

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Eaton v. Montana Democratic Party No. COPP 2017-CFP-003	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE VIOLATION AND DISMISSAL OF ALLEGATION OF VIOLATION
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On July 19, 2017, Jake Eaton, a resident of Billings, Montana, filed a formal complaint against the Montana Democratic Party (MDP) for failure to identify the candidates or issues benefitted by independent expenditures on its campaign finance reports, failure to report its support or opposition for a candidate on its statement of organization report, and coordinating expenditures with the Dirk Sandefur for Supreme Court Justice campaign in support of his candidacy through use of a shared campaign Deputy Treasurer.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of Montana political campaign finance law addressed by this decision are: proper reporting of independent expenditures; disclosure of support on a party committee's statement of organization; and coordination of expenditures between committee and candidate.

FINDINGS OF FACT

The foundational fact necessary for this Decision is as follows:

Finding of Fact No. 1: The 2016 General Election in Montana was held on November 8, 2016. (Secretary of State (SOS) website.)

DISCUSSION

The complainant alleges MDP did not identify candidates or issues to whom independent expenditures were intended to benefit, failed to report support or opposition position of a candidate's campaign, and coordinated expenditures with a candidate's campaign in violation of Montana Political Campaign Finance law. The Commissioner examines each of these issues.

1. Identification of intended benefit on independent expenditure reporting

Finding of Fact No. 2: MDP filed the required C-6 committee financial reports for election year 2016 on April 1, May 2, May 23, June 1, June 27, August 1, September 1, and October 3, 2016 that included addendums detailing all salary and payroll information. No Independent Expenditures (IE) were reported on these reports. Financial reports filed on March 1 and July 1, 2016 did not include addendums or other attachments. (Commissioner's Records.)

Finding of Fact No. 3: On October 24, 2016, MDP filed a C-6 committee financial report covering the dates of September 27 - October 19, 2016 using CERS¹ that reported 25 IE's totaling \$301,781.34, and included an addendum detailing all payroll and salary information for this period. Of the 25 IE's reviewed, 20 did not indicate the candidate or issue benefitted (see FOF No. 4; Table 1). (Commissioner's Records.)

Finding of Fact No. 4: On October 30, 2016, MDP used CERS to file an amended version of its October 24 C-6 committee financial report, listing 24 IE's totaling \$300,106.54. All IE entries remained the same as originally reported, save for one, a \$1,674.80 expenditure for 154 radio spots opposing Stephanie Hess was removed from the original filing (see FOF No. 5; Table 1). (Commissioner's Records.)

¹ CERS is an acronym for Campaign Electronic Reporting System, the e-filing system used by candidates and political committees to submit campaign finance reports and other required forms to COPP.

Table 1: Independent Expenditures as originally reported by MDP on its October 24, 2016 committee financial report² that did not disclose the candidate or issue the IE was intended to benefit.

Vendor	Description Provided	Candidate/Issue	Amount
AMS Communications Inc.	Print & postage of 100K Noah's Ark mail. opposing	[Blank]	\$41,000.00
AMS Communications Inc.	Print & postage of 100K Tax on Montanans mail. opp	[Blank]	\$48,000.00
AMS Communications Inc.	Print & postage of 100K Tax & SS mail. opposing	[Blank]	\$48,000.00
AMS Communications Inc.	Print & postage of 100K Tax Free Millionaire mail.	[Blank]	\$48,000.00
KOJM	Radio Spots oppose	Stephanie Hess	\$1,674.80
Petel & Company	Print & postage of Medicaid Expan2 mail HD96	[Blank]	\$3,342.39
Petel & Company	Print & postage Public Land 2 mail HD60	[Blank]	\$3,410.76
Petel & Company	Print & postage of GOP Platform 2 mail HD52	[Blank]	\$2,745.12
Petel & Company	Print & Postage of Public Land mail HD60	[Blank]	\$3,542.96
Petel & Company	Print & postage of Smith River 2 mail SD40	[Blank]	\$4,840.08
Petel & Company	Print & postage of GOP Platform mail HD52	[Blank]	\$2,851.52
Petel & Company	Print & postage of Voter Suppres mail HD84	[Blank]	\$3,173.12
Petel & Company	Printing & postage of Sandefur women mail	[Blank]	\$29,469.00

² The subsequent amendment of this report, dated October 30, 2016, removed the "Stephanie Hess" independent expenditure; MDP subsequently reported the expenditure on its November 1, 2016 committee finance report (FOF No. 4).

Vendor	Description Provided	Candidate/Issue	Amount
Petel & Company	Print & postage of Women's Health 2 mail SD26	[Blank]	\$4,868.60
Petel & Company	Print & postage of Voter Suppres mail 2 HD84	[Blank]	\$3,054.72
Petel & Company	Print & postage of GOP Platform mail HD51	[Blank]	\$2,826.06
Petel & Company	Print & postage of Smith River mail HD51	[Blank]	\$2,720.61
Petel & Company	Print & postage of Smith River mail SD40	[Blank]	\$5,070.56
Petel & Company	Print & postage of Women's Health Mail SD26	[Blank]	\$5,001.38
Petel & Company	Print & postage of Medicaid Expansion mail HD96	[Blank]	\$3,471.94

Finding of Fact No. 5: On its November 1, 2016 committee financial report, MDP reported an IE to KOJM for "Corrected amount for 154 radio spots opposing Stephanie Hess" totaling \$854.70. This expense was originally reported on the October 24 report (see FOF Nos. 3, 4). The report also included an IE opposing Greg Gianforte; MDP did not record the name of the candidate the IEs were intended to benefit (see Table 2). (Commissioner's Records.)

Table 2: Independent Expenditures as originally reported by MDP on its November 1, 2016 committee financial report that did not disclose the candidate or issue the IE was intended to benefit

Vendor	Description Provided	Candidate/Issue	Amount
KJOM	Corrected amount for 154 radio spots opposing Stephanie Hess	Stephanie Hess	\$4,622.13
AMS Communications	100K "retiree" mailers, 100K "fence" mailers Opposing Gianforte	Greg Gianforte	\$99,000.00

Finding of Fact No. 6: On its November 28, 2016 report, MDP listed two IEs totaling \$6,622.13, neither of which named a candidate the IE was intended to benefit. This report also included an addendum detailing all payroll and salary information for the time period of October 28-November 23, 2016 (see Table 3). (Commissioner’s Records.)

Table 3: Independent Expenditures as originally reported by MDP on its November 28, 2016 committee financial report that did not disclose the candidate or issue the IE was intended to benefit

Vendor	Description Provided	Candidate/Issue	Amount
Petel & Company	Extra postage/print for 46,708 Sandefur Women Mail	[Blank]	\$4,622.13
Montana Radio Company	150 30 sec. IE Radio ads opposing Terry Gauthier	[Blank]	\$2,000.00

Finding of Fact No. 7: During the 2016 electoral cycle, descriptions provided in the “Purpose” and “Candidate/Issue” fields on reports filed electronically in the CERS system were limited to 100 characters per field, including spaces and all punctuation. (Commissioner’s Records.)

In reviewing the 25 IEs reported on MDP’s October 24 and 30, 2016 campaign finance reports and the two IEs reported on its November 28, 2016 campaign finance report, it appears MDP did not utilize the “Candidate/Issue” field, but rather attempted to include the information in the “Purpose” field. As each field has character limits (FOF No. 7), any candidate, intended benefit, or relevant description information over the character limit would not be included on the report. The public, reviewing that report for information, would be limited to information provided in those initial 100 characters per field, which may or may not contain the minimally required reporting details. In examining the two reviewed IEs on the November 1, 2016 committee finance report, it

appears MDP reported the position of opposition and named the candidate, however did not name the candidate the IE was intended to benefit.

Montana political campaign finance law has specific requirements for reporting independent expenditures.

Independent Expenditures:

(a) shall be reported in accordance with the procedures for reporting other expenditures;

(b) a person making an independent expenditure shall report the **name of the candidate or committee** the independent expenditure **was intended to benefit**, and the fact that the expenditure was independent

44.11.502(8)(a)(b), ARM (emphasis added).

MDP failed to meet the independent expenditure reporting requirements 24 times by failing to name either the candidate or issue the reported IE's were intended to benefit (FOF Nos. 3, 4, 6, 7). While this information was provided to the COPP in response to this complaint, MDP has yet to update the proper financial report over a year after its original filing. In utilizing only the Purpose field for each expenditure, the information provided is limited to details such as quantity information, position taken, and in some cases the legislative district, with other purpose information being either unrecognizable or omitted completely in 22 of the 27 independent expenditures reviewed. In this matter, MDP failed to provide information pertaining to independent expenditures, specifically "name of candidate or committee," on its October 24, 30, November 1 and 28, 2016 campaign finance reports as required by 44.11.502(8)(b), ARM.

In its response, MDP claims that these reporting failures are "not the fault of the reporter, but of the system," suggesting it was unable to properly

report due to the limits of CERS. The system was designed to provide the user (in this case, MDP) with fields to add both Purpose and Candidate/Issue information, with each field holding 100 characters.³ In other words, MDP was able to utilize the Candidate/Issue field but failed to do so. Furthermore, MDP has, in other committee finance reports, utilized all the available fields, including the Candidate/Issue field. The Commissioner notes MDP, on several occasions, provided the position of ‘opposed’ and named the candidate the IE was opposing in detailing the IE, while failing to provide the name of the candidate the IE was intended to benefit. MDP has also used addendums to report necessary detail on payroll and other costs that exceeded the CERS technical limits. MDP’s prior submissions demonstrate that it was aware of potential character limitations and that it not only knew of options—both within the system itself, and work-arounds like addendum—but had also used those methods to fully detail all of the required information.

MDP could have utilized the Candidate/Issue field, or filed an addendum to provide the missing independent expenditure information it claims to have left off in this report because of character or other technical limitations. Further, 44.11.502(8)(a)(b), ARM was specifically cited in *Buttrey v. Montana Democratic Party*, COPP 2014-CFP050, in which Commissioner Motl determined “MDP failed to report and disclose independent expenditures ... in the manner required by law.”

³ The COPP has increased the Purpose field to 150 characters for reporting in 2017.

2. Failure to designate support of Dirk Sandefur’s candidacy on its Statement of Organization form.

The complaint alleges MDP failed to disclose its support of Supreme Court Justice candidate Dirk Sandefur in its statement of organization.

Finding of Fact No. 8: On August 11, 2016, an amended C-2 Statement of Organization was filed by MDP using CERS and naming 134 candidates MDP supported. Dirk Sandefur was not included on any C-2 Statement of Organization filings as a candidate specifically supported or opposed by MDP. (Commissioner’s Records.)

Montana law requires MDP to list “the name ... of each candidate on 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(18)(a)(i), MCA.

Finding of Fact No. 9: MDP reported independent expenditures on behalf of Dirk Sandefur for Supreme Court Justice on five separate occasions: September 30, October 4 (two expenditures), October 7, and November 1, 2016. (Commissioner’s Records.)

An examination of MDP committee finance reports and subsequent responses to the COPP investigation indicate five independent expenditures intended to benefit candidate Dirk Sandefur (FOF No. 9). As MDP made reportable election expenditures to the Dirk Sandefur for Supreme Court Justice campaign, it was required to name the candidate and office sought on its statement of organization.⁴ MDP did name 134 candidates and office sought on its statement of organization, however Dirk Sandefur was not among them.

⁴ Races for supreme court justice are nonpartisan, and thus the “party” designation would not have been applicable to the Sandefur candidacy.

3. The coordination of expenditures with a candidate's campaign

The complaint also alleges illegal coordination between MDP and the Sandefur for Supreme Court Justice campaign.

Finding of Fact No. 10: On January 6, 2016, MDP filed a hard copy C-2 Statement of Organization for election year 2016 listing Mary Sexton as the committee's Treasurer. Holly Giarraputo was listed as the Deputy Treasurer, with email address "holly(at)campaigncompliance.net." (Commissioner's Records.)

Finding of Fact No. 11: On January 20, 2016, MDP filed an amended C-2 Statement of Organization using CERS; this amended form no longer listed Ms. Giarraputo as Deputy Treasurer, but it provided "holly(at)campaigncompliance.net" as the email contact for Treasurer Mary Sexton. Subsequent amended versions of the Statement of Organization were filed using CERS on August 11 and August 31, 2016 that did not list Ms. Giarraputo as either Treasurer or Deputy Treasurer, but continued to provide "holly(at)campaigncompliance.net" as the Treasurer's email address. However, on an intervening Statement of Organization filed by hard copy on August 17, 2017, MDP again listed Ms. Giarraputo as its Deputy Treasurer. (Commissioner's Records.)

Finding of Fact No. 12: In response to a COPP request, on September 27, 2017, MDP stated, "Ms. Giarraputo has been an MDP deputy treasurer for the entire election cycle ... Because of her administrative responsibilities we have her email address listed and she uses that account to up-load her financial reports on the COPP website." (Commissioner's Records.)

Finding of Fact No. 13: On February 5, 2015, Dirk Sandefur filed a C-1 Statement of Candidate with the COPP for the Montana Supreme Court Justice #3 seat, listing himself as the Campaign Treasurer, with no Deputy Treasurer. (Commissioner's Records.)

Finding of Fact No. 14: On December 29, 2015, candidate Sandefur filed an amended C-1 listing Holly Giarraputo as the campaign's Deputy Treasurer. A subsequent amended Statement of Candidate filed January 19, 2016 again listed Ms. Giarraputo as the campaign's Deputy Treasurer, with the official campaign email being changed to "holly(at)campaigncompliance.net." (Commissioner's Records.)

Finding of Fact No. 15: MDP's August 31, 2017 complaint response letter stated of Holly Giarraputo's role, "her sole function with MDP is as its accountant ... She is not involved, in any way, in the political day-to-day decision making that occurs within the party staff." (Commissioner's Records.)

Finding of Fact No. 16: On August 31, 2017, MDP provided the COPP a Firewall Agreement prohibiting the communication of any privileged information regarding independent expenditures by MDP staff to other campaigns or committees they may have been working for. Ms. Giarraputo had signed and dated this Firewall Policy on July 7, 2016. (Commissioner's Records.)

Finding of Fact No. 17: The COPP has no record of this Firewall Policy, as signed and dated by Ms. Giarraputo on July 7, 2016, being submitted prior to August 31, 2017. (Commissioner's Records.)

Finding of Fact No. 18: On its October 30 and November 28, 2016 C-6 financial reports, MDP reported five independent expenditures listing candidate Sandefur, at a total cost of \$66,768.85. Of these independent expenditures, three specifically listed the position taken as "support," at a cost of \$32,677.72; two did not make specific reference to the intended benefit, in the amount of \$34,091.13. (Commissioner's Records.)

Finding of Fact No. 19: On October 24, 2017, COPP requested clarification as to Ms. Giarraputo's duties during the 2016 election cycle. In a letter received by the COPP the following day, she stated that, within MDP, she was responsible for reporting all receipt and expenditure information to the COPP, as well as reconciling all MDP finances. Within the Sandefur campaign, Ms. Giarraputo stated she was limited to the same work. Further, she wrote that she was not involved in substantive campaign decisions with either the Sandefur campaign or MDP, and that her contract with MDP specifically required her "not to be involved in any decision-making with respect to the various campaigns I worked on." (Commissioner's Records.)

Finding of Fact No. 20: Further, Ms. Giarraputo disclosed 15 state and Federal level campaigns for whom she performed this ministerial financial work during the 2016 electoral cycle. (Commissioner's Records.)

Finding of Fact No. 21: COPP sent a letter to Mary Sexton, also on October 24, 2017, asking for clarification as to her 2016

election cycle duties and responsibilities. Mary Sexton, in a letter received by the COPP on November 1, 2017, stated that while her role as MDP's Treasurer included her supervising the budget and report filings, all financial reports filed with the COPP were prepared and submitted by chief financial officer Trent Bolger and Ms. Giarraputo. Ms. Sexton stated that neither she, Holly, nor Trent were involved in any substantive decisions regarding independent expenditures by MDP, and that those decisions were made by a consultant, Tom Kimmel. (Commissioner's Records.)

As defined in Montana law, the term "coordinated," including any variations of the term, means made in cooperation with, in consultation with, at the request of, or with the express prior consent of a candidate or political committee or an agent of a candidate or political committee." § 13-1-101(10), MCA.

MDP reported spending \$32,677.72 on its committee financial reports supporting Sandefur's candidacy, and another \$34,091.13 with no stated position⁵ (FOF No. 18). Both MDP and the Sandefur campaign utilized the services of Ms. Giarraputo as Deputy Treasurer (FOF Nos. 10-12, 14). These facts alone do not support the complainant's allegation of coordination, as a "coordinated expenditure does not exist solely because of ... professional relationships between a candidate and other persons." 44.11.602(4)(a), ARM. In determining whether coordination occurred, the Montana Campaign Finance and Practices Administrative Rules provide guidance.

Coordination

(2) When determining whether a communication or reportable election activity is coordinated the following may be considered, whether:

⁵ In response to the investigation, COPP has determined that all of MDP expenditures associated with candidate Sandefur were intended to benefit, *i.e.*, "support," the Sandefur for Supreme Court Justice campaign.

* * *

(c) the person funding or facilitating the communication or reportable election activity retains the paid services of a person or individual who:

(i) currently, or during the six months immediately preceding the election in which the candidate's name will appear on the ballot, received compensation from the candidate or the candidate's agent; **and**

(ii) the person or individual **is involved in creating, producing, or disseminating the communication or reportable election activity.**

* * *

(f) the person funding or facilitating the communication or reportable election activity has:

(i) established a written firewall policy designed to prevent the flow of information about the candidate's campaign plans, projects, activities, or needs from the persons providing services to the candidate to persons involved in the creation, production, or dissemination of the communication or activity; and

(ii) **prior to the preparation or distribution of** any communication or reportable election activity has distributed the firewall policy to all relevant employees, consultants, and clients affected by the policy; **and**

(iii) filed the firewall policy with the COPP.

44.11.602(2)(c), (f), ARM (emphasis added).

A firewall agreement explicitly prohibiting the communication of any privileged information regarding independent expenditures by MDP, executed by Ms. Giarraputo, was provided to the COPP on August 31, 2017 (FOF No. 16). As the firewall agreement was not filed, however, with the COPP at the time of the agreement (FOF No. 17), it alone cannot be used to determine whether coordination occurred.

Ms. Giarraputo's vocation is campaign compliance services, providing services to 15 federal and state party, committee, or candidate campaigns (FOF No. 20). Further, both MDP and Ms. Giarraputo have provided the COPP

written statements as to Ms. Giarrapoto's duties and responsibilities (FOF Nos. 15, 19, 21). Both MDP and Ms. Giarraputo have credibly claimed that Ms. Giarraputo was not involved in planning or executing campaign expenditure activity. Further, there is no evidence Ms. Giarraputo was "involved in creating, producing, or disseminating the ... reportable election activity," of MDP in support of candidate Sandefur per 44.11.602(2)(c)(ii), ARM.

The Commissioner hereby dismisses the allegation of coordination between MDP and the Dirk Sandefur for Supreme Court Justice campaign.

FINDINGS

MDP reported 29 independent expenditures on its October 24, November 1, and November 28, 2016 committee finance reports (FOF Nos. 3-6).

Independent expenditures are third party election expenditures that are not coordinated with a candidate, and are generally carried out in the form of an election communication issued by a third party (here, MDP) supporting or opposing the election of a candidate or ballot issue.

Under Montana law, independent expenditures "must be reported in accordance with the procedure for reporting other expenditures[,]" including "the name of the candidate...the independent expenditure was intended to benefit..." 44.1.502(8)(a), (b), ARM.

Sufficiency Finding No. 1: In its October 26, November 1, and November 28, 2016 committee finance reports, MDP failed to provide the name of the candidate its independent expenditures were intended to benefit on 24 occasions (FOF Nos. 3-6).

The Commissioner finds MDP violated Montana Campaign Finance law when it failed to properly report independent expenditures during the 2016 election campaign cycle.

Montana law requires that MDP list “the name...of each 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(18)(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: MDP failed to report its support of the candidacy of Dirk Sandefur for Supreme Court Justice (FOF Nos. 8, 9).

The Commissioner finds MDP violated Montana Campaign Finance law when it failed to properly report its support of the Dirk Sandefur for Supreme Court Justice campaign on its statement of organization.

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. § 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 the Montana Democratic Party 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 the Montana Democratic Party. 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 cooperation or lack thereof in correcting the reports at 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. 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 5th day of December, 2017.



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