

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Eaton v. Build Montana PAC No. COPP 2016-CFP-042	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION PARTIAL DISMASSAL OF COMPLAINT ON APPLICATION OF PRINCIPLE OF <i>De Minimis</i>
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On October 28, 2016, Jake Eaton of Billings, Montana filed a complaint with the Commissioner of Political Practices (COPP) against Build Montana PAC, aka Build Montana, a registered Montana political committee, alleging several campaign violations during the 2016 election cycle.

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**Discussion**

The Complaint alleges that Build Montana failed to choose a proper name for the political committee, failed to have a proper disclaimer on an election communication, failed to list opposition to Greg Gianforte, a candidate for Governor in the 2016 general election, and failed to comply with expenditure disclosures. Each of these allegations is addressed in turn below.

1. The Naming and Labeling statute

The complaint alleges the Build Montana name does not appropriately reflect the special interest and common employer of a majority of its contributors as found in §13-37-210, MCA.

Finding of Fact No. 1: Build Montana PAC filed its initial Statement of Organization (C2) on March 28, 2014, listing Jay Reardon as the treasurer and did not list a purpose for the committee. (Commissioner's Records.)

Finding of Fact No. 2: Build Montana PAC filed an amended Statement of Organization on February 25, 2016 to change the name to be Build Montana aka BuildMTPac. (Commissioner's Records.)

Finding of Fact No. 3: Build Montana timely filed its campaign finance report due on May 1, 2016, reporting one contribution from Special Leg PAC (Special Legislative Fund Montana State AFL-CIO aka Montana State AFL-CIO Special Legislative Fund). (Commissioner's Records.)

Finding of Fact No. 4: Build Montana timely filed its campaign finance report due on September 1, 2016. It reported contributions from Montana State AFL-CIO, the International Association of Fire Fighters and the Union of Operating Engineers. (Commissioner's Records.)

Finding of Fact No. 5: Build Montana timely filed its campaign finance report due on October 24, 2016, receiving contributions from American Federation of Teachers, Machinists Non-Partisan Political League Committee, Montana State AFL-CIO, Professional Fire Fighters of Idaho, and SEIU Healthcare775NW. (Commissioner's Records.)

Finding of Fact No. 6: Build Montana filed its campaign finance report due on October 27, 2016 on October 28, 2016, reporting contributions from seven (7) non-organized labor affiliated individuals, businesses and organizations as well as two (2) organized labor affiliated individuals and committees. (Commissioner's Records.)

Finding of Fact No. 7: As of the date of the complaint, Build Montana had reported contributions were received from 14

committees, organizations and individuals associated with organized labor and 7 businesses, individuals, organizations and committees not associated with organized labor. (Commissioner's Records.)

Finding of Fact No. 8: On November 3, 2016, Build Montana filed a campaign finance report C-6, which encompassed its C-7, Notice of PreElection Contribution forms (filed via paper), reporting three (3) contributions from non-organized labor affiliated individuals and one (1) organized labor affiliated contribution. (Commissioner's Records.)

Finding of Fact No. 9: Build Montana timely filed its report due on November 28, 2016, receiving contributions from one (1) non-organized labor affiliated business as well as two (2) organized labor affiliated organizations and committees. (Commissioner's Records.)

Finding of Fact No. 10: In all, contributions were received from 18 committees, organizations and individuals associated with organized labor and 12 businesses, individuals, organizations and committees not associated with organized labor. (Commissioner's Records.)

Under Montana law, any identifiable economic or special interest promoting or opposing a ballot issue may not disguise its special interest by use of a name that does not identify that economic or special interest. *Trap Free v. MTA*, COPP-2014-CFP-023 (Commissioner Motl).

Montana law requires that a political committee name itself using a name that "clearly identifies the economic or special interest, if identifiable, of a majority of its contributors." §13-37-210 MCA. The Commissioner identifies a special interest in this matter as "organized labor".

Sufficiency Finding No. 1: Sufficient facts exist to show that the name of Build Montana failed to meet the naming and labeling requirements of Montana law because it did not identify the economic and special interest of "organized labor" in its name. (FOF Nos. 3 – 7.)

Prior Commissioners have used the method of identifying and counting contributors by identified economic or special interest when determining whether or not to make a “naming and labeling” sufficiency finding. *Hanson v. No on CA-30*, November 15, 1996, (Commissioner Argenbright). In making such a determination the Commissioner examines “whether or not an economic or special interest between the two contributors to the [political] committee exists.” *Feaver v Billings Education Advocates*, June 17, 1996 (Commissioner Argenbright); *Common Cause v. Committee to Defend First Amendment Rights*, October 11, 1996 (Commissioner Argenbright). For example, in the *Trap free v. MTA* Decision, such an economic interest determination has required the political committee to include the descriptive word “trappers” in its name, as trappers were identified as a majority of contributors to the political committee. *Trap Free v. MTA*, COPP-2014-CFP-023 (Commissioner Motl). Similarly, in *Eaton v. Montanans for Experienced Judges*, COPP-2016-CFP-035 (Commissioner Motl) the shared economic interest required the political committee to include the descriptive word “lawyers” in its name.

Here, more than half of the contributors to Build Montana were committees, organizations, and individuals associated with organized labor. (FOF No. 10.) The Sufficiency Finding in this Matter, requiring the descriptive words “organized labor” in the name of the political committee, is consistent with Montana law, as interpreted by prior Decisions made by Commissioners.

## 2. Proper disclaimer on election materials

The complaint also alleges Build Montana distributed an election mailer that did not have the required mailing address included in the attribution.

Finding of Fact No. 11: On the “Montana Values” mailer that was sent out by Build Montana, one side has the disclaimer “Paid for by Build Montana PAC, Quint Nyman, Treasurer”, and on the other side of the mailer “Build Montana PAC, 810 Hialeah CT, Helena, MT 59601, AFLMT-1609-14”. (Commissioner’s Records.)

Montana law is clear as to a proper attribution. “All election communications ... must clearly and conspicuously include the attribution “paid for by” followed by the name and address of the person who made or financed the expenditure.” §13-35-225(1), MCA. The mailing address was omitted from the attribution and placed as a return address on the opposite side of the attribution. In Build Montana PAC’s response to the Complaint, it stated the failure to include the address with the treasurer’s name as an oversight, and “not in any way intended to circumvent the statutory requirement.” As all the required information was included on the communication and the committee’s address was placed in a position normally reserved for the sender’s address, the Commissioner finds this to be an error of oversight rather than intention, and thus applies the *de minimis* principle.

The COPP began to regularly apply a *de minimis* exception to civil enforcement of a technical or minor violation of Montana’s campaign practice, when directed to do so law by the Ninth Circuit Court of Appeals in its decision in the Matter of *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth* 556 F. 3d 1021, 1028-29 (9th Cir. 2009). The *de minimis* actions identified by

the Court in *Canyon Ferry* were the limited use of staff and copying expenditures by a party involved in a ballot issue campaign.

While not always identifying it as *de minimis*, Commissioners have long used the concept to dismiss prosecution of technical violations: no prosecution for lack of address, *Shannon v. Andrews*, COPP-2012-CFP-035 (Commissioner Murry); no prosecution for failure to list party affiliation or funding source on a candidate website display, *Fitzpatrick v. Zook*, COPP-2011-CFP-014 (Commissioner Gallik); and no prosecution when full name of committee treasurer omitted, *Ellis v. Yes on CI-97*, April 15, 2008 (Commissioner Unsworth). The Commissioner has applied *de minimis* to excuse technical violations for: omitting a 'paid for by' attribution, *Ulvestad v. Brown*, COPP-2013-CFR-025; accepting a contribution of \$40 over the allowed amount, *Rodda v. Bennett*, COPP-2014-CFR-013; failing to register/attribute as a political committee, *Royston v. Crosby*, COPP-2012-CFP-041; failure to fully attribute on a candidate letter, *Ponte v. Buttrey*, COPP-2014-CFP-007; and failure to properly apportion total allowed amount of contribution between husband and wife, *Kenat v. Van Dyk*, No. COPP-2014-CFP-004.

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Further, Commissioner Motl, in a January 31, 2014 advisory opinion to Emilie Boyles, generally placed the *de minimis* principle in Montana campaign practice law as follows:

Second, there is a *de minimis* exception to Montana's definition of campaign contribution. This means that costs, fees or charges associated with a minor amount of campaign speech need not be reported. The *de minimis* principle holds that robust election speech is favored such that minimal election

speech actions cannot be burdened with any requirements. This principle would apply to except small cost amounts (such as one time electronic campaigning costs) from disclosure or reporting requirements. COPP-2014-AO-003-Boyles.

The constitutional considerations inherent in the “robust election speech issue” raised in the advisory opinion are also discussed in *Landsgaard v. Peterson*, COPP-2014-CFP-008.

Returning now to the Build Montana activity, the required information missing from the “paid for by” attribution was the address. However, all other required information, including the campaign address and treasurer, was included on the communication and not hidden, but rather printed conspicuously for public view. §13-35-225(1), MCA; (FOF No. 11). For the reasons set out in this discussion, Build Montana’s failure to fully attribute is dismissed under the *de minimis* principle.

### 3. List mission on Statement of Organization form

The complaint alleges Build Montana failed to disclose its opposition to gubernatorial candidate Greg Gianforte in its statement of organization.

Finding of Fact No. 12: Build Montana last amended its C-2 Statement of Organization on October 21, 2016; this amendment included as a purpose “Re-Elect Governor Bullock” referring to incumbent candidate Steve Bullock, but the amendment did not include Oppose Greg Gianforte or similar language. (Commissioner’s Records)

Finding of Fact No. 13: The October 25, 2016 Build Montana “Montana Values” election communication (mailer) includes the name and likeness of Mr. Gianforte, one of the candidates for governor running against Bullock. (Commissioner’s Records)

Montana law requires that Build Montana list “the name...of each

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candidate whom the committee makes a reportable election expenditure....” (44.11.201(f), ARM.) Expenditures include those “made by a candidate or political committee to support or oppose a candidate....” §13-1-101(17)(a)(i), MCA. Further, “[a]ny material change ... in a statement of organization ... shall be reported by filing an amended statement ... within five business days after the change.” (44.11.303(2), ARM.)

Sufficiency Finding No. 2: The Commissioner finds sufficient facts to show that Build Montana failed to list opposition to Greg Gianforte on its Statement of Organization form, as required by 44.11.202(1)(f), ARM, or file a timely amendment as required by 44.11.303(2), ARM. (FOF No. 12, 13.)

The Commissioner finds Build Montana violated campaign finance law when it failed to amend its Statement of Organization to include opposition to Greg Gianforte within five business days of sending the “Montana Values” mailer. (FOF No. 13).

#### 4. Report purpose and quantity of campaign materials

The Complaint further alleges Build Montana failed to include the purpose and quantity of its election communications on campaign finance reports.

Finding of Fact No. 14: On December 16, 2016, The COPP office emailed Build Montana, regarding the October 28, 2016 campaign finance report needing quantity information on election mailers. (Commissioner’s Records.)

Finding of Fact No. 15: Build Montana’s December 16, 2016 reply acknowledge they did not add the quantity of mailers on the report forms, but stated the information would be forthcoming. To date, the COPP office has not received an



updated campaign finance report with the missing information. (Commissioner's Records.)

Finding of Fact No. 16: Build Montana expenditures show expenditures on four separate occasions for "campaign mailings" or "vote by mail mailings" on September 28, 2016, October 3, 2016, October 17, 2016 and October 19, 2016; adequate purpose descriptions and quantity information was not made available on the October 24, 2016 campaign finance report. (Commissioner's Records)

Montana law requires that "reports of expenditures made to a consultant, advertising agency, polling firm or other person that performs service for or on behalf of a candidate or political committee must be itemized and described in sufficient detail ..." §13-37-229(2)(b), MCA. Further "the 'purpose'" of each expenditure as reported ... 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." ARM 44.11.502(7).

Sufficiency Finding No. 3: The Commissioner finds sufficient facts exist to determine Build Montana failed to provide information detailed enough to distinguish between election communication mailers; further, quantity information was neither provided initially on the campaign finance reports nor when requested by the COPP office. (FOF Nos. 14 – 16.)

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The Commissioner finds Build Montana violated campaign finance law when it failed to adequately provide the purpose and quantity of election communication mailers referenced by date on the October 24, 2016 campaign finance report: September 28, 2016, JVA Campaigns, campaign mailings for Voter by mail applications; October 3, 2016, JVA Campaigns, campaign for

Voter by mail mailings; October 17, 2016, JVA Campaigns, Vote by mail piece/HD 22, HD 60 mailings; and JVA Campaigns, campaign mailings/Governor Bullock.

5. Additional finding of campaign finance violations

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.

Finding of Fact No. 17: Build Montana’s campaign finance reports show expenditures on two separate occasions for “radio expenses for Jesse Laslovich” on October 27, 2016. Adequate purpose description and quantity information was not on the October 28, 2016 report. (Commissioner’s Records)

Montana law requires that “reports of expenditures made to a consultant, advertising agency, polling firm or other person that performs service for or on behalf of a candidate or political committee must be itemized and described in sufficient detail ...” §13-37-229(2)(b), MCA. Further “the “purpose” of each expenditure as reported ... 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”. ARM 44.11.502(7).

Sufficiency Finding No. 4: The Commissioner finds sufficient facts exist to determine Build Montana failed to provide sufficient information as to determine a distinction between election communications, if any; further, quantity information

was not provided on the campaign finance report. (FOF No. 17)

The Commissioner finds Build Montana did violate campaign finance law when it failed to adequately provide the purpose and quantity of the election communication expenditures it made on October 27, 2016.

### **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; 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, as set out in this Decision, to show that Build Montana 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).

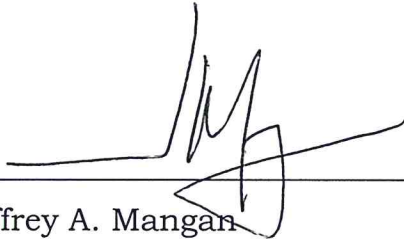
Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the above Sufficiency Findings, a civil fine is justified. §13-37-124, MCA. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying a civil fine or civil prosecution of Build Montana. 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 whether or not political committee undertook any action to correct 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 21<sup>st</sup> day of June, 2017.



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