

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Eaton v. Perry No. COPP 2018-CFP-011	DISMISSAL OF ALLEGED VIOLATIONS DISMISSAL OF COMPLAINT BASED ON APPLICATION OF PRINCIPLE OF EXCUSABLE NEGLIGENCE FINDING OF SUFFICIENT FACTS SUPPORT A CAMPAIGN FINANCE VIOLATION
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On May 18, 2018, Jake Eaton of Billings filed a campaign practices complaint against Zac Perry of Hungry Horse. The complaint alleged that candidate Perry: failed to provide the proper level of reporting detail to describe several expenditures made by his 2016 campaign; failed to report campaign expenditures in a timely manner; accepted an in-kind contribution from a prohibited source; and failed to report this in-kind contribution on financial reports.

SUBSTANTIVE ISSUES ADDRESSED

This decision addresses the sufficiency of expense detail when reporting campaign expenditures and services, timely reporting of expenditures, the proper reporting when an expenditure is a gift, and the proper disposition of surplus campaign funds. 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 facts necessary for this Decision are as follows:

Finding of Fact No. 1: Montana's 2016 general election was held on Tuesday, November 8, 2016. (Montana Secretary of State.)

Finding of Fact No. 2: Zach Perry filed a C-1 Statement of Candidate as a Democratic candidate for State Representative, House District 3 with the COPP on July 6, 2015. (Commissioner's Records.)

Finding of Fact No. 3: Zach Perry timely filed the required C-5 campaign finance reports throughout the 2016 election cycle. (Commissioner's Records.)

DISCUSSION

The Complaint asserts candidate Perry failed to timely report a campaign expenditure, alleged candidate Perry accepted an illegal in-kind contribution from a mailing services corporation, and that several expenditures reported by candidate Perry failed to include sufficient detail. The Commissioner examines each of these allegations.

1. Failure to timely and properly report an expenditure

The complaint alleges Representative Perry failed to report a services expenditure to an individual, Mr. Barry Conger who is described as "Campaign Manager," as a debt.

Finding of Fact No. 4: Candidate Perry and Mr. Conger did not have an agreement for services, rather Mr. Conger volunteered his time to the campaign. Mr. Conger provided campaign management services described as volunteer coordination, door-to-door canvassing, and work with Candidate Perry on Get Out the Vote activities, for the campaign from March 2016 to November 2016. Mr. Conger was not paid or compensated for the time provided, and he did not expect to be compensated in any form. (Commissioner's Records.)

Finding of Fact No. 5: Candidate Perry gave Mr. Conger \$500.00 at the end of the campaign as a gift. Candidate Perry reported this gift as an expenditure on his closing campaign finance report (see also, *infra*, Table 2). (Commissioner's Records.)

Mr. Conger volunteered his time as an individual on behalf of the Perry campaign and was not compensated for that time and had no expectation of being compensated (FOF No. 4). Candidate Perry made a payment to Mr. Conger described as a gift "in appreciation" of his volunteer service to the campaign (FOF No. 5).

The question presented by the Complaint is whether the \$500 expense reported by the Perry campaign to Mr. Conger on November 22, 2016 should have been reported earlier in the campaign as a debt. The COPP investigation showed Mr. Conger 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. Conger. The Commissioner determines the reported \$500 expenditure, therefore, is not considered a debt, Mont. Code Ann. § 13-37-229(2)(vii).

Mr. Conger volunteered his time to the Perry campaign from approximately March 2016 to November 2016 and engaged in volunteer services that included volunteer coordination and canvassing in support of the campaign (FOF No. 4). Candidate Perry provided the \$500 payment to show his appreciation to Mr. Conger's dedication to the campaign as a volunteer and reported it as a campaign expenditure at the time the gift was given (FOF No. 5).

This is the first time the COPP has examined the question of whether a payment provided to a volunteer qualifies as an expenditure, and if the laws regarding Surplus Campaign Funds, Mont. Code Ann. § 13-37-240, apply.

Beginning with the expenditure question, Montana statute defines an expenditure as:

- (a) "Expenditure" means a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value:
 - (i) made by a candidate or political committee to support or oppose a candidate or a ballot issue; or
 - (ii) used or intended for use in making independent expenditures or in producing electioneering communications.
- (b) "Expenditure" does not mean:
 - (i) services, food, or lodging provided in a manner that they are not contributions under subsection (9);
 - (ii) payments by a candidate [for a filing fee or]for personal travel expenses, food, clothing, lodging, or personal necessities for the candidate and the candidate's family;
 - (iii) the cost of any bona fide news story, commentary, blog, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication of general circulation; or
 - (iv) the cost of any communication by any membership organization or corporation to its members or stockholders or employees.

Mont. Code Ann. § 13-1-101(17) (2015).¹ Examining the issue further, the Commissioner explores the nature of the expenditure, a gift or bonus. In general, "no goods, services, funds, property, or other contributions" can be put to the personal use or expense of a candidate, his family, or the staff of his campaign. Admin. R. Mont. 44.11.608(1). However, "gifts or bonuses of less

¹ This was the version in effect during the 2016 election. The bracketed language shown in (b)(ii) above was removed by the 2017 Legislature. Mont. Code Ann. § 13-1-101(18) (2017).

than \$250 in a calendar year to campaign staff,” are an allowable expenditure in a campaign and not prohibited as personal use. *Id.*, at (4)(b).

In this matter, the expenditure in question is determined to be a gift. However, the expenditure exceeds the limit of the rule by an amount of \$250.00, a campaign finance violation. The Commissioner notes the expenditure was timely reported.

Sufficiency Finding No. 1: There are sufficient facts to show that the Perry 2016 campaign improperly exceeded the \$250 limit on gifts to a campaign staff.

Given the first-time nature of this determination and the likelihood that there may be other candidates who made similar gift expenditures, the Commissioner considered excusing this portion of the Complaint against Rep. Perry on the principle of excusable neglect. Here though, the amount of the gift expenditure was fully double the express limit on such gifts, and therefore the Commissioner determines the neglect should not be excused; for the same reason, the violation was not *de minimis*. As to the Sufficiency Finding No. 1, the Commissioner finds candidate Perry violated Montana campaign finance law.

This leaves the surplus campaign funds issue, which arises based on the timing of Candidate Perry’s gift at the end of the campaign. The disposal of surplus campaign funds is strictly controlled by statute and administrative rules. *See e.g.*, Mont. Code Ann. §§ 13-37-240, 402; Admin. R. Mont. 44.11.608(5), 44.11.701, et seq. Such funds are defined as

those campaign funds remaining when all debts and other obligations of the campaign have been paid or settled, pursuant to

ARM 44.11.608, no further campaign contributions will be received, and no further campaign expenditures will be made.

Admin. R. Mont. 44.11.702(2).

Because gifts or bonuses of less than \$250 are determined to be an expenditure, and “surplus campaign funds” are those that remain *after* “no further campaign expenditures will be made,” in this instance the initial \$250 of Candidate Perry’s gift was not surplus. By the same token, the excess \$250 of the gift may have been surplus and thus subject to additional disposition requirements as set out in Admin. R. Mont. 44.11.702(6)(c).

Surplus campaign funds are created by “filing the closing campaign report pursuant to 13-37-228.” Mont. Code Ann. § 13-37-240. Though there is no time limit to when such reports must be filed, Mont. Code Ann. § 13-37-228(3) defines the dominant “campaign measurement to be that of debts and obligations of the campaign, with the ability for a candidate to make contributions and expenditures after an election dependent on the relationship of the contribution or expenditure to the debts and obligations of the campaign.” Adams v. Sands, COPP 2015-CFP-013, at 6 (Oct. 26, 2015).

Here, Candidate Perry’s gift was at the conclusion of his campaign and disclosed on his closing report. (FOF Nos. 5, 7 (table 2).) The gift was not, as noted above, a debt or obligation of the campaign. Thus, had the \$250.00 excess amount of the gift not been made, that amount would have been surplus funds subject to the strict disposition requirements noted above. Gifts to campaign staff are not contemplated among the specific and limited methods for handling surplus funds. *See e.g.*, Admin. R. Mont. 44.11.702(6)(c).

Sufficiency Finding No. 2: There are sufficient facts to show that the Perry 2016 campaign improperly distributed \$250 in surplus campaign funds.

Given the first-time nature of this finding, few candidates would have been aware of this additional violation. This finding is *secondary* to the campaign finance violation detailed in Sufficiency Finding No. 1 and, therefore, it is appropriate that it be dismissed under the principal of excusable neglect.

The Commissioner will notify all candidates, committees, and political parties of the proper application of the rule and provide guidance from the date of this Decision.

2. Failure to report an in-kind contribution

The complaint also alleges Candidate Perry failed to report an in-kind contribution from a corporation his campaign used for mailing services.

Finding of Fact No. 6: Mailing Technical Services, Inc (MTS) CEO Merle Peifer explained that candidate Perry was billed a “single line item” by the company, and that this amount included all shipping and handling charges involved. Further, the email stated that candidate Perry paid all invoices “according to our terms and in full” and that nothing was provided in-kind to the Perry campaign by MTS. (Commissioner’s Records.)

Corporations are prohibited from making, and candidates are prohibited from accepting or receiving, “a contribution to a candidate directly or through an intermediary.” Mont. Code Ann. § 13-35-227(1)-(2). “Contributions” include traditional cash as well as in-kind contributions. *Id.*, § 13-1-101(9)(a). The COPP investigation found that MTS did not provide candidate Perry free or pro bono services, and that MTS billed candidate Perry in a manner consistent with its practice and policy. (FOF No. 6.) There is no evidence Candidate Perry

requested or received any type of contribution from MTS. Mont. Code Ann. § 13-35-227. The allegation is hereby dismissed.

3. *Failure to properly detail expenditures*

To address the allegations regarding insufficient detail in Candidate Perry's 2016 campaign finance reporting, the Commissioner reviewed his 2016 campaign finance reports as described in the complaint.

The complaint alleges failure to sufficiently detail a number of expenditures: 1) an expense in the amount of \$24.99 to Office Depot for envelopes; 2) an expense in the amount of \$11.91 to Walmart for thank you cards; and 3) an expense in the amount of \$23.70 to Montana Coffee Traders for breakfast with campaign manager. The Commissioner dismisses the above allegations Nos. 1 to 3 as *de minimis*, as the information excluded does not substantially affect disclosure.

The complaint included several other allegations of a similar nature with regard to allegedly insufficient detail. Having reviewed those reports, additional factual findings are necessary.

Finding of Fact No. 7: Candidate Perry's 2016 campaign finance reports show seven expenditures that lack sufficient detail (see Tables Nos. 1-6). (Commissioner's Records.)

Table 1: Expenditures, as reported by candidate Perry, on the 11/01/2015-04/28/2016 initial campaign finance report that did not contain the required level of reporting detail. Information comes from the most recent version of the report, Amended and Filed on November 28, 2016.

Entity	Date	Purpose	Amount
United States Postal Service	04/26/2016	POSTAGE	\$77.20

Table 2: Expenditures, as reported by candidate Perry, on the 10/23/2016-11/28/2016 closing campaign finance report that did not contain the required level of reporting detail. Information comes from the most recent version of the report, Amended and Filed on January 6, 2017.

Entity	Date	Purpose	Amount
Conger, Barry	11/22/2016	Campaign Manager	\$500.00

Table 3: Expenditures for campaign mailings, as reported by candidate Perry, on the 06/28/16-09/29/16 campaign finance report. Information comes from the most recent version of the report, Amended and Filed on November 28, 2016.

Entity	Date	Purpose	Amount
ArtCraft Printers	09/30/2016	Printing 14,500 mailers	\$2,027.00

Table 4: Expenditures for all campaign mailings as reported by candidate Perry on his 09/30/16-10/22/16 campaign finance report.

Entity	Date	Purpose	Amount
Mailing Technical Services	10/12/2016	Standard A postage for 4,457 mail pieces	\$1,176.65
Mailing Technical Services	10/17/2016	Standard A Postage for 3,647 mailers	\$962.81
Mailing Technical Services	10/26/2016	Standard A Postage for 2,027 mailers	\$535.13

Table 5: Expenditures for all campaign mailings, as reported by candidate Perry, on the 10/23/16-11/28/16 closing campaign finance report. Information comes from the most recent version of the report, Amended and Filed on January 6, 2017.

Entity	Date	Purpose	Amount
Mailing Technical Services	11/22/2016	Postage for 4,522 mailers	\$1,353.53

The expenses listed in the foregoing Tables required additional, substantive 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 for expenditures to persons who perform services for or on behalf of a candidate; 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. 3: There are sufficient facts to show that the 2016 Perry Campaign's finance reports failed in the seven instances above to disclose sufficient detail describing the foregoing campaign expenditures (FOF No. 7).

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 (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 portion of the Complaint against Rep. Perry will be dismissed for the same reasons and pursuant to the same two safeguards.

First, no later than October 28, 2018, Representative Perry is directed to file amended campaign finance reports 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 Perry from a campaign practice violation for the deficiencies identified above based on the principle of excusable neglect.²

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 this Decision, to show that Perry’s 2016 campaign violated Montana’s campaign practice laws, including, but not limited to the laws set out in this 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*

² The Commissioner notes that as part of the response to this Complaint, Representative Perry has provided the expenditure detail as required and has agreed to amend the campaign’s 2016 finance reports to fulfill the requirements set out by the Commissioner for dismissal.

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 Findings Nos. 2 and 3.

Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to Sufficiency Finding No. 1, 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 Perry. Because of the nature of the violation, this matter is referred to the County Attorney of Lewis & 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 timely reporting of the expenditure and cooperation in correcting issues 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, including those of Mont. Code Ann. § 13-37-240. *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 31st day of July 2018.



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