

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Craft v. Kluesner No. COPP 2018-CFP-036	FINDING OF SUFFICIENT FACTS SUPPORT A CAMPAIGN FINANCE VIOLATION
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On August 20, 2018, Paul Craft of Dillon, MT filed a campaign practices complaint against Franklin Kluesner, also of Dillon. The complaint alleged that candidate Kluesner failed to report the acquisition of campaign signs, failed to properly report contribution and expenditure activity on campaign financial reports, and did not include all required attribution language on campaign materials published in local newspapers.

SUBSTANTIVE ISSUES ADDRESSED

Proper reporting of used signs from previous campaign as an in-kind contribution. Attribution on a letter to the editor.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: Franklin D. Kluesner, II filed a C-1A Statement of Candidate as a C-box¹ candidate for County Sheriff in Beaverhead County on March 12, 2018. In 2018, so-called C-box candidates for county level elected office had required campaign financial reports due with the COPP on or before May 7 (detailing all activity from the beginning of the campaign through

¹ 'C' box designation means the candidate will spend/receive in excess of \$500.00

at least May 1), May 29 (May 2 through May 24), and June 25 (May 25 through June 20) of 2018. (Commissioner's Records.)

Finding of Fact No. 2: Candidate Kluesner filed his initial campaign financial report on May 6, covering March 9 through May 6, 2018. This report showed no contributions received and no expenditures made by the campaign. (Commissioner's Records.)

Finding of Fact No. 3: Candidate Kluenser filed an Amended version of his May 6 report on May 25, 2018, adding one in-kind contribution made by candidate Kluesner to the campaign in the amount of \$231.49 for "Filing Fee." The report still showed no other contributions received and no expenditures made by the campaign. (Commissioner's Records.)

Finding of Fact No. 4: Candidate Kluesner filed a periodic campaign financial report on May 25, covering May 7 through May 24, 2018. This report showed no contributions received and no expenditures made by the campaign. (Commissioner's Records.)

Finding of Fact No. 5: Candidate Kluesner filed a periodic campaign financial report on June 25, covering May 25 through June 23, 2018. While this report showed candidate Kluesner received \$610.00 in monetary contributions during this period, no in-kind contributions (for either signs or materials used to make them) were included. This report did include one expenditure, to Rocky Mountain Supply on June 16 for "t-posts for signs" at a cost of \$22.50. (Commissioner's Records.)

Finding of Fact No. 6: In his response to this complaint, received by email on August 30, 2018, candidate Kluenser included a copy of an email he sent to several local media outlets on July 25. The email included an attached campaign letter, referred to by Kluesner as "an op-ed or press release from my campaign." An image of the campaign letter he attached to the email was also included, which contained an attribution statement of "Paid for by the Franklin Kluesner II for Sheriff Campaign Fund, 55 Peterson Ln. Dillon, MT 59725." The contents of the letter were printed by both the Dillon Tribune on an unknown date and the Montana Standard in Butte on June 27, 2018. (Commissioner's Records.)

Finding of Fact No. 7: Responding to this complaint, Candidate Kluesner stated, "I estimate that between 50-60 signs had been left over from the 2014 election cycle" that were used to promote his 2018 candidacy, and, "I have amended my C-5 financial reporting

form for the March 9 - May 6, 2018 reporting period to include the signs as an in-kind donation at a depreciated value.” Of the campaign letter provided to the media, he stated, “It is important to note that the letter was sent to the media as an opinion/editorial article and not a paid campaign advertisement.” (Commissioner’s Records.)

Finding of Fact No. 8: Candidate Kluesner filed an amended version of his May 6, 2018 initial campaign financial report on August 30, 2018, adding a second in-kind contribution made by candidate Kluesner to the campaign for “Recycled campaign signs from 2014 election.” (Commissioner’s Records.)

DISCUSSION

The complaint alleges candidate Kluesner failed to report campaign signs, failed to report other campaign contributions and expenditures, and failed to utilize an attribution on an editorial submitted to a local newspaper. The Commissioner examines each of these allegations.

1. Failure to report campaign signs

To support the allegation that candidate Kluesner failed to report campaign signs which appeared in May 2018, the complaint included photos of campaign signs promoting Kluesner on May 29, 2018. Candidate Kluesner did not report receiving or purchasing campaign signs on his May 6, May 25, or June 25, 2018 campaign finance reports (FOF Nos. 2-5). However, his response to this complaint stated he re-used 50-60 campaign signs purchased during his 2014 campaign (FOF No. 7).

Mont. Code Ann. § 13-1-101(9)(a)(i), defines a contribution as “the receipt by a candidate or a political committee of an advance, gift, loan, conveyance, deposit, payment, or distribution of money *or anything of value* to support or oppose a candidate or a ballot issue.” Used or recycled campaign signs qualify

as “something of value to support or oppose a candidate” and are reportable as in-kind contributions. 44.11.402(1), ARM, further dictates that all in-kind contributions received by a candidate or committee must be reported “on the date the consideration is received[.]” (*See also* 44.11.403(1), ARM, directing that in-kind contributions are reported on the same schedule and require at least the same information as other contributions.) Therefore, Candidate Kluesner would be required to report the date the sign were first utilized in the 2018 campaign cycle.

Sufficiency Finding No. 1: Candidate Kluesner failed to properly report an in-kind contribution of used campaign signs from a previous campaign to his 2018 campaign.

The Commissioner finds candidate Kluesner failed to timely report campaign contribution activity, a Montana campaign finance violation.

2. Failure to report contributions and expenditures

The second allegation references a more general failure by candidate Kluesner to report all contributions received and expenditures made by his campaign on financial reports. Aside from the campaign signs (*see* Sufficiency Finding No. 1), there was no evidence presented that candidate Kluesner failed to report either campaign contributions or expenditure activities. While the filing fee is specifically mentioned by the complainant, candidate Kluesner reported this as an in-kind contribution from himself to the campaign on the first amended version of his initial finance report, filed on May 25, 2018 (FOF No. 3). The allegation is hereby dismissed.

3. *Failure to attribute a newspaper editorial*

The final allegation alleges a failure to include the required “paid for by” attribution language on a campaign letter published in both the Dillon Tribune and the Montana Standard newspapers. Election activity is not to be anonymous and Montana Law specifically requires expenditures to “clearly and conspicuously include the attribution ‘paid for by’ followed by the name and address of the person who made or financed the expenditure[.]” Mont. Code Ann. § 13-35-225(1). To this baseline requirement, the statute specifies additional requirements depending on the type of publication and source of financing. *Id.*, § 13-35-225.

Candidate Kluesner disputed the characterization of the letter he distributed to media as a campaign ad, describing it instead as an opinion or op-ed piece. His email sending the piece to local media specifically referred to the letter as “an op-ed or press release for my campaign” (FOF No. 6). The Montana Standard published the letter, in its entirety, in the opinion section; and it appears the Dillon Tribune also published the letter as an opinion piece, rather than a traditional advertisement.

Mont. Code Ann. § 13-35-225(1)(a), states that all election or electioneering communications financed by a candidate must include the attribution language “Paid for by,” followed by the candidate’s name and address. By definition, election and electioneering communications must be *paid* communication activities. *Id.*, §§ 13-1-101(14)(a) and (16)(a). Candidate Kluesner provided the letter as an opinion piece and there is no evidence he

paid for the letter to be published in either paper. Any decision to publish the material was left to the media outlets themselves and was their decision alone. As the letter was not a paid political advertisement or communication, no “paid for by” attribution was required; candidate Kluesner’s inclusion of one was unnecessary in these circumstances. This allegation is hereby dismissed.

DECISION

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner “shall investigate” any alleged violation of campaign practices law. Mont. Code Ann. § 13-37-111(2)(a). The mandate to investigate is followed by a mandate to take action; where there is “sufficient evidence” of a violation the Commissioner must (“shall notify,” *see id.*, at § 13-37-124) initiate consideration for prosecution.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence to show that candidate Kluesner violated Montana’s campaign practice laws, including, but not limited to the laws set out in the Decision. Having determined that sufficient evidence of a campaign practice violation exists, the next step is to determine whether there are circumstances or explanations that may affect prosecution of the violation and/or the amount of the fine.

The failure to fully and timely report and disclose cannot generally be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law as it relates to failures to file and report. See *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009 (discussing excusable neglect principles). Likewise, the Commissioner does not normally accept that failures to file or report be excused as *de minimis*. *Id.* (discussing *de minimis* principles).

Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the above Sufficiency Findings, a civil fine is justified. Mont. Code Ann. § 13-37-124. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying a civil fine or civil prosecution of candidate Kluesner. Because of the nature of the violation, this matter is referred to the County Attorney of Lewis and Clark County for his consideration as to prosecution. *Id.*, at (1). Should the County Attorney waive the right to prosecute (*id.*, at (2)) or fail to prosecute within 30 days (*id.*, at (1)) this Matter returns to this Commissioner for possible prosecution.

Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that the Matter is waived back, this Finding and Decision does not necessarily lead to civil prosecution as the Commissioner has discretion (“may then initiate” *see id.*) in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a

negotiated fine. In setting that fine the Commissioner will consider matters affecting mitigation, including the cooperation in correcting the issue when the matter was raised in the Complaint.

While it is expected that a fine amount can be negotiated and paid, in the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of campaign practice law. *See id.*, at § 13-37-128. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

DATED this 28th day of September 2018.



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