioner's Records).

Finding of Fact No. 2C: Montana's 2020 Primary election was held on June 2, 2020. (Commissioner's Records).

Finding of Fact No. 3: A copy of the "Fox and Henhouse" transcript was provided via email to the COPP by candidate Downing's campaign manager Sam Loveridge on May 28. Candidates Nicol and Tuxbury also received this email. The message states "Here's the transcript of the ad that started running on 5/20. We made a minor graphic change that started running on 5/27, the transcript stayed the same". The transcript provided was dated May 14, 2020. The transcript was typed up on letterhead from Strategic Perception, Inc. (Commissioner's Records).

Finding of Fact No. 4: On June 3, 2020, candidate Downing provided a formal response to this Complaint via email to the COPP (again through campaign manager Sam Loveridge). The response stated that "The "Fox and Henhouse" ad was placed on 05/20 prior to the fair notice deadline of May 23rd and in this ad we referenced "insurance insiders", there were no transcript changes and on a second buy placed on 5/27/20. The only change was a small graphic change". (Commissioner's Records).

Finding of Fact No. 5: On May 19, 2020, candidate Downing timely filed a Periodic C-5 campaign finance report, dated April 16, 2020 through May 14, 2020. This report disclosed an expenditure dated May 13, 2020 of \$8,000.00 to Strategic Perception for "Fox in Henhouse Ad 30 Sec TV Ad 05/08/20-05/14/20". (Commissioner's Records).

Finding of Fact No. 6: On May 22, 2020, candidate Downing filed a C-7E Notice of Pre-Election Expenditures, dated May 20, 2020 through May 22, 2020. This C-7E report disclosed one (1) expenditure dated May 22, 2020 of \$1,765.00 to Strategic Perception Inc., with Purpose provided as "30 Sec TV ad "Foxy Rev"

post production and re-editing”, Platform as “TV AD”, and Quantity as “05/22/20-06/02/20”. (Commissioner’s Records).

Finding of Fact No. 7: On June 19, 2020, candidate Downing filed timely filed a C-5 campaign finance report, dated May 15, 2020 through June 15, 2020. This report did not disclose any additional expenditures made or contributions received by the campaign pertaining to the “Foxy Rev” ad. A C-7E for May 29 filed by candidate Downing on May 29 did include one (1) In-Kind candidate loan of \$11,453.00 described as “Loan for Axiom Strategies “Fox in Hen House” Ad”, however the response received from candidate Downing in a related complaint (*Perkins v. Downing, COPP-2020-CFP-023*) indicated this In-Kind loan was for the purchase and distribution of campaign mailers. (Commissioner’s Records).

Finding of Fact No. 8: On June 14 and 15, 2020, COPP Investigator communicated via telephone and email with representatives from NBC Montana Missoula affiliate KECI. The station stated that the Downing campaign aired a television ad titled “Foxy” (the “Fox and Henhouse” ad) beginning May 20 through May 26 of 2020, with a second ad titled “Foxy Rev” airing from May 27 through June 2. KECI provided the transcript for each ad, which were identical. They also provided screenshots from each ad where they reference “insurance insiders”. The “Fox and Henhouse” ad shows only a picture of hens at that moment (see Exhibit 1), the “Foxy Rev” ad includes the name and image of both candidates Nicol and Tuxbury (see Exhibit 2). (Commissioner’s Records).

DISCUSSION

The Commissioner examines each of the allegations in this matter.

Fair Notice Period

The Complaint alleges candidate Downing failed to properly provide a copy of a new campaign advertisement that identified his opponents and was distributed within ten days of Montana’s Primary election to those opponents. The election communication included the name and image of both candidate Downing’s Primary election opponents, Nelly Nicol and Scott Tuxbury (FOF No.1).

§13-35-402, MCA, details Montana’s Fair Notice period:

Fair notice period before election. (1) A candidate or a political committee shall at the time specified in subsection (3) provide to candidates listed in subsection (2) any final copy of campaign advertising in print media, in printed material, or by broadcast media that is intended for public distribution in the 10 days prior to an election day unless:

- (a) identical material was already published or broadcast; or
- (b) the material does not identify or mention the opposing candidate.

(2) The material must be provided to all other candidates who have filed for the same office and who are individually identified or mentioned in the advertising, except candidates mentioned in the context of endorsements.

(3) Final copies of material described in subsection (1) must be provided to the candidates listed in subsection (2) at the following times:

- (a) at the time the material is published or broadcast or disseminated to the public;
- (b) if the material is disseminated by direct mail, on the date of the postmark; or
- (c) if the material is prepared and disseminated by hand, on the day the material is first being made available to the general public.

(4) The copy of the material that must be provided to the candidates listed in subsection (2) must be provided by electronic mail, facsimile transmission, or hand delivery, with a copy provided by direct mail if the recipient does not have available either electronic mail or facsimile transmission. If the material is for broadcast media, the copy provided must be a written transcript of the broadcast.

Montana's 2020 Primary elections were held on June 2, and the Fair Notice requirements went into effect on May 23, 2020 (FOF No 2C).

Candidate Downing's response indicated that the "Fox in Henhouse" ad was originally placed on March 20, 2020, with a second revised placement on March 27 (FOF No. 4). The response argued that "The only change was a small

graphic change. The voiceover and script were the same TV ad”. The response also stated that candidates Nicol and Tuxbury were provided copies of the “Fox and Henhouse” ad on May 28, in “an abundance of caution”. The email message also stated that the “Fox and Henhouse” ad “started running on 05/20. We made a minor graphic change that started running on 05/27” (FOF No. 3).

While Montana campaign finance law does not define the term identical, it is understood to mean “similar in every detail; exactly alike”.¹ By adding self-described “small graphic changes”, the May 27 version of the “Fox and Henhouse” ad cannot be considered identical to the original May 20 version. The Commissioner notes the “minor graphic change” was in fact the addition of both the likeness and names of Downing’s primary election opponents Nicol and Tuxbury (exhibits 1, 2), whereas the May 20 version refers only to “insurance insiders”. The exception of §13-35-402(1)(a), MCA does not apply to the May 27 version, as it is not “identical” to the May 20 version that had already been publicly disseminated. Candidate Downing was required to provide a copy of the transcript of the May 27 ad to candidates Nicol and Tuxbury at the time it was publicly disseminated, per Mont. Code Ann. §13-35-402(3)(a). By failing to provide candidates Nicol and Tuxbury a copy of the advertisement transcript on May 27, 2020, the time the material is published

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https://www.google.com/search?q=identical+definition&rlz=1C1GCEB_en&oq=identical&aqs=cchrome.0.69i59j69i57j013j46j012.1590j1j4&sourceid=chrome&ie=UTF-8

or broadcast or disseminated to the public, candidate Downing is in violation of Mont. Code Ann. §13-35-402(3)(c).

Reporting the Expenditure

The Complaint also alleges that candidate Downing failed to properly or timely report this campaign advertisement as an expenditure on finance reports filed with the COPP. According to both candidate Downing's email providing the ad transcript and official complaint response, the campaign originally placed the "Fox and Henhouse" ad on May 20, made some "small graphic changes", and began running this slightly different version of the ad ("Foxy Rev") on May 27 (FOF Nos. 3, 4). When reporting expenditures, §13-37-229(2)(a)(i) requires:

"the full name, mailing address, occupation, and principal place of business, if any, of each person to whom expenditures have been made by the committee or candidate during the reporting period, including the amount, date, and purpose of each expenditure and the total amount of expenditures made to each person".

44.11.502(7), ARM, further clarifies that

"the "purpose" of each expenditure as reported on the commissioner's campaign finance reporting forms shall specifically describe the purpose, quantity, subject matter, as appropriate to each expenditure" and that expenditures "must be detailed enough to distinguish among expenditures for similar purposes. For example, two expenditures for direct mail advertisements should not both be reported as "Flyers."".

The Downing campaign originally reported the "Fox and Henhouse" ad on its April 16 through May 14 C-5 finance report; the date of the expenditure was listed as May 13, and it stated the ad would run "05/08/20-05/14/20" (FOF No. 5). The Downing campaign later reported making an expenditure on May

22 for “post production and re-editing” of an ad named “Foxy rev” via a C-7E filed May 22 (FOF No. 6). Quantity was provided for this expenditure as “05/22/20-06/02/20”.

In comparing the Downing campaign’s financial reports to its complaint response, it does not appear the campaign reported appropriate quantity information for the “Fox and Henhouse” or “Foxy Rev” ads, as the run dates appear incorrect on the candidate’s campaign finance reports. The response indicated that the “Fox and Henhouse” ad began airing on May 20, and was replaced by the “Foxy Rev” ad on May 27. C-5 and C-7E campaign finance reports filed by candidate Downing do not reflect this information. Instead, the campaign reported the “Fox and Henhouse” ad as running from May 8 through May 14 on its May 19 C-5 report. The campaign did not indicate that the “Fox and Henhouse” television ad aired beyond May 14 on campaign financial reports. The campaign’s May 22 C-7E reported that the “Foxy Rev” ad aired between May 22 and June 2, contradicting the response’s assertion that this ad began airing on May 27. Run date records from KECI indicate the Downing campaign aired the “Fox and Henhouse” ad between May 20 and May 26, with “Foxy Rev” ad replacing it on May 27 through June 2, 2020. These dates are not reflected on Downing campaign finance reports.

The Downing campaign does not appear to have reported all contribution and/or expenditure activities associated with airing the “Foxy Rev” ad via television. The description provided on the May 22 C-7E describes this expense as for “post production and re-editing” of the ad; it makes no mention of

airtime. The cost reported of \$1,765.00 for this activity indicates that airtime was not included as a component of this expenditure. In contrast, the Downing campaign reported an \$8,000.00 expenditure to air the “Fox and Henhouse” ad via television between May 8 and May 14 (six days). It appears airtime for the ad run from May 15 to June 2, 2020 was not reported, as reflected in both the campaign response and the KECI confirmation contact provided by the complainant. The campaign’s June 19, 2020 C-5 financial report did not include any additional expenditures made or contributions received by the campaign pertaining to the “Foxy Rev” ad or any advertisement run May 15 to June 2, 2020 (FOF No. 7).

While candidate Downing did report personally providing his campaign an in-kind loan on May 29 for “Fox in Henhouse” Ad”, his response in the matter of *Perkins v. Downing, COPP-2020-CFP-023* stated that this in-kind loan was for the purchase and distribution of mailers, a separate campaign activity (FOF No. 7). No information was provided by candidate Downing on campaign financial reports disclosing contributions received or expenditures made for the airing of the “Foxy Rev” television ad.

FINDINGS

Candidate Downing distributed a new television advertisement, ‘Foxy Rev’ on May 27, 2020 which included the names and likenesses of his Primary election opponents Tuxbury and Nicols, who were not notified of the advertisement until May 28, 2020.

Sufficiency Finding No. 1: Candidate Downing failed to notify opponents Scott Tuxbury and Nelly Nicols of the May 27, 2020 “Foxy Rev” television advertisement distributed by his campaign.

The Commissioner finds candidate Downing violated Montana’s campaign finance and practices law by failing to notify opponents Tuxbury and Nicols under the Fair Notice Provision of Montana’s Clean Campaign Act.

Candidate Downing failed to properly report the expenditures for the ‘Fox and Henhouse’ and “Foxy Rev’ election communications, including amounts expended, quantity (dates run), and sufficient detail of the expenditures.

Sufficiency Finding No. 2: There are sufficient facts to show that Downing campaign finance report failed to properly report two or more expenditures for the ‘Fox and Henhouse’ and ‘Foxy Rev’ election communications run in May and June of 2020

The Commissioner finds candidate Downing violated Montana’s campaign finance and practices law by failing to properly disclose expenditures. The Commissioner orders candidate Downing to file an amended campaign finance report within 10 days of this decision that properly discloses the expenditures and/or debts detailed in this matter.

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. Mont. Code Ann. § 13-37-111(2)(a). The mandate to investigate is followed by a mandate to take action; where there is “sufficient evidence” of a violation the Commissioner

must (“shall notify,” *see id.*, at § 13-37-124) 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 to show that Troy Downing 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 Matters of Vincent*, Nos. COPP-2013-CFP-006, 009 (discussing excusable neglect principles). Likewise, the Commissioner does not normally accept that failures to file or report be excused as *de minimis*. *Id.* (discussing *de minimis* principles).


Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the above Sufficiency Findings, a civil fine is justified. Mont. Code Ann. § 13-37-124. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying a civil fine or civil prosecution of Troy Downing. Because of the

nature of the violation this matter is referred to the County Attorney of Lewis and 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 cooperation in correcting the issue when the matter was 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 Mont. Code Ann. §§13-35-402, 13-37-229. *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 16th day of July 2020.



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EXHIBIT

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EXHIBIT

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NELLY NICOL

SCOTT TUXBURY