

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

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| <p>Wafstet v. McDermott No. COPP 2018-CFP-009</p> | <p style="text-align: center;">DECLARATION OF MERIT OF COMPLAINT</p> <p style="text-align: center;">MEMORIALIZATION OF NOTIFICATION OF MERIT TO CANDIDATE</p> <p style="text-align: center;">RESOLUTION OF COMPLAINT BY PROMPT REMEDIAL ACTION BY CANDIDATE</p> <p style="text-align: center;">DISMISSAL OF ALLEGED VIOLATIONS</p> <p style="text-align: center;">FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN FINANCE VIOLATION</p> |
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On May 18, 2018, Travis Wafstet of Milltown, MT filed a campaign practices complaint against T.J. McDermott of Missoula, MT. The complaint alleged that candidate McDermott failed to: 1) properly attribute Facebook ads he had paid to boost or promote advertising his candidacy on no fewer than four occasions; 2) provide the proper date a banner ad promoting his candidacy was run on the online version of the Missoulian newspaper; 3) properly attribute campaign yard signs by using an old campaign committee name rather than the current one; 4) provide any attribution information on his

campaign website; 5) properly report expenditures related to the purchase of campaign signs, a campaign PO Box, or the creation and maintenance of his campaign website; 6) provide the required level of detail on a campaign debt reported on his initial C-5 financial report; and 7) properly report the value of campaign signs from his previous campaign as an in-kind contribution to his current campaign.

SUBSTANTIVE ISSUES ADDRESSED

Proper attribution of political campaign materials; proper reporting of in-kind contributions; and the proper reporting of campaign expenditures.

FINDINGS OF FACT

The foundational facts necessary for this Decision is as follows:

Finding of Fact No. 1: On January 8, 2018, T.J. McDermott filed a C-1A Statement of Candidate as a candidate for Missoula County Sheriff with the COPP. (Commissioner's Records)

Finding of Fact No. 2: On February 3, 2018, Travis Wafstet filed a C-1A Statement of Candidate as a candidate for Missoula County Coroner/Sheriff with the COPP. (Commissioner's Records)

Finding of Fact No. 3: Four Facebook posts by candidate McDermott did not originally contain the required attribution language. As of May 23, 2018, an attribution statement saying "Paid for by the Committee to Re-Elect TJ McDermott for Sheriff, Democrat, PO Box 4273, Missoula, MT 59806" had been added to the posts in question. (Commissioner's Records)

Finding of Fact No. 4: Candidate McDermott's campaign utilized a webpage, mcdermott4sheriff.com. As of May 23, 2018 an attribution statement "Paid for by the Committee to Re-Elect TJ McDermott for Sheriff, Democrat, PO Box 4273, Missoula, MT 59806" was included on the webpage. (Commissioner's Records)

Finding of Fact No. 5: Candidate McDermott utilized the same address, PO Box 4273, Missoula, MT 59806, on both the 2014 and 2018 Statement of Candidacy. (Commissioner's Records)

Finding of Fact No. 6: On May 7, 2018 candidate McDermott timely filed his initial C-5 campaign finance report using the CERS¹ system. This report covered all campaign financial activity between the dates of January 4, 2018 through May 1, 2018. The report did not include any in-kind contributions of items or services given or provided to the campaign, nor any expenditures or debts made for the purchase or procurement of signs, a campaign PO Box, or the maintenance or development of a campaign website. The report included two debts owed by the campaign to WestRidge Creative that did not contain the required level of reporting detail. (Commissioner's Records)

Finding of Fact No. 7: As part of his May 23, 2018 response, candidate McDermott stated that he and his wife had owned the PO Box referenced in this complaint for a period of several years, and that it was used for "personal mail collection". (Commissioner's Records)

Finding of Fact No. 8: On May 23, 2018 candidate McDermott filed an amended version of his initial campaign finance report. This amended report listed two in-kind contributions of signs used during his previous campaign to his 2018 campaign for current campaign. The amended report listed one debt owed by the campaign for the maintenance and upkeep of the website. (Commissioner's Records)

DISCUSSION

The Commissioner examines the allegations in each of the following areas: Proper attribution; proper reporting in-kind contributions; and the proper reporting of campaign expenditures

1. Proper attribution

Under Montana law "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

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.

communication.” §13-35-225(1) MCA. The complaint attached screenshots of what appeared to be four separate Facebook ‘sponsored²’ posts identified as: Missoula County Democrats endorsement; Sheriff Doug Chase endorsement; Governor Steve Bullock endorsement; and re-election and kick-off. The posts appear to have failed to include the required attribution.

The complaint also alleges the McDermott campaign website, mcdermott4sheriff.com, failed to include an attribution. Upon visiting the site as part of the COPP investigation on May 21, 2018 (both desktop and mobile version), a proper attribution was found.

Finally, the complaint alleges older campaign signs being used by candidate McDermott did not include an appropriate attribution. A 2017 Advisory Opinion, COPP-2017-AO-003, clarifies a candidate is “an individual who has filed a declaration or petition of nomination” and “a candidate and the candidate’s treasurer do not constitute a political committee”. While the statement of organization allows the campaign to name their campaign, it remains solely attributed to the individual. By rule, an attribution using the name of the campaign must include at least the last name of the candidate, 44.11.601(2), ARM. In this matter, candidate McDermott utilized both his first and last name. The address with the attribution remained the same in both 2014 and 2018 and is reflected as the same address on the candidates Statement of Candidacy, allowing for the public to contact candidate

² Paid Facebook posts are identified with a “sponsored” tag. All paid election or electioneering communications are required to include an appropriate attribution.

McDermott. It is clear what candidate paid for the sign, which has a current address, and the allegation is hereby dismissed.

Montana law requires an accelerated review (“as soon as practicable”) of a campaign practice complaint alleging an attribution violation. Accordingly, candidate McDermott was immediately contacted by the Commissioner’s office. Candidate McDermott responded saying that the omissions of the attribution were an oversight and would ensure that any attribution issues would be remedied. Within two days, candidate McDermott followed-up the conversation with the Commissioner’s office by taking responsibility for ensuring proper attributions, the corrective measures and time table taken, along with images of the corrected campaign items.

The law governing complaints of failure to properly attribute political items provides precise directions to the Commissioner:

1. The Commissioner is to immediately assess the merits of the Complaint. §13-35-225(7)(a), MCA. The Commissioner found merit to the Complaint and hereby memorializes that finding.
2. The Commissioner shall notify the candidate of the merit finding, requiring the Candidate to bring the signs into compliance. §13-35-225(7)(a), MCA. The Commissioner, by telephoning and a subsequent in-person meeting with Candidate McDermott, by discussing the attribution issue and requirements, did this and hereby memorializes the Notice.
3. The Candidate is provided an unspecified period of time to bring the signs into attribution compliance (§13-35-225(7)(b), MCA). By this Decision the Commissioner declares his satisfaction that the Candidate has acted promptly and properly to correct the attribution deficiency.

Under Montana law the Candidate with the attribution deficiency is relieved of a campaign practice violation, provided the candidate promptly

carries out the attribution correction as promised. Candidate McDermott has met these duties and is therefore relieved of a campaign practice violation under §13-35-225(7)(b), MCA. The allegation is hereby dismissed.

2. Proper reporting of in-kind contributions

The complaint alleges that candidate McDermott failed to report the use of campaign signs that were originally created for and reported by his previous 2014 campaign. 44.11.402(1) and (4), ARM, state:

(1) A contribution becomes a contribution on the date it is received; or, in the case of an in-kind contribution, on the date the consideration is received by the candidate or political committee.

(4) A contribution shall be reported for the reporting period during which it is received.

As candidate McDermott was utilizing signs originally created for its 2014 campaign during the time covered by his initial 2018 financial report³, candidate McDermott was required to report his use of these signs as an in-kind contribution. Candidate McDermott failed to report the in-kind contribution on his May 6, 2018 report. The Commissioner notes Candidate McDermott filed an amended financial report on May 23, 2018 reporting two in-kind contributions of yard signs from the 2014 campaign.

3. Proper reporting of campaign expenditures

³ County candidates initial campaign finance report was due on May 6, 2018 covering the period from beginning of campaign through May 1, 2018.

The complaint alleges that candidate McDermott failed to report any expenditures to obtain campaign yard signs. As no signs were purchased by the 2018 campaign, no such expenditure needed to be reported. The McDermott campaign did utilize and did not properly report older campaign signs as an in-kind campaign contribution (see no. 2 above). The allegation that he failed to report an expenditure for signs is hereby dismissed.

The complaint alleges that candidate McDermott failed to report any expenditures associated with his campaign PO Box. Candidate McDermott stated that the PO Box is his personal PO Box and is used by him and his wife primarily for personal mail collection and would continue to be their personal PO Box regardless of the outcome of the campaign. The COPP does not require candidates to report and disclose expenditures made on items primarily used for personal purposes that have incidentally become involved in campaign activities (personal mail collection, personal cell phones, personal internet access, etc.). Because it is personal in nature, no expenditure for this item needed to be reported (FOF No. 7). The allegation is hereby dismissed.

Additionally, the complaint alleges that candidate McDermott failed to report any expenditures associated with the maintenance or upkeep of his campaign website. Candidate McDermott is obligated to report any expenditures associated with the campaign website using the date the service was agreed to or provided. Because the website was live during the time-period covered by the initial report, candidate McDermott is required to report this activity as either an expenditure or debt of the campaign,

44.11.502(4), ARM:

“An obligation to pay for a campaign expenditure is incurred on the date the obligation is made, and shall be reported as a debt of the campaign until the campaign pays the obligation by making an expenditure”, while 44.11.502(3) clarifies that “An expenditure is made on the date payment is made, or in the case of an in-kind expenditure, on the date the consideration is given” (emphasis added).

Candidate McDermott was required to report all campaign debts using the date the obligation was incurred or the goods/services were provided, not the date his campaign received the invoice. While candidate McDermott did report a debt related to his campaign website on an amended financial report, the campaign failed to originally report this debt as required. The Commissioner also applies 44.11.505(4), ARM to the allegation an online banner ad was run on April 26, 2018 but reported as April 30, 2018. The Commissioner notes candidate McDermott filed an amended campaign finance report with debt corrections on May 3, 2018.

The complaint alleges multiple instances where candidate McDermott failed to provide the appropriate level of reporting detail on McDermott’s May 6, 2018 campaign finance report. Candidate McDermott failed to properly describe in detail services provided by Westridge Creative, as required by §13-37-229(2)(b), MCA.

FINDINGS

The McDermott campaign failed to report an in-kind contribution of previously used campaign signage as required by 44.11.403, ARM “A candidate ... 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.”

Sufficiency Finding No. 1: Candidate McDermott failed to report an in-kind contribution of campaign signage valued at \$2000 from his 2014 campaign (FOF No. 6).

Candidate McDermott failed to properly report expenditures on his May 6, 2018 initial campaign finance report. When reporting debts and/or expenditures, a candidate is responsible to report when the expenditure was incurred rather than wait for an invoice. Further, a candidate is responsible to ensure “Reports of expenditures made to a consultant, advertising agency, polling firm, or other person that performs services for or on behalf of a candidate or political committee must be itemized and described in sufficient detail to disclose the specific services performed by the entity to which payment or reimbursement was made”, § MCA 13-37-229(2)(b).

Sufficiency Finding No. 2: Candidate McDermott failed to properly report debts and expenditures when reporting its website development expenditure and failed to correctly report a date of expenditure (FOF No. 6).

Sufficiency Finding No. 3: Candidate McDermott failed to properly detail services expenditures as required (FOF No. 6).

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; 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, as set out in this Decision, to show that candidate McDermott 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 candidate McDermott. 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.

While it is expected that a mitigated 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 §13-37-226, MCA. 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 31st day of May 2018.



Jeffrey A Mangan
Commissioner of Political Practices
Of the State of Montana
P. O. Box 202401
1209 8th Avenue
Helena, MT 59620
Phone: (406)-444-3919