

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Rutherford v. Armstrong No. COPP 2021-CFP-014	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION AND DISMISSAL OF ALLEGATIONS
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On May 19, 2021, Darryl Rutherford of Helena, Montana filed a campaign practices complaint against Janet Armstrong, also of Helena. The complaint alleges that candidate Armstrong failed to properly report the campaign's obtaining newspaper advertisements supporting her campaign, failed to fully or properly report the campaign's obtaining of campaign yard signs by not disclosing their full value and failed to properly attribute those yard signs, failed to report expenses associated with the design of her newspaper advertisements and failed to attribute these newspaper advertisements, failed to attribute campaign content posted on Facebook, and failed to report expenditures associated with photography used in a newspaper advertisement and Facebook. The complaint also stated that candidate Armstrong failed to timely register as a candidate with the COPP despite participating as a candidate for election in a 2021 school trustee election.

SUBSTANTIVE ISSUES ADDRESSED

Timely filing of Statement of Candidate and campaign finance reports.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: Helena Public Schools held a school trustee election on May 4, 2021. (Commissioner's Records.)

Finding of Fact No. 2: On April 2, 2021, Janet Armstrong filed a C-1A Statement of Candidate as a candidate for election to a school trustee position in Helena Public Schools' May 4, 2021 election with the COPP. Candidate Armstrong filed as a 'C' box candidate, indicating that her campaign "Will spend more than \$500.00". (Commissioner's Records.)

Finding of Fact No. 2A: Candidates for election to a school office who certified that the campaign "Will spend more than \$500.00" had C-5 campaign finance reports due on or before March 5, March 30, and April 22 of 2021 (Commissioner's Records).

Finding of Fact No. 3: On April 22, 2021, candidate Armstrong filed an initial C-5 campaign finance report, dated April 2, 2021 through April 14, 2021. This report does not disclose any contributions received or expenditures made by candidate Armstrong. (Commissioner's Records.)

Finding of Fact No. 3A: On April 23, 2021, candidate Armstrong filed an amended version of her initial C-5 campaign finance report. This version of the report discloses one (1) expenditure in the amount of \$1,720.00 to "Lee Montana Newspapers, helena IR" described with Purpose "Helena IR 2 endorsement ads", Platform "Helena IR ad", Quantity "endorsement ad on 4/18/21 and 4/25/21" and Subject Matter "list of individuals endorsing the candidate". (Commissioner's Records.)

Finding of Fact No. 3B: On May 11, 2021, candidate Armstrong filed a second amended version of her initial C-5 campaign finance report. This report again included the \$1,720.00 Helena IR advertisement expenditure but additionally disclosed a monetary contribution of \$1,720.00 from candidate Armstrong to her campaign. (Commissioner's Records.)

Finding of Fact No. 3C: On May 12, 2021, candidate Armstrong filed a third amended version of her initial C-5 campaign finance report. This report removed both the \$1,720.00 personal financial contribution and \$1,720.00 expenditure to "Lee Newspapers, helena IR", instead disclosing one (1) in-kind loan from candidate

Armstrong to the campaign in the amount of \$1,720.00 described as “Lee MT Newspaper, 2 endorsement ads run 4/18/21 4/25/21-list of endorsing individuals”. The most recent amended version of candidate Armstrong’s Initial report, filed on June 4, 2021, discloses this in-kind loan in the same manner and amount. (Commissioner’s Records.)

Finding of Fact No. 4: On May 24, 2021, candidate Armstrong filed a periodic C-5 campaign finance report, dated April 15, 2021 through April 28, 2021. This report disclosed one (1) in-kind loan from candidate Armstrong to the campaign in the amount of \$320.00 described as “Signs Now, 40 campaign yard signs”. The report also disclosed candidate Armstrong as receiving \$3,080.00 in monetary contributions from individuals or entities other than herself. This report did not disclose any expenditures made by candidate Armstrong. (Commissioner’s Records.)

Finding of Fact No. 5: On May 24, 2021, candidate Armstrong filed a periodic C-5 campaign finance report, dated April 29, 2021 through May 6, 2021. This report disclosed candidate Armstrong as receiving \$100.00 in monetary contributions from individuals or entities other than herself. This report did not disclose any expenditures made by candidate Armstrong. (Commissioner’s Records.)

Finding of Fact No. 6: On May 25, 2021, candidate Armstrong filed a periodic C-5 campaign finance report, dated May 7, 2021 through May 18, 2021. This report did not disclose any contributions received by candidate Armstrong, either in-kind or monetary. This report did disclose two (2) expenditures made by candidate Armstrong: one dated May 18, 2021 in the amount of \$44.00 to Lee Enterprises of Montana described with Purpose “search boost 39.00, paper statement 5.00”, Platform “Helena IR”, and Quantity “4/26/2021”, and one dated May 18, 2021 to Sullivan, Sarah B in the amount of \$52.99 described as Purpose “for mailchimp”, Platform “mailchimp”, Quantity “5000 contacts” and Subject Matter “payment to set up a Mailchimp account so we could do a mass email in support of Janet Armstrong for School Board. Email sent 4/24/21”. This report also discloses candidate Armstrong as paying off, in full, her \$1,720.00 personal in-kind loan for endorsement ads and her \$320.00 personal in-kind loan for yard signs. The most recent Amended version of this report, filed on June 4, 2021, discloses these expenditures in the same manner and amount. (Commissioner’s Records.)

Finding of Fact No. 7: On June 4, 2021, candidate Armstrong filed a periodic C-5 campaign finance report, dated May 19, 2021 through June 3, 2021. This report disclosed candidate Armstrong as receiving one (1) in-kind contribution in the amount of \$100.00 from an individual named Jennifer McKee, described as “1 Facebook banner design, 1 social media post, 1 pre-existing, royalty free photo”. This report did not disclose candidate Armstrong as making any expenditures. (Commissioner’s Records.)

Finding of Fact No. 8: On June 4, 2021, candidate Armstrong hand-delivered a response to this complaint (see Attachment A). Regarding the newspaper advertisements, candidate Armstrong’s response states that “Per Office of Political Practices guidance this was filed under a loan from myself, the candidate, as I placed this expense on my credit card”. The response goes on to note that “The Independent Record [the newspaper these advertisements appeared in] designed the ads and it is included in the \$1720 paid and listed to the IR”. Copies of these two (2) ads were provided with this response, and each clearly contains a visible attribution message of “paid for by Janet Armstrong for School Board, 511 Hillsdale, Helena MT 59601, Keith Meyer Treasurer”.

Regarding the yard signs, candidate Armstrong’s response states that the activity “is listed as a loan, again per Office of Political Practices guidance as I placed the bill on my personal credit card”. The response includes an invoice received by candidate Armstrong from Signs Now in the amount of \$320.00 for their provision of forty (40) yard signs “@ \$8.00 each. Full color- no stands”. A picture of a yard sign with a visible attribution message of “Paid for by Janet Armstrong for School Board, 511 Hillsdale, Helena, MT 59601, Keith Meyer Treasurer” was also included. The invoice was dated April 19, 2021.

Regarding photographs used for campaign advertising, candidate Armstrong’s response states that “All photos are either taken with my phone or non-copyrighted images found through a Google search. The photo of me for the paper was taken with my phone”. The response indicated that a photo used for a social media post was obtained by Jennifer McKee through a subscription, and this social media post was reported by candidate Armstrong as an in-kind contribution received from that individual. The invoice provided for this in-kind contribution indicates that the “Post was not used in any paid advertising”.

Finally, the response included a copy of a Declaration of Intent and Oath of Candidacy filed with the County by candidate Armstrong, signed and dated March 16, 2021. (Commissioner's Records.)

Finding of Fact No. 9: A June 16, 2021 COPP review of candidate Armstrong's campaign Facebook page, Armstrong for Helena Schools, determined the page did not run any paid advertisements requiring attribution. (Commissioner's Records.)

DISCUSSION

Part One: Reporting contributions and expenditures

Helena IR newspaper advertisements

The first campaign contribution or expenditure activity this complaint alleges candidate Armstrong failed to properly report are two (2) newspaper ads run in the Helena Independent Record newspaper meant to support her candidacy. While her initial C-5 campaign finance report as originally filed did not disclose any campaign contributions received or expenditures made referencing newspaper ads, candidate Armstrong immediately filed an amended version of the report disclosing a \$1,720.00 campaign expenditure for two (2) advertisements in the Independent Record newspaper (FOF Nos. 3, 3A). On May 12, prior to the date this complaint was filed, candidate Armstrong filed another amended version of the initial finance report to clarify that the newspaper ads were an in-kind loan made by herself personally to the campaign (FOF No. 3C). Candidate Armstrong's response stated she was directed by COPP Compliance Specialists to report these two (2) Helena Independent Record newspaper advertisements as in-kind loans made by herself to the campaign rather than campaign expenditures because she had

paid for them personally using her personal credit card rather than using campaign funds (FOF No. 8).

44.11.403(1), Administrative Rules of Montana, states that “A candidate who makes personal expenditures benefitting his or her campaign, shall also report and disclose the expenditures as in-kind contributions or loans to the campaign”. In this case, candidate Armstrong made two (2) personal expenditures, newspaper advertisements, intended to benefit her campaign for election to a school trustee position. After discussions with COPP compliance staff, and prior to the receipt of this complaint, candidate Armstrong correctly reported these two (2) personal expenditures as an in-kind loan made to her campaign on the relevant campaign finance report. Candidate Armstrong reported the activity in compliance with relevant campaign contribution reporting and disclosure rules.

The allegation that candidate Armstrong has failed to properly report two (2) newspaper ads as contributions received or expenditures made by the campaign is hereby dismissed.

This complaint also alleges that candidate Armstrong failed to properly report expenditures associated with the design of two (2) newspaper advertisements. In her response, candidate Armstrong indicated that “the Independent Record designed these ads and it is included in the \$1720 paid and listed to the IR” (FOF No. 8). COPP was unable to obtain evidence to contradict this claim or suggest that candidate Armstrong expended campaign funds to design these newspaper advertisements, or that candidate Armstrong

paid the Helena Independent Record newspaper any amount beyond \$1,720.00 to design these two (2) advertisements. The allegation that candidate Armstrong failed to disclose expenditures associated with the design of these newspaper ads is hereby dismissed.

Finally, the complaint suggests that these newspaper advertisements did not contain a 'paid for by' attribution message as required. A "paid for by" attribution message is required on any election communication or electioneering communication finance by a candidate and must include "the name and address of the candidate or candidate's campaign", Mont. Code Ann. §13-35-225(1)(a). Each of these two (2) newspaper advertisements would, as a paid advertisement published in a newspaper meant to support a candidate for election, qualify as an election communication, Mont. Code Ann. §13-1-101(13). Attribution would therefore be required on both of candidate Armstrong's newspaper advertisements.

The copies of the newspaper advertisements provided to the COPP by candidate Armstrong with her response clearly and obviously contain a complete attribution message of "paid for by Janet Armstrong for School Board, 511 Hillsdale, Helena MT 59601, Keith Meyer Treasurer" (FOF No. 8). The complaint's allegation that these advertisements failed to include the required attribution message is hereby dismissed.

The complaint further alleges that candidate Armstrong failed to report expenditures associated with photography used for these two newspaper advertisements. The complaint does not specify or identify any individual

photograph or photographs used in one or both advertisement/s. COPP review of the advertisements as included in both the original complaint and candidate Armstrong's response determines that no photographs were utilized in either newspaper advertisement. This allegation is hereby dismissed.

Campaign yard signs

Additional campaign materials identified in the complaint alleges that candidate Armstrong failed to properly report were campaign yard signs meant to support her campaign. Specifically, the complainant alleges that candidate Armstrong failed to report the full value of these yard signs when disclosing them on campaign finance reports. The complainant also asserts that, in his view, candidate Armstrong may have accepted a prohibited corporate contribution, but he does not specify or directly assert the value or nature of any corporate contribution/s he believes candidate Armstrong received.

Candidate Armstrong reported a personal in-kind loan in the amount of \$320.00 for "40 campaign yard signs" on her periodic campaign finance report dated April 15, 2021 through April 28, 2021, filed on May 24 (FOF No. 4). Candidate Armstrong's response indicated that these 40 yard signs were purchased using her personal credit card rather than with campaign funds (FOF No. 8). The response also included an invoice received by candidate Armstrong from Signs Now for this purchase, which shows that she was billed \$320.00 for 40 yard signs, "@\$8.00 each. Full color- no stands".

As with the newspaper ads discussed above, candidate Armstrong made a personal expenditure intended to benefit her campaign when obtaining yard

signs. Candidate Armstrong reported this personal expenditure as an in-kind loan received by her campaign, in line with the requirements of 44.11.403(2), ARM. Candidate Armstrong reported the amount of the loan as the full amount charged by the vendor and adequately described the specific items or services being loaned in-kind to the campaign. This activity was included on the finance report covering April 19, the date this in-kind loan was made. The allegation that candidate Armstrong failed to fully or appropriately disclose these campaign yard signs on finance reports is hereby dismissed.

This complaint further alleges that candidate Armstrong failed to include a “paid for by” attribution message on these yard signs. In her response, candidate Armstrong included a picture of a yard sign with a visible attribution message of “Paid for by Janet Armstrong for School Board, 511 Hillside, Helena, MT 59601, Keith Meyer Treasurer” (FOF No. 8). Candidate Armstrong’s campaign yard signs have been shown to contain a full and proper attribution message, the allegation is hereby dismissed.

Facebook

This complaint also alleges that candidate Armstrong failed to attribute certain posts made on Facebook meant to support her candidacy. COPP review of candidate Armstrong’s campaign Facebook page, Armstrong for Helena Schools, determined the page did not run any paid advertisements requiring attribution (FOF No. 9). COPP has routinely emphasized to candidates, political committees, and interested members of the public that unpaid social media posts do not require attribution; a social media post would need to be a paid

post to require attribution. As candidate Armstrong did not run any paid social media posts on Facebook, no individual post would require attribution. The allegation that candidate Armstrong failed to attribute individual Facebook posts is hereby dismissed.

The complaint further alleges that candidate Armstrong failed to report expenditures associated with photography used in these Facebook posts. In her response, candidate Armstrong states that “All photos are either taken with my phone or non-copyrighted images found through a Google search” (FOF No. 8).

Photographs used by a campaign taken on a personal phone belonging to a candidate would not qualify as a contribution received or expenditure made by the campaign subject to reporting and disclosure requirements under Montana law because they have a “cumulative fair market value of less than \$35”, making them “de minimus” acts, 44.11.603(2)(b), ARM. Similarly, the creation of “electronic or written communications or digital photos or video, on a voluntary (unpaid) basis by an individual, including the creation and outgoing content development and delivery of social media on the internet or by telephone” are also exempted from reporting as “de minimus” acts, 44.11.603(2)(a), ARM (emphasis added).

The use of non-copyrighted, publicly available photographs by a campaign would not qualify as a contribution received by that candidate because any individual would have the same ability to utilize those photographs for their own purposes. Any individual citizen, political candidate,

organizational group, etc. has the same ability to use non-copyrighted, publicly available photographs as any other.

In this case, COPP has no evidence to assert that candidate Armstrong provided monetary compensation or agreed to provide monetary compensation to individuals, including herself, for the capture of specific photos to be used in social media posts promoting her campaign. Similarly, candidate Armstrong's use of non-copyrighted, publicly available photos on campaign materials would not qualify as a contribution because any opposing candidate, political committee or interested individual could utilize the same photographs. The allegation that candidate Armstrong failed to report expenditures associated with photography used in social media posts meant to support her campaign is hereby dismissed.

The Commissioner notes that candidate Armstrong did report receiving one (1) in-kind contribution for the creation of social media posts meant to support her campaign. On a periodic finance report dated May 19, 2021 through June 3, 2021, candidate Armstrong disclosed receiving an in-kind contribution of \$100.00 from an individual named Jennifer McKee described as "1 Facebook banner design, 1 social media post, 1 pre-existing, royalty free photo" (FOF No. 7).

Part Two: Candidate Filing

This complaint also alleges that candidate Armstrong failed to timely file her registration for a 2021 school trustee election. The complaint argues that despite participating as a candidate for election to school trustee positions in

Helena Public Schools' May 4, 2021 school trustee election, candidate Armstrong did not timely file a statement of candidate with the COPP.

Mont. Code Ann. §13-37-201 requires that candidates seeking election to public office register with the COPP "within 5 days after becoming a candidate". While some school trustee candidates are exempted from this requirement under §13-37-206(1), neither the Helena Elementary or Helena High School districts would not be among the exempted districts. This means that candidates seeking election to the Helena Public Schools' Board of Trustees would need to register as a candidate with the COPP under applicable Montana campaign finance law.

In this matter, candidate Armstrong filed a Declaration of Intent and Oath of Candidacy declaring her candidacy for election to a school trustee position with the local election administrator on March 16, 2021 (FOF No. 8). By filing a "declaration" of candidacy with the local election administrator for Helena Public Schools' 2021 school trustee election, Janet Armstrong became a 2021 candidate as that term is defined, §13-1-101(8), Mont. Code Ann. Candidates for election to a trustee position in Helena Public Schools would be required to register with the COPP, §13-37-201, Mont. Code Ann.

Janet Armstrong became a candidate in Helena Public Schools' May 4, 2021 school trustee election on March 16, 2021 by filing a Declaration of Intent and Oath of Candidacy for Trustee Candidates (FOF No. 8). Under §13-37-206(1), Mont. Code Ann., candidate Armstrong was required to file a Statement of Candidate with the COPP for this election on or before March 21, 2021, five

days after becoming a candidate. Candidate Armstrong filed a Statement of Candidate with the COPP on April 2, 2021, later than five days after becoming a candidate (FOF No. 2).

Sufficiency Finding No. 1: Candidate Armstrong failed to timely file the required Statement of Candidate record with the COPP within 5 days of becoming a candidate for School District Trustee.

There are sufficient facts to show candidate Armstrong violated the requirements of Mont. Code Ann. §13-37-206(1) by failing to file a Statement of Candidate with the COPP within five days, a Montana campaign finance and practice violation.

Part Three: Campaign Finance Reporting

The COPP's investigation into this matter determined that candidate Armstrong failed to timely file a campaign finance report. On her Statement of Candidate, candidate Armstrong certified that his campaign expenditure activity would exceed \$500.00 (FOF No. 2). School candidates who anticipate "receiving contributions in a total amount of less than \$500 and anticipates making expenditures in a total amount of less than \$500 for all elections in a campaign" are exempted from filing campaign finance reports, 44.11.304, Administrative Rules of Montana. However, in this case candidate Armstrong indicated on her Statement of Candidate that campaign expenditures would exceed \$500.00, meaning her campaign would be required to financial reports under Mont. Code Ann. §13-37-226.

Candidates for election to a school position in the May 4, 2021 election who certified that campaign expenditures would exceed \$500.00 had C-5

campaign finance reports due on or before March 5, March 30, and April 22 of 2021, §13-37-226(3)(a), Mont. Code Ann. As Candidate Armstrong became a candidate on March 16, 2021, an initial campaign finance report was due on or before March 30, 2021.

Sufficiency Finding No. 2: Candidate Armstrong failed to timely file the required campaign finance report with the COPP due March 30, 2021.

There are sufficient facts to determine Candidate Armstrong filed her initial report on April 22, 2021, later than required under law. Candidate Armstrong failed to timely and properly file the March 30, 2021 C-5 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 candidate Armstrong 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 candidate Armstrong. 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. §§ 13-37-206(1), 13-37-226(3)(a). *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 7th day of July 2021.



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