

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Daniel Zolnikov v. Tony O'Donnell No. COPP 2020-CFP-009	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN FINANCE VIOLATION
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On May 7, 2020, Daniel Zolnikov of Billings, MT, filed a campaign practices complaint against Tony O'Donnell, also of Billings. The complaint alleged that candidate O'Donnell did not include the required "Paid for by" attribution message on certain campaign materials and that he failed to report campaign expenditures made to an entity named 23 Holdings LLC with all required reporting detail.

SUBSTANTIVE ISSUES ADDRESSED

The proper reporting of a campaign finance expenditure and use of an attribution on election communications.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: Tony O'Donnell filed a C-1 Statement of Candidate as a Republican candidate for Public Service Commission (PSC) District No. 2 with the COPP on February 13, 2020. (Commissioner's Records.)

Finding of Fact No. 1A: Daniel Zolnikov and Kirk Bushman have also filed with the COPP as Republican candidates for election to PSC District No. 2. Candidates O'Donnell, Zolnikov, and Bushman

will each participate in the Republican Primary election, with the candidate receiving the highest number of votes advancing to November's General election. Montana's Primary election will be held on June 2, 2020. (Commissioner's Records.)

Finding of Fact No. 2: On March 21, 2020, candidate O'Donnell filed his initial C-5 campaign financial report, dated February 14, 2020 through March 15, 2020. Included on this report was one campaign expenditure of \$2,562.00 to 23 Holdings LLC for "design and maintenance of website, mailing preparation, social media", dated February 28. The platform, quantity, and subject matter fields were all left blank. This report was filed one day late. (Commissioner's Records.)

Finding of Fact No. 3: On April 20, 2020, candidate O'Donnell timely filed a periodic C-5 campaign financial report, dated March 16, 2020 through April 15, 2020. Included on this report was one campaign expenditure of \$800.00 to 23 holdings for "Social media", dated April 5. The Platform was listed as Facebook, quantity was listed as "unknown", and subject matter was listed as "vote for tony". (Commissioner's Records.)

Finding of Fact No. 4: The original complaint included pictures of both candidate O'Donnell's website and Facebook page, stating that neither contained the required "Paid for by" attribution message. A May 8 review by COPP staff determined that candidate O'Donnell did not include the "Paid for by" attribution message on either his campaign website or paid Facebook ads. (Commissioner's Records.)

Finding of Fact No. 4A: A May 12 review by COPP staff of candidate O'Donnell's Facebook page determined that, as of that date, candidate O'Donnell had run seven individual paid ads on Facebook. Six of those ads were in inactive status (meaning they were no longer being run), while one was listed as Active (meaning it was being run publicly as a paid ad at that time). (Commissioner's Records.)

Finding of Fact No. 5: On May 11, 2020, candidate O'Donnell emailed the COPP with a response to this Complaint. The response stated of the February 28 expense to 23 Holdings:

In an email today 23 Holdings gave me these specifics:

\$1299 Website Design

\$198 Social Media Page Setup

\$300 Voter List Research

\$500 Facebook/Instagram Ads (did not run until after March 15 due to approval delays)

\$265 Media/Art Creation

total \$2,562

The response did not mention or provide any additional detail regarding the April 5 expense to 23 Holdings. The response asserted that candidate O'Donnell had added the "Paid for by" attribution message to all campaign materials. (Commissioner's Records.)

Finding of Fact No. 6: A May 12 review by COPP staff determined that candidate O'Donnell added the "Paid for by" attribution message to both his campaign website and the one active paid Facebook ad. (Commissioner's Records.)

DISCUSSION

The complaint alleges candidate O'Donnell failed to properly attribute a campaign election communication and failed to properly report campaign expenditures in his campaign finance reports. The Commissioner examines the allegations.

Attribution

Montana law requires an accelerated review ("as soon as practicable") of a campaign practice complaint alleging an attribution violation. Accordingly, Candidate O'Donnell was contacted by the Commissioner's office upon receipt of the complaint. Candidate O'Donnell responded saying that the omission of an attribution was an oversight. Candidate O'Donnell followed up the conversation with the COPP with an email taking responsibility for the oversight and detailing corrective measures taken.

The law governing complaints of failure to properly attribute political brochures provides precise directions to the Commissioner:

1. The Commissioner is to immediately assess the merits of the attribution Complaint. §13-35-225(5), MCA. The Commissioner found merit to the attribution Complaint and hereby memorializes that finding.
2. The Commissioner shall notify the candidate of the merit finding, requiring the Candidate to bring the material into compliance. §13-35-225(6)(a), MCA. The COPP, by both telephoning Candidate O'Donnell and providing Notice of Non-compliant Election Communication, did this and hereby memorializes the Notice.
3. The Candidate is provided 2 business days to bring the material into attribution compliance §13-35-225(6)(a)(ii), MCA.

Under Montana law the Candidate with the attribution deficiency is relieved of a campaign practice violation, provided he promptly carries out the attribution correction as promised. Candidate O'Donnell has met these duties (FOF No. 6) and is therefore relieved of a campaign practice violation under §13-35-225(6), MCA.

Expenditure Detail

This complaint alleges that candidate O'Donnell failed to report campaign expenditures paid out to a vendor named 23 Holdings, LLC with all required detail.

44.11.502(7), ARM, states that:

(7) For purposes of the disclosure requirements of 13-37-229 and 13-37-232, MCA, 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 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."

Further, §13-37-229(2)(b), MCA,

Reports of expenditures made to a consultant, advertising agency, polling firm, or other person that performs services for or on behalf of a candidate or political committee must be itemized and described in sufficient detail to disclose the specific services performed by the entity to which payment or reimbursement was made.

Upon review candidate O'Donnell's C-5 campaign financial reports, COPP determined the statutorily required detail to describe expenditures to 23 Holdings in both the March and April campaign finance reports are insufficient. The February 28 expenditure's listed purpose of "design and maintenance of website, mailing preparation, social media" fails to fully identify or clearly describe the "specific services provided (FOF No. 2). Similarly, the April 5 expenditure's description as "Social media" does not provide identifying information as to the *specific* purpose of the expenditure (FOF No. 3).

Additionally, candidate O'Donnell's response states social media ads were included as part of the February 28 expense (FOF No. 5). A review of his campaign Facebook page identified seven individual paid ads run on Facebook (FOF No. 4A). Candidate O'Donnell did not disclose the individual ads as part of the purpose description provided for expenditures made to 23 Holdings, and did not provided information detailing the "purpose, quantity, subject matter" for the paid ads.

Sufficiency Finding No. 1: There are sufficient facts to show that the O'Donnell March and April 2020 campaign finance reports failed to disclose sufficient detail describing campaign expenditures.

While the O'Donnell campaign disclosed expenditures to 23 Holdings, LLC, these generic expenditures do not provide the "purpose, quantity, subject matter" expense-reporting detail required by 44.11.502(7), ARM. Nor, does the report meet Montana's statutory requirement of detail required for campaign finance reports: "[r]eports of expenditures made to a consultant, advertising agency, polling firm, or other person that performs services for or on behalf of a candidate or political committee 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. The Commissioner finds candidate O'Donnell violated Montana Campaign Finance law by failure to provide sufficient detail regarding campaign expenditures. Candidate O'Donnell is ordered to submit amended March and April 2020 campaign finance reports detailing the expenditures as discussed in this matter no later than 5 business days from the date of this decision.

Montana requires that campaign finance reports be timely filed according to statutory deadlines, § 13-37-226, MCA. A political candidate is required to report at the times specified in § 13-37-226(1)(b), MCA.

Sufficiency Finding No. 2: The Commissioner finds that there are sufficient facts to show that candidate O'Donnell filed his March 2020 campaign finance report one date late (FOF No. 2).

Reporting and disclosure are required so that the public, press, and opposing candidates understand the contribution and expenditure of funds used in a candidate's campaign. The Commissioner finds candidate O'Donnell

failed to timely file a campaign finance report, a Montana campaign finance violation.

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 Tony O’Donnell 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

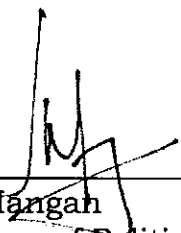
neglect principles). Likewise, the Commissioner does not normally accept that failures to file or report be excused as *de minimis*. *Id.* (discussing *de minimis* principles).

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 Tony O’Donnell. 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. §§ 13-37-226,229(2)(b). *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 20th day of May 2020.



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