

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Bennett v. Vent Missoula No. COPP 2017-CFP-007	DISMISSAL OF COMPLAINT BASED ON LACK OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION AND ON APPLICATION OF PRINCIPLE OF EXCUSABLE NEGLECT
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On October 25, 2017, Bryce Bennett, resident of Missoula, Montana, filed a campaign complaint against the Facebook page Vent Missoula for failure to properly classify itself as an incidental committee and failure to disclose expenditures.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: The general municipal election in Missoula County occurred on November 7, 2017. (Montana Secretary of State website.)

Finding of Fact No. 2: John Engen filed a C-1A Statement of Candidacy on February 16, 2017 for Mayor of Missoula. (Commissioner's Records.)

Finding of Fact No. 3: Lisa Triepke filed a C-1A Statement of Candidacy on April 20, 2017 for Mayor of Missoula. (Commissioner's Records.)

Finding of Fact No. 4: Jesse Ramos filed a C-1A Statement of Candidacy on June 21, 2017 for City Council in Missoula. (Commissioner's Records.)

Finding of Fact No. 5: On October 26, 2017, the COPP received an email from Tyler (John) Theisen, who identified himself as the Vent Missoula page administrator since September 20, 2017. (Commissioner's Records.)

Finding of Fact No. 6: Mr. Theisen's email identified Brendon Naasz as the creator of the Vent Missoula page, and its page administrator prior to September 20, 2017. (Commissioner's Records.)

DISCUSSION

The complainant alleges Vent Missoula, a Facebook page, became a political committee at the time it "boosted" and "sponsored" posts involved in the local Missoula municipal election. By doing so, the complainant contends that Vent Missoula should be required to register with the COPP as a political committee, provide campaign financial reports of all contributions and expenditures as required, and properly attribute all election and electioneering communications.

The Commissioner discusses each of these issues by: examining the question of paid and non-paid posting on social media platforms, specifically Facebook; determining if a paid social media post is considered an election or electioneering communication; determining if Vent Missoula is a political committee; and addressing the need to properly attribute paid election or electioneering communications on social media platforms.

1. Paid versus non-paid posts

Individuals, businesses, governments, candidates, campaigns, media outlets and any other entity can create an account on Facebook, Twitter,

YouTube, and other social media platforms. Social media is described by Wikipedia as:

“computer-mediated technologies that facilitate the creation and sharing of information, ideas, career interests and other forms of expression via virtual communities and networks. The variety of stand-alone and built-in social media services currently available introduces challenges of definition; however, there are some common features:

1. Social media are interactive Web 2.0 Internet-based applications.
2. User-generated content, such as text posts or comments, digital photos or videos, and data generated through all online interactions, are the lifeblood of social media.
3. Users create service-specific profiles for the website or app that are designed and maintained by the social media organization.
4. Social media facilitate the development of online social networks by connecting a user's profile with those of other individuals or groups”¹

Facebook, for example, allows a user to create a Facebook profile,² Facebook page,³ or Facebook group.⁴ Facebook profiles, pages, and groups are provided free to those individuals and entities who choose to create one under the terms and conditions of the platform.

¹ Wikipedia, *Social media*, https://en.wikipedia.org/wiki/Social_media (last accessed Nov. 14, 2017).

² Profiles are for individual use only. See Facebook Help Center, *What names are allowed on Facebook?*, https://www.facebook.com/help/112146705538576?helpref=faq_content (last accessed Nov. 14, 2017).

³ Businesses, organizations and public figures can connect with their customers or fans on Facebook by creating a Facebook Page. Anyone with a Facebook account can create a Page or help manage one, as long as they have a role on the Page. People who like a Page can get updates about the Page, such as posts, photos or videos, in their News Feed. See Facebook Help Center, *About: Pages*, <https://www.facebook.com/help/282489752085908/> (last accessed Nov. 14, 2017).

⁴ Groups provide a space to communicate about shared interests with certain people. See Facebook Help Center, *About: Groups*, <https://www.facebook.com/help/1629740080681586/> (accessed Nov. 14, 2017).

Social media platforms allow users to post content at no charge to the social network that is available to friends, followers, and others that chose to see the content, such as text, images, links, and video. Such unpaid⁵ posting of political content is currently allowed under Montana Political Campaign Finance law. When an individual or entity chooses to pay for, by “boosting”⁶ or “promoting,”⁷ that same political content, it is then advertised and made available to a wider audience. On Facebook, such posts are identified with a “sponsored”⁸ label. It is paid political content that may be required to be reported and attributed under Montana Political Campaign Finance law.

Finding of Fact No. 7: Mr. Naasz reported four Facebook posts had been boosted (paid) from the Vent Missoula page from August 12, 2017 to September 11, 2017 in an amount of \$23.00. Mr. Naasz paid for the boosts with personal funds. (Commissioner’s Records.)

Finding of Fact No. 8: Mr. Theisen reported thirteen Facebook posts had been boosted (paid) from the Vent Missoula page from September 20, 2017 to October 23, 2017 in the amount of \$87.43. Mr. Theisen paid for the boosts with personal funds. (Commissioner’s Records.)

⁵ The post is “unpaid” in that neither the post nor the individual making the post receive compensation or are charged for the action.

⁶ A boost is a form of paid promotion or advertising on the Facebook social network platform. Facebook describes a boost as, “Boosting a post may help you get more people to like, share and comment on the posts you create. Boosted posts are also a way to reach new people who are likely interested in your content but don’t currently follow you on Facebook.” See facebook business, Advertising Help Center, *Creating Ads from your Page, Business Page Promotions: About boosting posts*, <https://www.facebook.com/business/help/547448218658012> (last accessed Nov. 14, 2017).

⁷ On the social media platform Twitter, tweet engagements campaign “promotes your Tweets to a large, targeted group of people.... Tweets in these campaigns are clearly labeled as Promoted but are like regular Tweets in every other way.” See Twitter, *Business: Increase Tweet engagements with Promoted Tweets*, <https://business.twitter.com/en/advertising/campaign-types/increase-tweet-engagements.html> (last accessed Nov. 14, 2017).

⁸ From Facebook: “The ad you create will look just like the Page post it’s based on. The only difference is that your ad will appear with a Sponsored label in the top-left corner.” See facebook business, Advertising Help Center, *Creating Ads from your Page, Business Page Promotions: About boosting posts*, *supra* n. 6.

Turning to the complaint, Vent Missoula is a Facebook page created by an individual, Brendon Naasz of Missoula. (FOF No. 6.) Mr. Naasz served as the page administrator⁹ through September 20, 2017. (FOF No. 6.) Mr. Naasz reported that, while he was the page administrator, four posts had been boosted (or paid), totaling \$23.00, from the Vent Missoula Facebook page (FOF No. 7).

Mr. Theisen of Missoula identified himself as the Vent Missoula page administrator from September 20, 2017 to October 28, 2017. (FOF No. 5.) Mr. Theisen reported during that time, thirteen posts had been boosted (or paid), totaling \$87.43, from the Vent Missoula Facebook page (FOF No. 8).

2. When does a social media post become an election or electioneering communication?

Under Montana Political Campaign Finance law, an election communication is defined as “forms of communication to support or oppose a candidate or ballot issue ... paid placement of content on the internet of other electronic communications network[.]” §13-1-101(14)(a)(ii), MCA. An electioneering communication is defined as

a paid communication that is publicly distributed by ... internet website, ... that is made within 60 days of the initiation of voting in an election, that does not support or oppose a candidate or ballot issue, that can be received by more than 100 recipients in the voting district on the candidate or ballot issue, and that:

(i) refers to one or more clearly identified candidates in that election;

⁹ A page administrator can create a Page, change how the Page looks and publish as the Page. Page admins can assign roles to other users. See Facebook Help Center, *Page Roles: What are the different Page roles and what can they do?*, <https://www.facebook.com/help/323502271070625/> (last accessed Nov. 14, 2017).

- (ii) depicts the name image likeness or voice of one or more clearly identified candidates in that election; or
- (iii) refers to political party, ballot issue, or other question submitted to the voters in that election.”

§13-1-101(16)(a), MCA.

Page administrators and visitors to the Vent Missoula Facebook page routinely posted a variety of political oriented posts: written text posts; sharing of videos; sharing links of interest from others news, editorials, articles and broadcasts; images, satirical memes,¹⁰ and other visual posts. On at least 17 occasions (see Tables 1, 2), the Vent Missoula Facebook page administrators boosted various posts (FOF Nos. 7, 8).

Finding of Fact No. 9: In correspondence dated November 9, 2017, Mr. Naasz self-reported the following paid posts (see Table 1) on the Vent Missoula page during the time he was page administrator:

Table 1 – Posts boosted by Brendon Naasz

Date of Post	Cost	Description	Candidate(s) Mentioned by Name and/or Likeness?	Candidates Supported or Opposed?
08/12/17	\$5.00	Initial Post to start the page	No	No
08/13/17	\$5.00	Post about the fair and how it would be better if horse racing was brought back	No	No
08/15/17	\$5.00	Online Petition to bring back horse racing	No	No
09/11/17	\$8.00	Installation of new police recruits by Mayor Engen	Yes	No

Finding of Fact No. 10: In correspondence dated October 29, 2017, Mr. Theisen self-reported the following paid posts (see Table 2) on the Vent Missoula page during the time he was page administrator:

¹⁰ Meme - is an idea, behavior, or style that spreads from person to person within a culture — often with the aim of conveying a particular phenomenon, theme, or meaning represented by the meme. See Wikipedia, *Meme*, <https://en.wikipedia.org/wiki/Meme> (last accessed Nov. 14, 2017).

Table 2 – Posts boosted by Tyler Theisen

Date of Post	Cost	Description	Candidate(s) Mentioned by Name and/or Likeness?	Candidates Supported or Opposed?
09/20/17	\$0.65	Video Making Fun of Bicyclists	No	No
09/21/17	\$4.17	Remark noting comment removal on Engen for Mayor page	Yes	No
09/21/17	\$1.54	Reminder to vote, link to voter registration site	No	No
09/27/17	\$4.99	Picture of dog in business suit, criticism of city construction projects	No	No
09/27/17	\$3.15	Article on new Fairgrounds director also treasurer for Mayoral campaign	No	No
09/29/17	\$5.00	Article criticizing proposed road construction projects	No	No
10/13/17	\$18.00	Transcript & video of speech from Jesse Ramos	Yes	No
10/14/17	\$0.35	Comment about another user being called a “troll” by Engen for Mayor page, video of actor Danny DeVito pretending to be actual troll	No*	No*
10/19/17	\$1.94	Article about poor voter turnout, encouragement to users to vote	No	No
10/19/17	\$14.06	Screen capture of Engen for Mayor Page telling user to “get a job”	Yes	No
10/22/17	\$16.00	Parody picture of Mayor Campaign banner with comment about high taxes	Yes	No
10/23/17	\$15.83	Criticism of Missoulian’s coverage of Lisa Triepke’s divorce, list of news story links involving alleged Mayoral misconduct	Yes	No
10/23/17	\$1.75	Link to editorial in Missoulian encouraging voters to think beyond party lines	No	No

*Post could not be found

Finding of Fact No. 11: The COPP investigation concluded none of the identified boosted posts would qualify as an election

communication, per § 13-1-101(14), MCA. (Commissioner's Records.)

Finding of Fact No. 12: Mr. Naasz reported an expenditure of \$8.00 for one identified boosted post that would, however, qualify as an electioneering communication, per § 13-1-101(16), MCA. (Commissioner's Records.)

Finding of Fact No. 13: Mr. Theisen reported expenditures of \$68.06 for five identified boosted posts that would qualify as an electioneering communication, per § 13-1-101(16), MCA. (Commissioner's Records.)

Finding of Fact No. 14: The six total identified electioneering communications from the Vent Missoula page were boosted after August 19, 2017, which date is sixty days prior to the Missoula County general election date of November 7, 2017.¹¹ (Commissioner's Records.)

Finding of Fact No. 15: The Facebook page Vent Missoula has over 300 likes and followers. (Commissioner's Records.)

The COPP investigator reviewed 16 of the 17 identified paid posts on the Vent Missoula page to determine which, if any, would fall under the definition of an election communication or electioneering communication. (See Table 2, re post on Oct. 14, 2017.) Of those reviewed, the COPP concluded none were an election communication and six would be considered an electioneering communication (FOF Nos. 11-14). The six paid posts constituting electioneering communications included a likeness or full name of a candidate involved in the 2017 Missoula County municipal election (FOF Nos. 2-4), and did not indicate support or opposition to the candidate. All identified electioneering communications occurred within 60 days of the November 7, 2017 general election date (FOF No. 14). Posts can reach the 300+ followers of the

¹¹ In the case of mail ballot elections, the initiation of voting occurs when the official ballot packs are mailed. ARM 44.11.605(2)(a).

Vent Missoula page unpaid and can be expanded by boosting or paid distribution through Facebook ads.¹² (FOF No. 14.)

3. Is Vent Missoula a political committee?

A political committee is defined in Montana law as “a combination of two or more individuals or a person other than an individual who receives a contribution or makes an expenditure ... to support or oppose a candidate; [or] to prepare or disseminate an election communication, an electioneering communication, or an independent expenditure.” §13-1-101(31)(a)(i), (iii). Further, a political committee is not formed by an individual who makes an independent expenditure solely with his or her own funds and by his or her own actions. ARM 44.11.202(3)(a).

Vent Missoula was a page created by one individual, Mr. Naasz, in early August 2017 and turned over to another individual, Mr. Theisen, on or about September 20, 2017 (FOF Nos. 5, 6). There is no evidence to suggest that two or more individuals came together to form a committee, to support or oppose a candidate or ballot issue, or to prepare or disseminate an election communication or electioneering communication. It is the determination of the Commissioner that Mr. Naasz acted alone in creating the Vent Missoula Facebook page and occasionally boosted posts through mid-September 2017. The Commissioner further finds that in mid-September, Mr. Theisen, as an

¹² “Organic reach is the total number of unique people who were shown your post through unpaid distribution. Paid reach is the total number of unique people who were shown your post as a result of ads.” See Facebook Help Center, *What’s the difference between organic, paid and total reach?*, <https://www.facebook.com/help/285625061456389> (last accessed Nov. 14, 2017).

individual, took control of the Facebook page and became responsible for the occasional boosting of posts. As both acted in their individual capacity, it was not necessary to organize as a political committee.

Individuals do not have to report independent expenditures or expenditures for election or electioneering communications.

4. Properly attribute paid election and electioneering communications

While individuals do not have to report independent expenditures or expenditures for an election communication or electioneering communication, an individual does have to correctly attribute such expenditure. Montana law is clear as to a proper attribution. “All election communications, electioneering 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.

Finding of Fact No. 16: The COPP investigation determined none of the six identified boosted posts by Vent Missoula that qualified as an electioneering communication included a proper attribution as required by Montana state law. (Commissioner’s Records.)

In communications with Mr. Naasz and Mr. Theisen, they reported that none of the six paid electioneering communications included an attribution as required by Montana law (FOF No. 16).

FINDINGS

The Vent Missoula Facebook page was created by an individual, Brendon Naasz and turned over to another individual, Tyler Theisen (FOF Nos. 5, 6). They did not create the page together and did not together create or disseminate election or electioneering communications on the Vent Missoula

Facebook page. The facts as presented indicate all expenditures were paid for by Mr. Naasz and Mr. Theisen individually, using their personal funds (FOF Nos. 7, 8). No facts presented indicate any other individuals were involved in creating the page or making expenditures associated with the page. The allegation of failing to file as a political committee is hereby dismissed.

Text, videos, links, and images were routinely posted on the Vent Missoula Facebook page. Many, but not all, of these posts were political in nature. The page administrators acted alone when posting content, exercising their First Amendment right to express themselves. Posting content on the page was free and available to view by the followers of the Facebook page and others who chose to visit the page. The page administrators did, however, pay to boost posts to reach a wider audience. When doing so, several of the paid posts became electioneering communications as the posts identified by name or likeness candidates in an election 60 days prior to an election day and could reach over 100 recipients (FOF Nos. 12-15). While an individual is not required to report independent expenditures or expenditures for an election communication or electioneering communication, an individual is responsible for the inclusion of the proper “paid for by” attribution. §13-35-225(1), MCA.

Sufficiency Finding No. 1: There are sufficient facts to show that page administrators of the Facebook page Vent Missoula failed to properly attribute paid electioneering communications. (FOF No. 16.)

Compared to previous elections, during the 2017 primary and general election cycle the COPP has seen a greater number of paid social media posts by candidates, committees, and individuals as it is a newer advertising

medium, and more accessible to campaigns and the public. There have also been a number of social media-based, identified paid election and electioneering communications that failed to include the required attribution.

The Commissioner hereby excuses (dismisses) Brendon Naasz and Tyler Theisen from a campaign practice violation for the deficiencies examined in the above sufficiency finding. This dismissal is based on the principle of excusable neglect, given the first-time nature of this determination and the likelihood that there are other individuals, candidates, and committees in a similarly deficient reporting status.

Excusable neglect cannot be applied to oversight or ignorance of the law as it relates to failures to file and report. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009. In this Matter, however, application of excusable neglect is appropriate for the reasons set out above. Excusable neglect is therefore applied to dismiss Sufficiency Finding Nos. 1. See comparable application in *Thomas v. Gianforte*, COPP-2016-CFP-0001 and *MDP v. MRLCC*, No. COPP 2016-CFP-029.

Excusable neglect principles will not be applied to excuse future campaign practice violations for failure to properly attribute paid social media posts—*i.e.*, via boosting, promoting, or advertising on a social media platform.

DECISION

Because the finding of violation is excused by application of excusable neglect principles, this Matter is dismissed in its entirety.

DATED this 14th day of November 2017.



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