

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

De Spain v. McDowell No. COPP 2017-CFP-009	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE VIOLATION AND DISMISSAL OF ALLEGATION OF VIOLATION AS DE MINIMIS
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On November 3, 2017, Charles William De Spain, a resident of Hamilton, MT, filed a campaign finance complaint against Jerald McDowell, candidate for Mayor of Darby, MT, for failure to file financial reports detailing all expenditure activity, as well as for failure to properly attribute paid campaign materials.

SUBSTANTIVE ISSUES ADDRESSED

This decision addresses timely and complete campaign finance report filing and proper attribution of campaign materials.

FINDINGS OF FACT

The foundational facts necessary for this Decision is as follows:

Finding of Fact No. 1: The Municipal General Election in Ravalli County took place on November 7, 2017. (Montana Secretary of State (SOS) website.)

Finding of Fact No. 2: Jerald McDowell filed a C-1A Statement of Candidacy with the Commissioner of Political Practices (COPP) on July 12, 2017, with office sought as Mayor of Darby. Candidate McDowell filed as an 'A' box candidate, certifying no money would be spent or received during the campaign. (Commissioner's Records.)

Finding of Fact No. 3: Pamela Hart-Schlapman filed a C-1A Statement of Candidacy on July 12, 2017, with office sought as Council Person in Darby, MT. Candidate Hart-Schlapman also filed as an 'A' box candidate, certifying no money would be spent or received during the campaign. (Commissioner's Records.)

Finding of Fact No. 4: Jasen Lewis filed a C-1A Statement of Candidacy on July 27, 2017, with office sought as Darby Town Council. Candidate Lewis also filed as an 'A' box candidate, certifying no money would be spent or received during the campaign. (Commissioner's Records.)

Finding of Fact No. 5: Candidate finance reports were due for the 2017 municipal elections on the following schedule: October 26 for the period September 29 – October 21; November 27 for the period October 22 – November 22, 2017. (Commissioner's Records.)

DISCUSSION

On November 1, 2017, the COPP received a copy of a political postcard from a concerned citizen that supported three candidates in the Darby, MT municipal election. The entity on the postcard's return address was "Responsible Governing for Darby," and the postcard appeared to support candidates McDowell, Lewis, and Hart-Schlapman in the Darby, MT Municipal election.

Finding of Fact No. 6: There is no record of a political committee filed under the name Responsible Governing for Darby. (Commissioner's Records.)

A review of the COPP records could find no committee recorded as Responsible Governing for Darby (FOF No. 6), and as A-box candidates McDowell, Lewis, and Hart-Schlapman had certified that no money would be spent or received during the campaign (FOF Nos. 2-4). The Commissioner called each of the three candidates on November 1, 2017; each returned the phone call. Candidates Lewis and Hart-Schlapman each stated they were

aware of the postcard but were not involved in creating or financially supporting the mailer. Candidate McDowell, however, stated he was responsible for creating and paying for the mailer for his campaign. Candidate McDowell stated he thought he did not need to update his statement of candidacy until he paid for the mailer, and had not yet received the invoice. He stated it was his intent to both report the change in candidacy and report the expenditure. Candidates who originally file a Statement of Candidacy certifying they will not “receive or expend any funds” have five business days to amend the filing upon change of status. 44.11.304 ARM. The Commissioner explained to Mr. McDowell his statement of candidacy needed to be updated at the time the initial expenditure was incurred (moving from A-box status) and follow the campaign finance reporting schedule to report expenditures of \$500.00 or more. Further, the Commissioner explained to candidate McDowell that the mailer did not have the appropriate attribution.

Finding of Fact No. 7: An email from candidate McDowell received by the COPP on November 1, 2017, stated that Mr. McDowell had ordered seven sets of postcards to be mailed out in the two weeks prior to the election by Allegra Printing, and that he would be billed for those items when each mailing went out. (Commissioner’s Records.)

Finding of Fact No. 8: On November 2, Mr. McDowell filed an amended Statement of Candidate changing his reporting status to ‘C’ box and adding a Candidate Committee Name, Responsible Governing for Darby. (Commissioner’s Records.)

Finding of Fact No. 9: Candidate McDowell also filed an initial C-5 financial report showing a personal contribution from himself of \$34.00. One corresponding expenditure to the UPS Store for “Handouts” was listed along with date October 21, 2017; also listed were two debts owed to Allegra Printing for “Postcard #1”

(\$255.81) and “Postcard #2” (\$290.45), both incurred on October 29, 2017. (Commissioner’s Records.)

Candidate McDowell followed up the phone conversation with an email on November 1, 2017, explaining he ordered seven mailers to be mailed two weeks prior to the election (FOF No. 7). On November 2, 2017, the COPP office received candidate McDowell’s amended Statement of Candidacy, which included amending his reporting status to C-box¹ and naming his candidate committee “Responsible Governing for Darby.” (FOF No. 8). McDowell also submitted an initial campaign finance report on November 2, reporting a personal contribution of \$34.00, a \$34.00 expenditure on October 21, and two debts totaling \$546.26, incurred on October 29, 2017.

On November 3, 2017 the COPP received a campaign finance complaint against Candidate McDowell, filed by Mr. De Spain.²

Finding of Fact No. 10: On November 8, candidate McDowell filed a C-5 financial report covering the dates of November 2 through November 6, 2017. Included within this report was an expenditure to the UPS Store for ‘Yard Signs’ for \$841.50, with date provided of November 2. Also included was the debt owed to Allegra Printing for Postcards #1 and #2, originally reported November 2 (FOF No. 9). Expenditures either paid or incurred on November 2 were required to be reported to the COPP on a financial report no later than November 27, 2017. (Commissioner’s Records.)

Finding of Fact No. 11: On November 27, candidate McDowell filed a C-5 financial report covering the dates of October 21 through November 6, 2017. Included within the report was one (1) debt to Allegra Printing for \$788.67, incurred on October 31,

¹ ‘C-box’ status indicates the candidate intends to spend more than \$500 and requires the candidate to list a Treasurer and provide bank account information. See Form C-1-A, *Statement of Candidate (County, Municipal or School Office)*, available at <http://politicalpractices.mt.gov/Portals/144/2018forms/C-1A%20Form%20updated.pdf?ver=2017-09-13-141359-630>.

² The complaint was postmarked November 1, 2017.

with listed a Purpose of “Postcard Campaign (Approx. 252 Postcards Less Duplicates Per Mailer) Mailer #3, #4, #5 (756 Postcards).” The debt owed to Allegra Printing originally reported on November 2, and re-reported on November 8, was again included. This report also amended the November 2 expenditure to the UPS Store to provide the quantity of Yard Signs purchased as 100. A second version of this report was also filed on November 27 with reporting dates of October 21 through November 22, with all financial information staying the same. Expenditures either paid or incurred on October 31 were required to be reported to the COPP on a financial report no later than November 27, 2017. (Commissioner’s Records.)

Finding of Fact No. 12: On December 7, 2017 the COPP emailed candidate McDowell attempting to determine if in fact seven mailers had been ordered as originally stated (FOF No. 7), because only five had been disclosed as debts on his financial reports to-date. On December 8, candidate McDowell responded, stating there were in fact seven mailers ordered, but he had yet to report the two others because he did not have an exact quote for the amount. Candidate McDowell further stated that a final campaign financial report would be forthcoming. (Commissioner’s Records.)

Finding of Fact No. 13: On December 8, 2017 candidate McDowell filed a closing C-5 financial report covering the dates of October 21 through December 8, 2017. The report listed just one expenditure, made to Allegra Printing and detailing seven individual payments made, one for each postcard mailer ordered. Of the seven individual payments (reported as a single expenditure), two were newly-reported items, with listed Purpose, “Postcard #6 and Postcard #7,” incurred on November 4 (invoice received November 29) at a cost of \$262.89 each. The single expenditure also entailed payments for all previously reported debts owed to Allegra for Postcards #1-5, at a total cost of \$1334.93. The total cost of all expenditures to Allegra was \$1860.71. The single expenditure reported on the December 8 report also contained a notice stating, “Note the dates are the date of printing, not invoiced.” Expenditures either paid or incurred on November 4 were required to be reported to the COPP on a financial report no later than November 27, 2017. (Commissioner’s Records.)

There were two candidate finance reports due during the 2017 municipal elections—the first on October 26 (for the period September 29 – October 21)

and the second on November 27 (for October 22 – November 22). (FOF No. 5.) Candidate McDowell was not required to file the first campaign finance report because his contributions and/or expenditures had not yet reached the \$500.00 threshold for filing during that period ending October 21, 2017.

An examination of candidate McDowell’s November 27 campaign finance report, his response to the complaint, and subsequent email conversations with COPP indicate Mr. McDowell failed to timely report two expenditures incurred on November 4; Postcards #6 and #7 were not reported until his December 8, 2017 campaign finance report. (See Table 1; FOF Nos. 11-13.)

Table 1: All Expenditure activities reported by candidate McDowell

Date Expenditure was Incurred	Item	Amount	Date Expenditure was Reported	Timely
10/21/17	Handouts	\$34.00	11/02/17	NA ³
10/29/17	Postcard #1	\$841.50	11/02/17 ^{**^+}	Yes
10/29/17	Postcard #2	\$255.81	11/02/17 ^{**^+}	Yes
11/02/17	Yard Signs	\$290.45	11/08/17 [^]	Yes
10/31/17	Postcard #3	\$262.89	11/27/17 ^{^+}	Yes
10/31/17	Postcard #4	\$262.89	11/27/17 ^{^+}	Yes
10/31/17	Postcard #5	\$262.89	11/27/17 ^{^+}	Yes
11/04/17	Postcard #6	\$262.89	12/08/17	No
11/04/17	Postcard #7	\$262.89	12/08/17	No

^{*}Expenditures re-reported on November 8, 2017. (FOF No. 10.)

[^]Expenditures re-reported on November 27, 2017. (FOF No. 11.)

⁺Expenditures re-reported on December 8, 2017. (FOF No. 13.)

Of the seven postcards candidate McDowell sent, four were referenced in the complaint as having an incorrect attribution.

Finding of Fact No. 14: Four of candidate McDowell’s postcards included an attribution stating:

³ Candidate McDowell was not required to file a campaign finance report until he received contributions, or made expenditures, in excess of \$500, ARM 44.11.304(2), *i.e.*, the initial expenditure of \$34.00 for handouts on October 21, 2017 was well below the reporting threshold.

Paid for by
Responsible Governing for Darby
610 1st St Ste 5-228
Hamilton, MT 59840
(Commissioner's Records.)

Montana law requires all election communications, such as candidate McDowell's postcards, to include an attribution identifying who made or financed the expenditure; when made by a candidate, the attribution must include his name and address or that of his campaign. Mont. Code Ann. § 13-35-225(1)(a). Where, as here (*see* FOF No. 8), the name of a candidate's campaign does not include at least the candidate's last name, the attribution "must include the first and last name of the candidate"

44.11.601(2)(a)(ii)(A), ARM. Candidate McDowell failed to include his name in the attribution of four postcards financed and distributed by his campaign. (FOF No. 14.)

FINDINGS

By providing \$34.00 to his campaign, candidate McDowell was required to, within five business days of that date, amend his C-1-A to either 'B' or 'C' box status. 44.11.304 ARM. Having made this \$34.00 expenditure on October 21, candidate McDowell's amended C-1-A was due on or before Monday, October 30. Candidate McDowell submitted an amended C-1-A updating his status to C-box on Thursday, November 2, 2017 (FOF No. 8), three days late. In consideration of this short delay, from Monday to Thursday and still prior to election day, the Commissioner dismisses as *de minimis* Candidate McDowell's

failure to file an amended Statement of Candidacy within the five-business day period for change upon receipt of contributions or making expenditures.

While the facts of this Matter allow application of the *de minimis* principle, most Matters before the Commissioner do not allow for such application and result in a Sufficiency Finding. *See e.g. Baker v. Key*, COPP-2011-CFP-32. Montana's laws and rules require complete and timely reporting and disclosure of campaign expenditures or contributions. The Commissioner, subject to the specific facts herein, applies the principle of *de minimis* to the activities discussed above.

FURTHER FINDINGS

Sufficiency Finding No. 1: The Commissioner determines that sufficient facts exist to show that Candidate McDowell failed to report on his November 27, 2017 campaign finance report two expenditures, totaling \$525.78, which were incurred within the reporting period.

In general, timely reporting and disclosure must include “the amount and nature of debts and obligations owed” by the campaign at the end of the reporting period. §13-37-229(2)(a)(vi), MCA. Further, “[i]f the exact amount of a debt or obligation is not known, the estimated amount owed shall be reported.” 44.11.506, ARM. Past Commissioners have applied these laws to require that campaigns “estimate their debts when they are incurred,” not after an election when the bill is paid, *Akey v. Clark*, March 26, 1999 (Commissioner Vaughey), because “the public has a right to full disclosure of all debts and estimated debts incurred by a candidate during the appropriate reporting periods,” *Ream v. Bankhead*, September 10, 1999 (Commissioner Vaughey).

A campaign's obligation to report debt includes debt owed for services, advertisements and campaign expenses in general (*Wilcox v. Raser*, May 26, 2010 (Commissioner Unsworth); *Williams v Andersen*, COPP 2014-CFP-035 (Commissioner Motl)), and even less common expenses, such as those owed musicians (*Hardin v. Ringling* 5, December 17, 2012 (Commissioner Murry)).

Candidate McDowell incurred two separate debts for an election communication on November 4, 2017 and failed to report the incurred expense on the November 27, 2017 campaign finance report (FOF No. 12, 13).

Candidate McDowell was aware of the anticipated debts on November 1, 2017. (FOF No. 7.) By failing to timely report the debt, candidate McDowell violated Montana campaign finance law.

Sufficiency Finding No. 2: The Commissioner determines that sufficient facts exist to show that Candidate McDowell failed to properly attribute election communications on at least four postcard mailers as required by Montana law.

Full and complete attribution of campaign materials has been and continues to be a requirement specifically defined by the Montana legislature: "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 for the communication." §13-35-225(1), MCA. Candidate McDowell did not meet these attribution requirements on four occasions. (FOF No. 14.)

Reporting and disclosure is required so that the public, press, and opposing candidates understand the contribution and expenditure of funds used in support of a particular campaign. The Commissioner encourages local

candidates to be aware of the appearance to the public of a candidate's failure to report and disclose expenditures to their campaigns, and to update their filings in a timely manner with the COPP. Utilizing a proper attribution allows the public, press, and opposing candidates to determine whether a candidate or a political committee was responsible for the election campaign material.

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 Jerald McDowell 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).

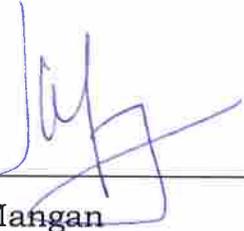
Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the above Sufficiency Findings, a civil fine is justified. §13-37-124, MCA. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying a civil fine or civil prosecution of Mr. McDowell. 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 28th day of December 2017.



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