

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Perkins v. Downing  No. COPP 2020-CFP-022	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION
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On May 29, 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 disclose mailers purchased by his campaign on financial reports filed with the COPP.

**SUBSTANTIVE ISSUES ADDRESSED**

This decision addresses the proper reporting of campaign expenditures.

**FINDINGS OF FACT**

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: 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. 2: The Complaint included a copy of a mailer financed by candidate Downing that the complainant alleged was delivered in the “Missoula and Gallatin areas between 5/18/20 and 5/21/20” (see Attachment A) (Commissioner’s Records).

Finding of Fact No. 3: On June 1, 2020, candidate Downing provided a formal response to this Complaint. The response stated that the mailer referenced by this Complaint was “mailed on May 7th” by the campaign through an entity named Core Insight. The response went on to state that the Downing campaign “is currently under negotiations with the vendor, because of issues with

delivery and price. Mailer was dropped to the Billings NDC on May 7th and we don't have clear reasoning from the PO and the vendor why it took nearly 16 days for delivery to homes". A postage statement for these mailers was also included, which indicated that 32,970 pieces identified as 'Troy Downing Intro card' were mailed by Core Insight for the Downing campaign at a cost of \$8,020.63. The statement included a mailing date of May 7, 2020. (Commissioner's Records).

Finding of Fact No. 4: On May 19, 2020, candidate Downing filed a periodic C-5 campaign finance report, dated April 16, 2020 through May 14, 2020. This report did not disclose any expenditures made or debts owed by the campaign to Core Insight in association with the 'Troy Downing Intro card' mailers. This report was most recently amended on June 1, 2020. (Commissioner's Records).

Finding of Fact No. 5: On June 19, 2020, candidate Downing filed a periodic C-5 campaign finance report, dated May 15, 2020 through June 15, 2020. This report did not disclose any expenditures made or debts owed by the campaign to Core Insight in association with the 'Troy Downing Intro card' mailers. (Commissioner's Records).

## **DISCUSSION**

This Complaint alleges that candidate Downing failed to properly report campaign expenditure activity on finance reports filed with the COPP. Specifically, it alleges that candidate Downing failed to report an expenditure pertaining to mailers on a C-7E Notice of Pre-Election Expenditures as required.

Mont. Code Ann. §13-37-226(1)(d) requires candidates to file special expenditure reports (C-7E) "within 2 business days of making an expenditure of \$100 or more if made between the 15th day of the month preceding an election in which the candidate participates and the day of the election". Montana's Primary election was held on June 2, 2020. Candidate Downing's response stated that the mailers were sent on May 7, well outside the C-7E

reporting period. The USPS Postage Statement provided by the Downing campaign includes a 'mailer's mailing date' of May 7, 2020 (FOF No. 3). A C-7E campaign finance reporting form would not be necessary for an expenditure prior to May 15, 2020.

While candidate Downing was not required to report the activity on a C-7E campaign finance reporting form, the campaign would be required to properly report expenditures such as the mailers, Mont Code Ann. §13-37-229(2)(i):

"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".

For debts owed by the campaign, subsection (vi) requires "the amount and nature of debts and obligations owed by a political committee or candidate in the form prescribed by the commissioner". 44.11.502(2), ARM, clarifies:

**"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" (emphasis added).

Candidate Downing's response indicated that the campaign had not made payment on the mailers as of June 1, as they were "currently under negotiations with the vendor, because of issues with delivery and price".

Candidate Downing incurred a campaign obligation no later than May 7 for what appears to be 32,970 printed 'Troy Downing Intro card' mailers plus an additional \$8,020.63 in postage. Montana law, Mont. Code Ann. §13-37-229(2)(vi) and 44.11.502(2), ARM, requires the Downing campaign to report the

production and printing of the mailers and the postage to distribute as a debt owed to Core Insight and/or any other vendor associated with the production and distribution of the May 7, 2020 mailers on the financial report covering May 7, or the date the debt was incurred. Candidate Downing did not disclose the mailers as either an expenditure made or debt owed by his campaign on his initial campaign finance report filed on March 20, or in subsequent periodic campaign finance reports filed on April 20, May 19, and June 19, 2020 (FOF Nos. 4, 5). By failing to disclose the mailers or distribution of the mailers on C-5 campaign finance reports, candidate Downing failed to properly report this campaign expenditure activity.

### **FINDINGS**

Candidate Downing distributed an election communication in May of 2020 which he failed to report as an expenditure or debt on his campaign finance reports.

Sufficiency Finding No. 1: Candidate Downing failed to report the production and distribution of a May 2020 'Troy Downing Intro card' mailer as either a debt or expenditure.

The Commissioner finds candidate Downing violated Montana's campaign finance and practices law by failing to disclose the costs of production and distribution incurred its May 2020 introduction mailer. The Commissioner orders candidate Downing to file an amended campaign finance report within 10 days of this decision that properly discloses the expenditure and/or debt 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 16 day of July 2020.



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Jeffrey A. Mangan  
Commissioner of Political Practices  
Of the State of Montana  
P.O. Box 202401  
1209 8<sup>th</sup> Avenue  
Helena, MT 59620  
Phone: (406)-444-3919



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PO Box 6565  
Bozeman, MT 59721

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Once again, Troy has heard the call to serve his state and country, by defending our American Dream from career politicians and special interests.



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TROY DOWNING FOR MT STATE AUDITOR | JUNE 2