

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Scow v. Kephart No. COPP 2022-CFP-028	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION ATTRIBUTION DISMISSAL
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On October 31, 2022, Faith Scow of Butte, MT filed a campaign practices complaint against James Kephart, also of Butte. The complaint alleged that certain campaign material financed by candidate Kephart failed to include partisan affiliation as required, and that candidate Kephart failed to timely or appropriately file campaign finance reports disclosing campaign contributions received and expenditures made.

SUBSTANTIVE ISSUES ADDRESSED

Proper and timely filing of required campaign finance reports; proper attribution affixed to election communications.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: James Kephart filed a C-1 Statement of Candidate as a Republican candidate for election to the position of House District 74 in Silver Bow County with the COPP on February 2, 2022. (Commissioner's Records.)

Finding of Fact No. 1A: Candidate for election to a State District office participating in Montana's November 8, 2022 general election

had required C-5 campaign finance reports due on or before October 20, 2022. Between October 15 and November 7, these candidates were also required to disclose contributions of \$125.00 received from a single source (via form C-7) and expenditures made of \$125.00 or more (via form C-7E) within 2 business days. (Commissioner's Records.)

Finding of Fact No. 2: On October 31, 2022, COPP sent email correspondence to candidate Kephart notifying him that this Complaint had been received. The message informed candidate Kephart that the attribution complaint was merited, as the campaign mailer material, campaign yard sign material, and paid text message/s mentioned by the Complaint did not appear to include partisan affiliation, and provided candidate Kephart two (2) business days to bring the material into compliance. (Commissioner's Records.)

Finding of Fact No. 2A: On October 31, 2022, candidate Kephart emailed the COPP in response to the attribution portion of this complaint. Candidate Kephart's attribution response stated that his campaign had financed each campaign material in question, and that lack of any portion of the attribution message, including partisan affiliation, was an oversight. The attribution response further noted that about 5,000 postcards and 1,600 paid text messages were sent in HD 74, and each should have included an 'R' to denote his partisan affiliation as a Republican candidate. (Commissioner's Records.)

Finding of Fact No. 2B: On November 2, 2022, candidate Kephart, via text message, provided COPP with photos showing the addition of an 'R' symbol to the campaign yard sign material to denote his partisan affiliation as a Republican candidate. (Commissioner's Records.)

Finding of Fact No. 3: Candidate Kephart did not file a Periodic C-5 campaign finance report on or before October 20, 2022. (Commissioner's Records.)

Finding of Fact No. 4: On October 31, 202, candidate Kephart filed a Periodic C-5 campaign finance report, dated September 16, 2022 through October 15, 2022. (Commissioner's Records.)

On November 2, 2022, candidate Kephart filed an Amended version of this report, changing the reporting period to be September 16 through October 24. In this Amended report, candidate Kephart

disclosed four (4) campaign expenditures of \$125.00 or more dated October 15 or later (see Table 1). (Commissioner's Records.)

Table 1: Campaign expenditures of \$125.00 or more dated October 15, 2022 or later by candidate Kephart on the September 16-October 24 report

Entity	Date	Purpose	Amount
KBOW/KOPR	10/20/2022	30 second radio ads (10)	\$250.00
KBOW/KOPR	10/20/2022	30 second radio ads (15)	\$238.25
usps	10/24/2022	Postage for more flyers	\$126.60
usps	10/18/2022	Postage for flyers	\$888.62

DISCUSSION

Attribution

Under Montana law “Communications in a partisan election financed by a candidate...must state the candidate’s party affiliation or include the party symbol”, §13-35-225(2) MCA. The complaint attached photo/s of various campaign materials financed by candidate Kephart that failed to include partisan affiliation.

Montana law requires an accelerated review (“as soon as practicable”) of a campaign practice complaint alleging an attribution violation. Accordingly, Candidate Kephart was immediately contacted by the Commissioner’s office (FOF No. 2). Candidate Kephart responded saying that the omission of partisan affiliation on campaign materials was an error and took responsibility for the omission (FOF No. 2A).

The law governing complaints of failure to properly attribute political communications 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 (FOF No. 2).
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 providing Notice of Non-compliant Election Communication, did this and hereby memorializes the Notice (FOF No. 2A).
3. The Candidate is provided 48 hours to bring the material into attribution compliance §13-35-225(6)(a)(ii), MCA. (FOF No. 2B).

Under Montana law the candidate with the attribution deficiency is relieved of a campaign practice violation, provided he/she promptly carries out the attribution correction. Candidate Kephart has met these duties by notifying COPP the quantity and date sent and appropriate partisan affiliation for postcards and paid campaign text messages originally sent without partisan affiliation, as well as by adding appropriate partisan affiliation to a campaign yard sign material, and is therefore relieved of a campaign practice violation under §13-35-225(6), MCA (FOF Nos. 2A, 2B). The attribution complaint is dismissed.

Timely Filing of Campaign Finance Reports

This complaint also alleges that candidate Kephart failed to timely and appropriately file campaign finance reports disclosing certain campaign

contribution and expenditure activity, including required pre-election disclosures.

Mont. Code Ann. § 13-37-226(1)(b) requires that candidates for election to public office in Montana file campaign finance reports on “the 20th day of March, April, May, June, August, September, October, and November in the year of an election in which the candidate... participates” (emphasis added). Candidate Kephart participated as a candidate for election to House District 74 in Montana’s November 8, 2022 general election (FOF No. 1). Candidate Kephart did not file a campaign finance report with COPP on or before October 20, 2022 as required (FOF No. 3). Candidate Kephart instead filed the October monthly report on October 31, 2022, eleven (11) days late (FOF No. 4).

Montana campaign finance law additionally requires that candidates for election to a state district office like candidate Kephart file campaign finance reports “within 2 business days of making an expenditure of...\$125.00 or more... if made between the 15th day of the month preceding an election in which the candidate participates and the day before the election”, Mont. Code Ann. § 13-37-226(1)(d). In other words, candidate Kephart was required by law to disclose any expenditures of \$125.00 or more made between the dates of October 15 and November 7 within 2 business days. COPP review determined that Candidate Kephart made four (4) expenditures of \$125.00 or more during this time: an October 20, 2022 expenditure in the amount of \$250.00 to KBOW/KOPR; an October 20, 2022 expenditure in the amount of \$238.50 to KBOW/KOPR; an October 24, 2022 expenditure in the amount of \$126.60 to

the USPS; and an October 18, 2022 expenditure in the amount of \$888.62 to the USPS (FOF No. 4, Table 1). Candidate Kephart did not disclose any of these four (4) expenditures within 2 business days as required, instead only disclosing each by Amending a C-5 campaign finance report on November 2, after his receipt of this Complaint (FOF No. 4).

Montana's campaign finance report filing requirements are mandatory: "shall file" (See §13-37-226 MCA). The filing date requirements are date certain. In Bradshaw v. Bahr, COPP 2018-CFP-008, Commissioner Mangan found candidate Bahr had filed two days late and wrote "any failure to meet a mandatory, date-certain filing date is a violation of §13-37-226, MCA". In this case, candidate Kephart failed to timely file one (1) required monthly campaign finance report, and additionally failed to timely disclose four (4) pre-election expenditures as required by law.

Sufficiency Finding No. 1: Candidate Kephart did not file a Periodic C-5 campaign finance report on or before October 20, 2022

The Commissioner finds sufficient facts to determine candidate Kephart failed to timely file his October 20, 2022, campaign finance report. The Commissioner notes candidate Kephart filed his October 20 report on October 31, 2022.

Sufficiency Finding No. 2: Candidate Kephart did not timely disclose campaign expenditures within two business days as required when expenditures exceed \$125.00 between the 15th of October through the day preceding election day as required.

The Commissioner finds sufficient facts to determine candidate Kephart failed to timely disclose four expenditures exceeding \$125.00 between the 15th

of October and election day, 2022. The Commissioner notes candidate Kephart filed an amended campaign finance report on November 2, 2022, reporting these four expenditures.

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 Kephart 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 Kephart. 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. *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 5th day of November 2022.



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