

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

MDP v. MRLCC No. COPP 2016-CFP-044	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION
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On December 9, 2016, the Montana Democratic Party (MDP) of Helena, Montana filed a complaint against the Montana Republican Legislative Campaign Committee (MRLCC), also of Helena, for failure to file an amended campaign finance report as directed in a previous COPP decision and failing to timely report and disclose campaign contribution information.

Discussion

In the October 3, 2016 decision, COPP 2016-CFP-029, now-retired Commissioner Motl dismissed the campaign violation that the MRLCC did not sufficiently describe or disclose specific services rendered in its campaign finance reports “contingent upon a campaign finance report being filed.”

Finding of Fact No. 1: With regard to the complaint filed by the Montana Democratic Party on September 22, 2016 against MRLCC, Commissioner Motl issued a Dismissal of Complaint Based on Lack of Sufficient Facts to Support a Campaign Practice Act Violation and on Application of Principle of Excusable Neglect on October 3, 2016. (Commissioner's Records.)

Finding of Fact No. 2: As of the date of this decision, the MRLCC has not filed any amended campaign finance report as directed by COPP 2016-CFP-029. (Commissioner's Records.)

This Commissioner hereby reinstates Commissioner Motl's findings and sufficiency decision found in COPP 2016-CFP-029 (as set out next at #1).

1. The MRLCC Expenditures Are Not Reported in Sufficient Detail¹

Once a complaint is filed the Commissioner "shall investigate any other alleged violation ..." §13-37-111(2)(a), MCA. This investigative authority includes authority to investigate "all statements" and examine "each statement or report" filed with the COPP. §§13-37-111, 123 MCA. The Commissioner is afforded discretion in exercising this authority. *Powell v. Motl*, OP-07111, Supreme Court of Montana, November 6, 2014 Order.

The Commissioner examines the sufficiency of expense detail provided by the MRLCC campaign finance reports. The MRLCC reported expenditures on its campaign finance reports in the following detail:

Finding of Fact No. 3: The MRLCC's 2016 campaign finance reports show expenditures as follows:

¹ This section originally appeared as section 2, on pages 4-7, of the published Decision; further, the footnotes appearing herein at nn. 2-7, were part of the original Decision as nn. 4-9.

- a. The April 7 report shows \$800 to Marilyn Miller for “bookkeeping,” and \$8,073.97 to the Political Company for “consulting, fundraising letter and reimbursement.”
- b. The May 3 report shows \$800 to Marilyn Miller for “bookkeeping and reporting,” and \$4,000 to the Political Company for “consulting.”
- c. The May 26 report shows \$400 to Marilyn Miller for “bookkeeping and reporting,” and \$5,585.61 to the Political Company for “consulting and fundraising.”
- d. The June 22 report shows \$400 to Marilyn Miller for “bookkeeping and reporting,” and \$2,000 to the Political Company for “consulting.”
- e. The August 9 report shows \$400 to Marilyn Miller for “bookkeeping and compliance reporting,” and \$3,227.28 to the Political Company for “consulting.” (COPP records.)

Three of the MRLCC campaign finance reports described in FOF No. 3 list a payment to the Political Company solely as a “consulting” expenditure. This generic expenditure listing does not provide the “purpose, quantity, subject matter” expense reporting detail required by 44.11.502(7), ARM.² Nor, does this listing 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.³

Sufficiency Finding No. 1: There are sufficient facts to show that the MRLCC’s campaign finance reports failed to disclose detail describing the specific services provided by its consultant expenditures.

² The COPP’s Accounting and Reporting Manual for Candidates at P. 19 adds that “[a] common [expense reporting] mistake is the reporting of consultants. Reports of expenditures to a consultant ...must be itemized and must be described in sufficient detail to disclose the specific services performed.”

³ This statute was formerly numbered §13-37-230(2), MCA.

This Decision marks the first time that the COPP has examined a single word (or group of words) listing a campaign expense in a campaign finance report and determined whether the word or group of words provided “sufficient detail” of the expense as required by law.⁴ Prior COPP Decisions, have looked at narrow issues of campaign finance report disclosure such as whether: 1) the disclosure failed to report the expense at all; or, 2) the disclosure failed to report a particular activity, as revealed by examination of receipts or other documents showing the detail of that particular expense.

These previous COPP Decisions determined a campaign practice violation by a political committee or candidate for failure to report in-kind value of paid staff or vendors providing services to the campaign.⁵ Other Decisions determined a campaign practice violation by a political committee for failure to itemize expenditures according to each candidate served by the expenditures.⁶ Still other Decisions determined a campaign practice violation by a candidate

⁴ The COPP touched on this issue in *O’Hara v. Pinocci*, COPP-2014-CFP-027 (Initial and Final Decisions) with those Decisions focusing on the general deficiency of the method and manner of reporting, rather than the lack of “sufficient detail” stemming from the use of a single word like “consultant.” The COPP came closest to this issue in *Clark v. Datsopoulos*, COPP-2014-CFP-033B wherein the COPP investigator retrieved a “detailed invoice” from the campaign consultant. The COPP then compared the campaign reporting to the invoice and determined that the campaign finance report was deficient because it failed to disclose the “mailing, printing, radio and management services” listed in the invoice.

⁵ “The COPP has a 20 year-plus history of interpreting Montana’s contribution [expense] law ...to require reporting and disclosure of the in-kind value of express advocacy use of paid staff by any entity involved in a campaign.” *Hamlett v. MGN*, COPP-2012-CFP-053. *See also* *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Clark v. Bannan*, COPP 2010-CFP-023; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; *Bonogofsky v. Wittich*, COPP-2010-CFP-031; *Madin v. Sales*, COPP-2010-CFP-029; *Bonogofsky v. Prouse*, COPP-2010-CFP-033; *Bonogofsky v. Wagman*, COPP-2010-CFP-035; *Petrini v. Houck*, COPP-2015-CFP-011; and *Clark v. Datsopoulos*, COPP-2014-CFP-033B.

⁶ *Gibson v. Montana Democratic Party*, COPP 2014-CFP-053; *Shellnutt v. Planned Parenthood*, COPP-2014-CFP-058; *Perea v. MDP*, COPP-2014-CFP-055; *Buttrey v. MDP*, COPP-2014-CFP-050; *Kary v. MDP*, COPP-2014-CFP-059; and *Gibson v. MDP*, COPP-2014-CFP-062.

for failure to disclose any part of the name, mailing address, occupation or employer of a contributor to their campaign.⁷

Based on the facts of this Matter, the Commissioner reaches the next issue – that is, that there is an affirmative duty on the part of a candidate or committee to use a word or words in their campaign finance report that provide “sufficient detail to disclose the specific services” covered by the expenditure. In this Matter, the use of the word or words “bookkeeping” or “bookkeeping and compliance reporting” sufficiently describe and thereby disclose the specific services provided by Marilyn Miller to the MRLCC (FOF No. [3]). In contrast, the use of the words “consulting”, “fundraising” or “reimbursement” are not sufficient to describe or disclose the specific services of the “The Political Company” (FOF No. [3]).

The Decision in COPP 2016-CFP-029, released on October 3, 2016, required MRLCC to “immediately file” an amended campaign finance report with the required information, and that “contingent on an amended campaign finance report being filed, the Commissioner hereby excuses (dismisses) the MRLCC from a campaign practice violation for the deficiencies examined in the above section.” This Commissioner has reviewed MRLCC’s file and notes that no amended reports have been received by the COPP. MRLCC has been on notice since at least September 2016 that there are alleged, and later confirmed findings of deficiencies in MRLCC’s reporting and disclosure during the 2016 election cycle.

⁷ *O’Hara v. Erb*, COPP 2016-CFP-012; *Essman v Patients for Reform*, COPP-2012-CFP-034; and *Adams v. Brown*, COPP-2015-CFP-005.

Sufficiency Finding No. 2: The MRLCC failed to provide an amended campaign finance report as required in COPP 2016-CFP-029. (FOF No. 2.)

This Commissioner finds that MRLCC's failure to provide an amended campaign finance report nullifies Commissioner Motl's contingent dismissal of the violation. This Commissioner upholds Commissioner Motl's sufficiency finding (SF No. 1) and finds the MRLCC violated Montana's campaign finance laws by failure to sufficiently describe or disclose specific contributions. The earlier Partial Decision and this Final Decision will be posted together on the COPP website.

2. Improper reporting of expenditures and in-kind contributions

The present complaint further alleges the MRLCC campaign finance reports contained inaccurate and incomplete expenditure records, including Independent and Other expenditures also labeled as in-kind contributions and multiple items not assigned a value, or assigned a value in an addendum but not within the report itself.

Finding of Fact No. 4: Montana Republican State Central Committee (MRSCC) filed its campaign finance report for September 1, 2016 on August 30, 2016 and amended the report on September 26, 2016. Under Independent Expenditures, MRSCC lists 3 expenditures to TJS Strategies LLC for "Printing expenses" on August 24, 2016. The Candidate/Issue listed were Peggy Webb, Adam Rosendale, Donald Roberts, Robert Saunders, Kerri Seeking-Crow, Donna Huston for \$767.16; Brad Tschida, Johanna Clark, Debra Lamm, Mike Hopkins, Adam Hertz, Daniel Saloman, Chet Billi for \$895.02; and Jimmy Patelis, Neal Ganser, Talor (sic) Rose, Steve Gibson, Jeremy Trebas, Stephanie Hess, Terry Gauthier for \$894.95. (Commissioner's Records.)

Finding of Fact No. 5: MRLCC, on its October 4, 2016 report filed October 1, 2016, included an addendum for Independent Expenditures of Door Hangers at \$127.86 for 1,500, per candidate, for twenty candidates, Peggy Webb, Adam Rosendale, Donald Roberts, Robert Saunders, Kerri Seeking-Crow, Donna Huston, Brad Tschida, Johanna Clark, Debra Lamm, Mike Hopkins, Adam Hertz, Daniel Saloman, Chet Billi, Jimmy Patelis, Neal Ganser, Taylor Rose, Steve Gibson, Jeremy Trebas, Stephanie Hess, and Terry Gauthier. The total expenditure would be \$2557.20. MRLCC lists these as in-kind expenditures from Montana Republican State Central Committee. (Commissioner's Records.)

Finding of Fact No. 6: The total of the Printing expenses from the MRSCC is \$2557.13, .07 cents less than the amount listed on the addendum from MRLCC. (Commissioner's Records.)

The *state* committee (MRSCC) reported printing expenses, in the amount of \$2557.13, as an Independent expenditure for 20 candidates on its August 30, 2016 campaign finance report. On its October 1, 2016 campaign finance report, the *legislative* committee (MRLCC) included an addendum that listed a printing expense for the same 20 candidates and amount (\$2557.20) as an independent expenditure made by the MRLCC, and did not include an amount in the body of the report, only on the attached addendum. Complicating it further, the MRLCC's addendum referred to the expenditures as both an in-kind donation from the *state* committee (MRSCC), as well as an independent expenditure of the *legislative* committee (MRLCC).

Finding of Fact No. 7: MRLCC's April 7, 2016 campaign finance report reported under the field Expenditures: Other "Various, See Attached" and added a written description "CONSULTING: (In-Kind)" with a value of \$0.00. The attachment listed 19 candidate entries for "planning calls", "strategic planning" and "prep packet" with values ranging

from \$11.54 to \$25.00, totaling \$419.24. (Commissioner's Records.)

Finding of Fact No. 8: MRLCC's May 3, 2016 campaign finance report reported under the field Expenditures: Other "Various, See Attached", and added a written description "CONSULTING: (In-Kind)" with a value of \$0.00. The attachment listed 33 candidate entries for "strategic planning conference call", "voter list prep" with values ranging from \$5.77 to \$25.00, totaling \$1056.89. (Commissioner's Records.)

Finding of Fact No. 9: MRLCC's May 24, 2016 campaign finance report reported under the field Expenditures: Other – "See fax, Various", and added a written description "In Kind Consulting" with a value of \$0.00. The attachment listed 29 candidate entries for "strategic planning conference call", "voter list prep", all with a value of \$11.54, totaling \$334.66. (Commissioner's Records.)

Finding of Fact No. 10: MRLCC's October 27, 2016 campaign finance report included entries under the field Independent Expenditures of "Strategic planning conference call" during October, 2016 as follows: on October 5 and October 12, 2016 with Chet Billi, October 13 for Terry Gauthier, October 11 for Steve Gibson, October 11 for Adam Hertz, October 4 for Donna Huston, October 12 for Jimmy Patelis, October 5 and October 12 for Dan Salomon, and October 5, 2016 for Brad Tschida; all with a value recorded as \$0.00. (Commissioner's Records.)

Finding of Fact No. 11: Chet Billi's campaign finance reports disclosed receiving in-kind contributions from MRLCC on nine different occasions for "Conference call with Committee," with a reported value of \$11.54, "Strategic planning conference call" with a reported value of \$11.54, and "Planning call" with a reported value of \$5.77. However, none were listed as taking place in October 2016. (Commissioner's Records.)

Finding of Fact No. 12: Adam Hertz's campaign finance reports disclosed receiving in-kind contributions from MRLCC on eight different occasions for "Strategic planning conference call" each with a reported value of \$11.54, including an entry on October 11, 2016. (Commissioner's Records.)

Finding of Fact No. 13: Jimmy Patelis' campaign finance

reports disclosed receiving in-kind contributions from MRLCC on five different occasions for “Strategic planning conference call” each with a reported value of \$11.54 a call, as well as “Planning & Strategic Planning Meetings/Conference Calls, and Walk Prep List” for \$71.16, including an \$11.54 entry on October 20, 2016. (Commissioner’s Records.)

Finding of Fact No. 14: Dan Salomon’s campaign finance reports disclosed receiving in-kind contributions from MRLCC on 10 different occasions for “Strategic planning conference call” each with a reported value of \$11.54, including entries of \$11.54 on October 5 and October 12, 2016. (Commissioner’s Records.)

Finding of Fact No. 15: Terry Gauthier’s October 4, 2016 campaign finance report disclosed receiving an in-kind contribution under Candidate Contributions for a “Strategic planning conference call” with a reported value of \$11.54 on July 21, 2016 and September 15, 2016. (Commissioner’s Records.)

Finding of Fact No. 16: Terry Gauthier’s October 27, 2016 campaign finance report disclosed receiving in-kind contributions, under Candidate Contributions, for “Strategic planning conference call” with a reported value of \$11.54 on October 13, 2016. (Commissioner’s Records.)

Finding of Fact No. 17: Steve Gibson, on his June 27, 2016 campaign finance report listed under Candidate contributions, “MRLCC – strategic planning conference call – June 14, 2016” with a reported value of \$11.54. (Commissioner’s Records.)

Finding of Fact No. 18: Donna Huston reported on her June 27, 2016 campaign finance report, “Strategic Planning conference calls” at a value of \$34.62 on April 28, 2016 with MRLCC listed as the contributor. (Commissioner’s Records.)

Finding of Fact No. 19: Donna Huston reported on her October 4, 2016 campaign finance report, “Strategic Planning conference calls (8/29 – 9/6)” with a value of \$23.08 on September 30, 2016 with MRLCC listed as the contributor. (Commissioner’s Records.)

Finding of Fact No. 20: Donna Huston reported on her October 28, 2016 campaign finance report, “Strategic Planning conference call”, with a value of \$11.52 on October 4, 2016 with MRLCC listed as the contributor.

(Commissioner's Records.)

On its October 27, 2016 campaign finance report, the MRLCC reported eight (8) independent expenditures to candidates; the expenditures were identified as an electioneering communication and the purpose was described as a strategic planning conference call, but per entity amount or value was not included in the body of the report (*i.e.*, submitted the amount as \$0.00). (FOF No. 10.) A review of the candidate's campaign finance reports found strategic conference planning calls identified as in-kind contributions from the MRLCC for amounts ranging from \$5.71 to \$71.16. (FOF Nos. 11-20)

Sufficiency Finding No. 3: The MRLCC's April 7, 2016, May 3, and May 24, 2016 report disclosed "in-kind consulting" as an 'Expenditures: Other' and reported the value as \$0.00. The report does not disclose a value, necessary for an expenditure, in-kind contribution, and the report's total calculation. (FOF Nos. 7, 8, 9.)

Sufficiency Finding No. 4: The MRLCC submitted its October 4, 2016 campaign finance report on October 1, 2016, which included an election communication expense described as both an independent expenditure and in-kind contribution. The entry did not include a value in the "amount" column. The report does not disclose a value, necessary for an expenditure, in-kind contribution, and the report's total calculation. The reported item cannot be both an independent expenditure and an in-kind contribution. (FOF Nos. 4, 5, 6.)

Sufficiency Finding No. 5: The MRLCC timely submitted its October 27, 2016 campaign finance report, reporting eight (8) election communication expenses described as both an independent expenditure and in-kind contribution. The entries did not include a value in the "amount" column. The report does not disclose a value, necessary for an expenditure, in-kind contribution, and the report's total calculation. The reported items cannot be both an independent expenditure and an in-kind contribution. (FOF

Nos. 10 - 20.)

Reports are required to be “verified as true, complete and correct” §13-37-231(1), MCA. The Commissioner finds the MRLCC filed incorrect and incomplete campaign finance reports. In the case of the October 1, 2016 campaign finance report, the MRLCC reported in the ‘Independent Expenditures’ section, “Various see attached” identified by the MRLCC as electioneering communications, and described as “door hangers (In Kind)” with an amount \$0.00. The attachment was labeled “Ink-Kind donation from: Montana Republican State Central Committee ...” followed by “Independent Expenditures in the Following Races” listing 20 candidates, each receiving 1500 door hangers at a cost of \$127.86 for a total of \$2557.20. (FOF No. 5.) The communication in question is either an in-kind contribution or an independent expenditure, not both. By failure to accurately report an item as an in-kind expenditure, 44.11.503, ARM, an independent expenditure, 44.11.502(8), ARM, or as an in-kind contribution, 44.11.403, ARM, the MRLCC has violated Montana’s campaign finance laws.

Further, it appears the same item was reported by the Montana Republican State Central Committee as an independent expenditure on its September 1, 2016 campaign finance report, which will be addressed by the COPP separate from this decision.

Continuing, the MRLCC’s October 27, 2016 campaign report contained similar discrepancies. The MRLCC reported independent expenditures to eight (8) candidates, identified as electioneering communications, described as

“strategic planning conference call” and listing \$0.00 as the amount expended. (FOF No. 10.) A review of the campaign finance reports of the eight candidates MRLCC said were in receipt of the expenditures, shows that 7 of the 8 recorded “strategic planning conference call” as an in-kind donation and assigned a monetary value. While it is possible the committee provided the candidate a value of the service, both the candidate and the committee are required to report the service value. “Because an in-kind expense becomes a contribution to the receiving candidate... this regulation works in tandem with ARM 44.11.403 and the record keeping requirements of that regulation apply.” 44.11.503(4), ARM.

Further review of earlier campaign finance reports⁸ reveals similar in-kind donations which were listed as ‘Expenditure: Other’ with \$0.00 value attached and addendums that included candidate names, descriptions and amounts. A review of the reports filed by the referenced Candidates show multiple strategic planning calls and/or similarly worded services from the MRLCC which are not included in the MRLCC campaign finance reports.

In all of the above-cited situations, the MRLCC failed to properly report an expenditure, and by doing so, produced a number of errors and omissions which may potentially affect candidates and other committee reports.

Ultimately, opposition candidates, parties, committees and the citizens of the State of Montana did not have access to complete and accurate MRLCC campaign finance data prior to election day. The Commissioner finds the

⁸ MRLCC campaign finance reports from April, May 2016 (FOF Nos. 7, 8, 9)

MRLCC has violated Montana’s campaign finance laws by filing incomplete and inaccurate campaign finance reports.

The Commissioner will require that in any enforcement of this matter all MRLCC’s campaign finance reports from the 2016 election will be reviewed, information electronically updated with correct expenditure (including detail and specificity) and contribution totals as appropriate. In addition, the examples found in Section 2 above (failure to properly report an expenditure), leads the Commissioner to require the MRLCC to submit a copy of its “firewall” policy, outlining the steps and methods undertaken to ensure coordination did not take place between the MRLCC, candidates, and other committees on independent expenditures.

ENFORCEMENT OF SUFFICIENCY FINDINGS

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. §13-37-111(2)(a), MCA. The mandate to investigate is followed by a mandate to take action. The law requires that where there is “sufficient evidence” of a violation the Commissioner must (“shall notify,” *see* §13-37-124, MCA) 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 MRLCC’s 2016

campaign practices 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.

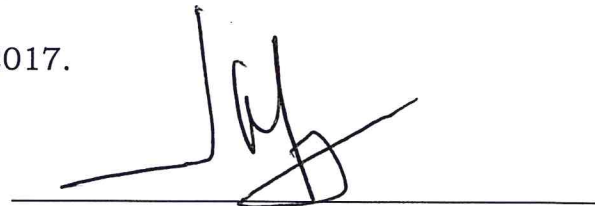
The failure to fully and timely report and disclose cannot generally be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law as it relates to failures to file and report. *See Matters of Vincent*, Nos. COPP-2013-CFP-006, 009 (discussing excusable neglect principles). Likewise, the Commissioner does not normally accept that failures to file or report be excused as *de minimis*. *See Matters of Vincent*, Nos. COPP-2013-CFP-006, 009 (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. §13-37-124, MCA. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying a civil fine or civil prosecution of MRLCC. Because of the nature of the violations (the failure to report and disclose occurred in Lewis and Clark County), this matter is referred to the County Attorney of Lewis and Clark County for his consideration as to prosecution. §13-37-124(1), MCA. Should the County Attorney waive the right to prosecute (§13-37-124(2), MCA) or fail to prosecute within 30 days (§13-37-124(1) MCA) 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 §13-37-124(1), MCA) 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 actions (or lack thereof) that the political committee undertook in correcting the reports at issue when the matter was raised in the Complaint.

While it is expected that a mitigated 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 §13-37-226, MCA. See §13-37-128, MCA. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

DATED this 6th day of July, 2017.



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