

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Eaton v. Brown No. COPP 2018-CFP-019	DISMISSAL OF COMPLAINT
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On June 14, 2018, Jake Eaton of Billings, Montana filed a campaign practices complaint against Zach Brown of Bozeman, MT. The complaint alleged that candidate Brown failed to provide the proper level of reporting detail to describe two expenditures made by his 2016 campaign, failed to accurately or timely report two campaign expenditures that should have first been reported as debts owed by the campaign, and failed to report remit envelopes used by the campaign as either an expenditure or an in-kind contribution received.

**SUBSTANTIVE ISSUES ADDRESSED**

This decision addresses the sufficiency of expense detail when reporting campaign expenditures and services, the proper reporting of in-kind contributions from an earlier campaign, and examines the use of a stipend in a campaign. A portion of this Complaint will be dismissed for the same reasoning and analysis set forth in *Eaton v. Dunwell*, COPP-2018-018.

## **FINDINGS OF FACT**

The foundational fact necessary for the Decision is as follows:

Finding of Fact No. 1: Zach Brown filed a C-1 Statement of Candidate as a candidate for the Montana House of Representatives in Gallatin County with the COPP on February 17, 2016. Candidate Brown timely filed all 2016 C-5 campaign finance reports. (Commissioner's Records.)

## **DISCUSSION**

The complaint alleges failure to sufficiently detail two expenditures: 1) an expense of \$6.80 to Rosauers supermarket for buying postcard stamps, and; 2) an expense of \$502.39 to Mail Technical Services for standard postage for mailing. The complaint also alleges candidate Brown failed to accurately or timely report three additional expenditures: 3) an expense or in-kind contribution for remit envelopes; 4) an expense of \$350 to Kylar Clifton described as a campaign staff stipend rather than as a debt; and 5) an expenditure of \$23.50 to Facebook for a remaining ads balance.

The Commissioner dismisses allegations Nos. 1 and 5 as *de minimis*. The information not reported does not substantially affect disclosure. Allegation No. 1 is further dismissed as frivolous. The remaining allegations are examined in turn below.

### *Detail expense to Mail Technical Services (No. 2)*

Finding of Fact No. 2: On his periodic campaign finance report covering all activity from October 5 through October 25, 2016, candidate Brown reported making one expenditure for \$502.39 to Montana Technical Services for "standard A postage for mailing done on 10/10/2016." The report does not include a quantity or further description of the mailing. (Commissioner's Records.)

The expense in question required additional detail. Such generic expenditure descriptions are more akin to a list or category than a description and do not provide the “purpose, quantity, subject matter” of the expense which are the details required to be reported by 44.11.502(7), ARM. Nor, do the listings meet Montana’s statutory requirement of detail required for expenditures to consultants or other persons who perform services for, or on behalf of, a candidate; the law requires that such expenditures “must be itemized and described in sufficient detail to disclose the specific services performed by the entity to which payment or reimbursement was made.” § 13-37-229(2)(b), MCA.

Sufficiency Finding No. 1: There are sufficient facts to show that Brown’s 2016 campaign finance reports failed to disclose sufficient detail describing a campaign expenditure (FOF No. 2).

Similar problems of insufficient detail in expenditure reporting under the current rules and statutes was first substantively addressed on October 3, 2016 in *MDP v. MRLCC*, COPP-2016-CFP-029, by then-Commissioner Jonathan Motl. While MRLCC’s lack of expenditure reporting detail was a violation, such a finding was, at the time of the 2016 election cycle, a further application of the rule and statute at issue. Thus, the violation was dismissed under the “excusable neglect” principle:

[G]iven the first time nature of this determination and the likelihood that there are other candidates and committees in a similarly deficient reporting status.

*Id.*, at 7.

The Commissioner incorporates herein by reference the in-depth review of the *MDP v. MRLCC* decision recently set out in *Eaton v. Dunwell*, 2018-CFP-018. This Complaint against Rep. Brown will be dismissed for the same reasons and pursuant to the same two safeguards.

First, no later than October 15, 2018, Representative Brown is directed to file an amended campaign finance report providing the required “sufficient detail” for the specific expenditures noted in this decision. Second, contingent on amended campaign finance reports being filed, the Commissioner hereby excuses (dismisses) Representative Brown from a campaign practice violation for the deficiencies identified above based on the principle of excusable neglect.<sup>1</sup>

*Failure to report remittance envelopes (No. 3)*

Finding of Fact No. 3: On his periodic campaign finance report covering all activity from May 27 through June 22, 2016, candidate Brown reported one expenditure for \$16.80 to Postal Annex Bozeman for “Postage-package of remit envelopes to friend in Washington, DC.” Neither this nor previous campaign finance reports filed by candidate Brown reported an expenditure or in-kind contribution for the printing or obtaining of envelopes to remit donations to his 2016 campaign. (Commissioner’s Records.)

Finding of Fact No. 4: An August 7, 2018 email, candidate Brown stated he had sent “20-30 remit envelopes” re-used from his 2014 campaign to Washington DC as part of a fundraising effort (see FOF No. 3). Of these, he estimated 15 were used, with the rest “returned and recycled.” (Commissioner’s Records.)

The COPP investigation concluded candidate Brown did not incur a debt for remittance envelopes in his 2016 campaign, rather he utilized 30 remittance

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<sup>1</sup> The Commissioner notes that Representative Brown has agreed to provide the expenditure detail as required as part of his complaint response and amend his campaign’s 2016 finance reports to fulfill the requirements set out by the Commissioner for dismissal.

envelopes from his 2014 campaign, and then failed to report the in-kind contribution to his 2016 campaign (FOF Nos. 3, 4). The rule for this situation provides:

(1) A candidate or political committee shall report an in-kind contribution on the appropriate reporting schedule and shall describe what was received consistent with the reporting requirements specified in ARM 44.11.402.

(2) A candidate who makes personal expenditures benefitting his or her campaign, shall also report and disclose the expenditures as in-kind contributions or loans to the campaign, see ARM 44.11.501.

(3) The total value of the services, property, or rights contributed in-kind shall be deemed to have been consumed in the reporting period in which received.

(4) The value of an in-kind contribution shall be calculated and recorded in writing. The written record is a campaign record as defined by 13-37-208, MCA. The calculation and written record shall show one of the following values for the in-kind contribution:

(a) the actual monetary cost, value or worth of the item of property, right or service contributed at the time of the in-kind contribution;

(b) if there is no actual cost or value as set out in (a), then the reasonable fair market value of the item of property, right or service based on an appropriate comparison made at the time of the in-kind contribution;

(c) in the event that the candidate or ballot committee paid for a portion of the value established by (b), then the difference between the amount paid and the value set by (b); or

(d) in the event that, due to extraordinary circumstances it is not appropriate or possible to determine the value set by (b), then a precise description must be made of the property, right or service received by the candidate or ballot committee.

(5) The value under (4) shall be reported and disclosed as a contribution as defined and required by ARM 44.11.502.

44.11.403, ARM. In this instance, candidate Brown should have reported the fair market value of the 30 remittance envelopes left over from his 2014 campaign as an in-kind donation at the time they were used in the 2016

campaign. Assigning a value of .40 cents per envelope, the campaign would report this in-kind contribution with a value of \$12.00.

Sufficiency Finding No. 2: There are sufficient facts to show that Brown's 2016 campaign finance reports failed to disclose an in-kind contribution (FOF No. 3, 4).

The Commissioner dismisses the violation as *de minimis*, as the fair market value (aggregate) is less than \$35.00, 44.11.603 (2)(b)-(c), ARM.

*Failure to report volunteer stipend as a debt (No. 4)*

Finding of Fact No. 5: On his periodic campaign finance report covering all activity from November 29, 2016 through May 10, 2017, candidate Brown reported making one expenditure for \$350.00 to Kylar Clifton for "Campaign staff stipend" on December 1, 2016. (Commissioner's Records.)

Finding of Fact No. 6: Mr. Clifton provided campaign management services described as campaign outreach, door-to-door canvassing, and work with Candidate Brown on campaign activities, from May 2016 to November 2016. Candidate Brown and Mr. Clifton did not have an agreement for services, rather Mr. Clifton volunteered his time to the campaign. Mr. Clifton did not expect to be compensated in any form for his volunteer work prior to the stipend at the end of the campaign. (Commissioner's Records.)

The allegation presented by the Complaint is that the \$350 expense reported by the Brown campaign to Mr. Clifton on December 1, 2016 should have been reported earlier in the campaign as a debt. "An obligation to pay for a campaign expenditure," in other words, a debt, must be reported when it is incurred, as opposed to when it is eventually paid. 44.11.502(2), ARM. All debts must be reported as such until they are paid, at which time the payment is reported as an expenditure. *Id.* Another way of saying this is that all debts will eventually become expenditures, but not all expenditures are debts. The question here is whether the stipend was a debt.

COPP's investigation showed Mr. Clifton was not a paid staff person, was not promised compensation for volunteered services to the campaign, and the campaign had no expectation that it would later provide compensation to Mr. Clifton. Mr. Clifton's services were as a volunteer, without expectation of payment, and thus the Brown campaign at no point incurred an obligation to Mr. Clifton. The Commissioner determines the reported \$350 expenditure, therefore, is not considered a debt. § 13-37-229(2)(vii), MCA; 44.12.502(2), ARM.

Mr. Clifton volunteered his time to the Brown campaign for approximately seven months and engaged in volunteer services that included promotion and canvassing in support of the campaign (FOF No. 6). Candidate Brown provided the \$350 stipend to Mr. Clifton's at the end of the campaign and reported it as a campaign expenditure at the time the stipend was given (FOF No. 5). The Brown campaign properly reported the expenditure. The allegation is hereby dismissed.

The Commissioner explores the nature of the expenditure, a stipend, as such an expenditure may require campaigns and committees to ensure all regulations and reporting are contemplated. A stipend is defined<sup>2</sup> as:

A stipend is a regular fixed sum of money paid for services or to defray expenses, such as for scholarship, internship, or apprenticeship. It is often distinct from an income or a salary because it does not necessarily represent payment for work performed; instead it represents a payment that enables somebody to be exempt partly or wholly from waged or salaried employment

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<sup>2</sup> COPP's rules do not specifically define "stipend," and thus the Commissioner looks to the common understanding of the word. See Wikipedia (July 2018).

in order to undertake a role that is normally unpaid or voluntary, or which cannot be measured in terms of a task.

While a stipend is a widely recognized tool available to business, organizations, and governments, a stipend is not represented in Montana's campaign finance statutes or rules as either an allowed or disallowed expense. A stipend also has a potential Unemployment Insurance (UI), workers compensation, and other related reporting implications. As part of this investigation, COPP contacted officials with the Montana Department of Labor and Industry and learned the following key points:

There is no exception for political activities in terms of what is considered employment or wages.

If the campaign paid employees during the course of the campaign and the total wage amount equaled or exceeded \$1,000, the campaign would have had to file UI wage reports and pay UI taxes on those wages.

That means, any stipend [\$1000.00 or greater, aggregate] to a volunteer post-campaign, in the same calendar year, would have to be reported to UI and UI tax paid accordingly.

Even if the campaign did not have paid employees, a stipend of \$500 paid to more than one person would be reportable to UI. [\$1000.00 or greater, aggregate]

UI cannot treat the volunteer receiving the stipend as an independent contractor without an Independent Contractor Exemption Certificate. [\$1000.00 or greater, aggregate]

Worker compensation reporting may be required upon the initial dollar provided.

Any campaign should investigate all personnel paperwork and reporting requirements with the appropriate agency.

In short, a campaign may utilize stipends, however it is cautioned that additional requirements with other entities, such as the Montana Department of Labor and a Worker's compensation insurance provider may be necessary.

The Commissioner notes Montana law also allows campaigns to provide up to \$250.00 to campaign volunteers as a gift in appreciation of their service to a campaign. The issue of gifts to volunteers was recently addressed in *Eaton v. Perry*, COPP 2018-CFP-011.

It is likely other candidates and committees may be in this or similar position of providing volunteers a stipend in lieu of paid staff. Until such time as the Legislature, or a citizen's initiative, addresses the use of a stipend in political campaigns, the Commissioner will address each instance on the information provided by the paid campaign/committee volunteer, including length and amount of time of volunteer service provided and the activities of volunteer service, and how those facts compare with the amount and timing of the "stipend" expenditure. Discussions with the candidate, committee, staff, and volunteer would also be included in such a process. Additionally, the Commissioner will provide written guidance to all candidates and committees in September of 2018 outlining the appropriate use and employment related considerations such as unemployment insurance and workers compensation reporting requirements. Campaigns are cautioned to review all applicable laws and rules associated with both stipend and gift payments to campaign staff, volunteer or paid.

## 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; if there is “sufficient evidence” of a violation the Commissioner must (“shall notify,” *see* §13-37-124, MCA) initiate consideration for prosecution.

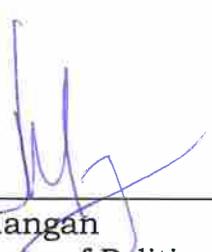
Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence, as set out in the Decision, to show that Brown’s 2016 campaign practices 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* 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 and is therefore applied to dismiss Sufficiency Finding No. 1.

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

DATED this 13<sup>th</sup> day of August 2018.



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