

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Darrow v. Missoula County Democratic Central Committee  No. COPP 2019-CFP-002	DISMISSAL OF ALLEGATIONS; AND SUFFICIENT FACTS TO SUPPORT A CAMPAIGN FINANCE VIOLATION
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On March 11, 2019, Ben Darrow of Missoula, MT, filed a campaign practices complaint against David Kendall, Deputy Treasurer/Chair for the Missoula County Democratic Central Committee (MCDCC)<sup>1</sup>. The complaint alleges that the MCDCC mailed out letters containing an erroneous ‘paid for by’ disclaimer that did not identify the true individual responsible for financing the communication on no fewer than three instances, and that the committee failed to report in-kind contributions it received in the form of work done on their website by Confluence Communications.

**SUBSTANTIVE ISSUES ADDRESSED**

The decision addresses proper application of campaign finance attribution on election materials, the reporting of in-kind contributions and time by committee volunteers, and the timely reporting of political party committee finance reports.

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<sup>1</sup> The Missoula County Democratic Central Committee will be treated as the Respondent in this matter, as each of the two allegations the Commissioner will consider concern actions or activities concerning the committee itself.

## **FINDINGS OF FACT**

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: The Missoula County Democratic Central Committee (MCDCC) filed an original C-2 Statement of Organization as a Political Party committee with the COPP on January 30, 2007. On September 27, 2018, the MCDCC most recently amended this Statement of Organization electronically. While the Statement of Organization lists David Kendall as an additional officer for the committee, it does not specify an official title. (Commissioner's Records.)

Finding of Fact No. 2: The MCDCC's website lists David Kendall as the committee's current Chairperson. (Commissioner's Records.)

Finding of Fact No. 3: On March 23, 2017, David Kendall published a blog post on the MCDCC's website titled "Welcome to the new website for Missoula Democrats". The post named six individuals as contributors who helped "build" the website: Stacy Hunt, Tim Gunderson, Megan Emjsh, Danny Tanenbaum, Bracha Tanenbaum, and Bob Jaffe. (Commissioner's Records.)

Finding of Fact No. 3A: Confluence Communications is a "woman owned small business based in Missoula, MT...We are a seasoned outreach and communications team with dozens of years of experience developing and implementing communications programs for government programs, corporations, and nonprofits<sup>2</sup>". Confluence Communication's website lists Stacy Hunt, Megan Emish, and Tim Gunderson as employees, but does not list the MCDCC as a client. Similarly, their featured projects page does not list any work done with or for the MCDCC. (Commissioner's Records.)

Finding of Fact No. 3B: The MCDCC's website lists Stacy Hunt as the committee's current Communications Director. She is also listed as the current Precinct Committeewoman for Precinct 97. (Commissioner's Records.)

Finding of Fact No. 3C: On April 11, 2019, Stacy Hunt emailed the COPP Investigator to discuss Confluence Communication's role in building or designing the MCDCC website. She stated that herself and Tim Gunderson both volunteered "a limited number of hours" to design and build the MCDCC website, and that neither was employed by Confluence Communications at that time nor was

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<sup>2</sup> Confluence Communications website - <http://confluencecc.com/about/>

either compensated by Confluence Communications or the MCDCC for their efforts. This email further stated that Confluence Communications did not have any sort of agreement with the MCDCC to build or design the website and reiterated that all time spent on these tasks by herself and Mr. Gunderson was personal time that they volunteered. The email finally stated that Megan Amish did not actually volunteer to assist the MCDCC in their website building efforts. (Commissioner's Records.)

Finding of Fact No. 4: On January 31, 2018, the MCDCC filed a C-6 committee finance report dated January 1, 2017 through January 31, 2017. The report does not list any in-kind contributions received or expenditures made by the committee relating to the "build" of or updates made to the MCDCC website. The most recent version of this report was amended and filed on January 31, 2019. (Commissioner's Records.)

Finding of Fact No. 5: On March 19, 2019, the COPP received a letter responding on behalf of both Mr. Kendall and the MCDCC from Mike Meloy. Mr. Meloy characterized the website build as "uncompensated volunteer work" carried out by "several volunteers with technological experience" that would not be subject to reporting and disclosure requirements as an expenditure or contribution. (Commissioner's Records.)

Finding of Fact No. 6: On July 2, 2018, the MCDCC sent out a mailer alerting recipients to the fact that, at the committee's next scheduled meeting (to be held July 10, 2018), the committee would be considering potential changes to its bylaws. This letter contained a disclaimer stating "Paid for by Missoula County Democrats, Pam Walzer, Treasurer P.O. Box 9305 Missoula, MT 59807" and was addressed to "Central Committee Members, Missoula County Democrats". (Commissioner's Records.)

Finding of Fact No. 7: On July 6, 2018, the MCDCC sent out a mailer alerting recipients about a petition to remove an MCDCC Executive Board member from their position, as well as a future meeting where a vote would be held on this very topic. This letter contained a disclaimer stating "Paid for by Missoula County Democrats, Pam Walzer, Treasurer P.O. Box 9305 Missoula, MT 59807" and was addressed to "Central Committee Members, Missoula County Democrats". (Commissioner's Records.)

Finding of Fact No. 8: On November 26, 2018, the MCDCC late filed by 48 days a C-6 committee finance report dated June 25, 2018

through October 1, 2018<sup>3</sup>. Although this report did not include any expenditures made by the MCDCC related to the committee's July 2 mailing, the committee did report receiving one in-kind contribution valued at \$388.32 from David Kendall for (in part) "photo copies: platform & rules change, rules change mailing". Similarly, while this report did not include any expenditures made by the MCDCC related to the committee's July 6 mailer, the committee did report receiving one in-kind contribution valued at \$76.51 from Jennifer Cady for "Removal of Officer petition photocopy and mailing (54 copies)". This committee finance report disclosed that the MCDCC received \$4,053.75 in contributions during this time period and expended \$12,446.98. The report was most recently amended and filed on January 31, 2019. (Commissioner's Records.)

Finding of Fact No. 9: On November 26, 2018, the MCDCC late filed by 28 days a C-6 committee finance report dated October 2, 2018 through October 24, 2018<sup>4</sup>. This committee finance report disclosed the MCDCC received \$305.00 in contributions during this time period and expended \$23.08. The report was most recently Amended and filed on November 28, 2018. (Commissioner's Records.)

Finding of Fact No. 10: On November 26, 2018, the MCDCC timely filed a C-6 committee finance report dated October 25, 2018 through November 21, 2018.

Finding of Fact No. 11: On December 22, 2018, the MCDCC sent a letter to Mr. Darrow concerning his access to MCDCC electronic records and data. This letter contained a disclaimer stating "Paid for by Missoula County Democrats, Pam Walzer, Treasurer P.O. Box 9305 Missoula, MT 59807". (Commissioner's Records.)

Finding of Fact No. 11A: The MCDCC's website currently lists Mr. Darrow as the current Precinct Committeeman for Precinct 96E. (Commissioner's Records.)

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<sup>3</sup> Report was due on October 9, 2018 (The original due date of October 6 fell on a Saturday, and Monday the 8<sup>th</sup> was a Holiday, so the due date was pushed to the 9<sup>th</sup>). Because the MCDCC engaged in expenditure and contribution activity to support State District candidates, the MCDCC was required to use the State District reporting calendar

<sup>4</sup> Report was due on October 29, 2018.

## **DISCUSSION AND FINDINGS**

*Part One: Did the MCDCC's July 2, July 6, and December 22 mailings contain an erroneous 'Paid for by' attribution message?*

Mr. Darrow alleges that the MCDCC used the "Paid for by" disclaimer without authority or approval to send false and accusatory letters in the name of the Missoula Democratic Central Committee when in fact those letters were not approved by the central committee or E-board and were actually funded by other individuals.

While the COPP cannot and will not investigate whether the MCDCC had the "authority or approval" of its membership to distribute such communications (as the COPP does not and will not involve itself in the internal operations of a registered political committee), the veracity of the attribution message itself can be discussed. Each of the three mailers referenced by Mr. Darrow contained an attribution message stating "Paid for by Missoula County Democrats, Pam Walzer, Treasurer P.O. Box 9305 Missoula, MT 59807" (FOF Nos. 6, 7, 11). Mont. Code Ann. §13-35-225, the statute the complaint argues the letters violated, states:

(1) All election communications, electioneering communications, and independent expenditures 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.

Based on financial reports filed by the MCDCC, neither the July 2 or July 6 mailer was actually paid for by the committee. Instead, both were contributed to the committee in-kind by individuals (FOF No. 8). A plain reading of this statute would give one the impression that it was violated, as the "name and address of the person who made or financed the expenditure" was not

included. However, the attribution requirement applies only to election communications, electioneering communications, and independent expenditures, meaning the mailers must fall under one of these attribution requirements to apply.

An election communication is defined by Mont. Code Ann. §13-1-101(14), as:

(a) "Election communication" means the following forms of communication to support or oppose a candidate or ballot issue:

(i) a paid advertisement broadcast over radio, television, cable, or satellite;

(ii) paid placement of content on the internet or other electronic communication network;

(iii) a paid advertisement published in a newspaper or periodical or on a billboard;

(iv) a mailing; or

(v) printed materials.

(b) The term does not mean:

(i) an activity or communication for the purpose of encouraging individuals to register to vote or to vote, if that activity or communication does not mention or depict a clearly identified candidate or ballot issue;

(ii) a communication that does not support or oppose a candidate or ballot issue;

(iii) a bona fide news story, commentary, blog, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, internet website, or other periodical publication of general circulation;

(iv) a communication by any membership organization or corporation to its members, stockholders, or employees; or

(v) a communication that the commissioner determines by rule is not an election communication.

None of the July 2, July 6, or December 22 mailers supported or opposed candidates or ballot issues for elections. The July 2 mailer simply discussed proposed changes to the MCDCC's bylaws and the timeline for voting on these proposed changes. The July 6 mailer discussed a petition to remove an MCDCC officer from their position and explained future proceedings on that front. And the December 22 letter was concerned only with Mr. Darrow's access to certain data or information (FOF Nos. 6, 7, 11). As none of the mailers supported or opposed candidates or ballot issues for election, they cannot be considered election communications. Even if they had, they would be exempted under subsection (b)(iv), as they were clearly communications made by the MCDCC to its membership. Taken together, there is no reasonable interpretation where the mailers can be defined as election communications.

Similarly, an electioneering expenditure is defined under Mont. Code Ann. §13-1-101(16) as:

(a) "Electioneering communication" means a paid communication that is publicly distributed by radio, television, cable, satellite, internet website, newspaper, periodical, billboard, mail, or any other distribution of printed materials, that is made within 60 days of the initiation of voting in an election, that does not support or oppose a candidate or ballot issue, that can be received by more than 100 recipients in the district voting on the candidate or ballot issue, and that:

(i) refers to one or more clearly identified candidates in that election;

(ii) depicts the name, image, likeness, or voice of one or more clearly identified candidates in that election; or

(iii) refers to a political party, ballot issue, or other question submitted to the voters in that election.

(b) The term does not mean:

(i) a bona fide news story, commentary, blog, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, internet website, or other periodical

publication of general circulation unless the facilities are owned or controlled by a candidate or political committee;

(ii) a communication by any membership organization or corporation to its members, stockholders, or employees;

(iii) a commercial communication that depicts a candidate's name, image, likeness, or voice only in the candidate's capacity as owner, operator, or employee of a business that existed prior to the candidacy;

(iv) a communication that constitutes a candidate debate or forum or that solely promotes a candidate debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(v) a communication that the commissioner determines by rule is not an electioneering communication.

Even without considering the date the mailers were produced or distributed, they would not qualify as electioneering communications. As previously established, none of the mailers referred to or otherwise depicted the name, image, or likeness any candidates for election, nor did the mailers refer to any political party, ballot issue, or other question submitted to voters in an election. Had the mailers met one or more of these criteria, they would not qualify as electioneering communications under subsection (b)(ii), as they were communications made by the MCDCC to its membership.

Finally, an independent expenditure is defined by Mont. Code Ann. §13-1-101(25) as:

“Independent expenditure” means an expenditure for an election communication to support or oppose a candidate or ballot issue made at any time that is not coordinated with a candidate or ballot issue committee”.

As none of the mailers can be considered election communications, by definition they could not be considered independent expenditures.

Because the MCDCC’s July 2, July 6, and December 22 mailers do not qualify as election communications, electioneering communications, or

independent expenditures, the attribution requirements of Mont. Code Ann. §13-35-225 would not apply. The allegation is hereby dismissed.

*Part Two: Did the MCDCC fail to report in-kind contributions received?*

This complaint also alleges that the MCDCC failed to report website work done on behalf of the committee as an in-kind contribution received. Specifically, the complaint states that Confluence Communications, a professional communications firm, provided professional website work to the MCDCC to design and build its website and that the MCDCC failed to report this activity as an in-kind contribution.

On March 23, 2017, the MCDCC unveiled a new website, complete with a blog post titled “Welcome to the new website for Missoula Democrats” (FOF No. 3). On its C-6 committee financial report covering the committee’s 2017 activity financial activity, the MCDCC did not report making any expenditures or receiving contributions associated with the building or developing of this new website (FOF No. 4).

The MCDCC’s official response to this complaint categorized the MCDCC’s new website build as “uncompensated volunteer work” provided by “several volunteers with technological experience” and argued that this work did not constitute reportable activity (FOF No. 5). This characterization is supported by Stacy Hunt’s April 11, 2019, email to the COPP, which stressed that she and Tim Gunderson’s involvement was purely in a voluntary capacity and that they were not compensated by the MCDCC or Confluence Communications for their time or efforts, and Confluence Communications itself was not involved in the design or build of the MCDCC website (FOF No. 3C). Evidenced by the language used in the March 23, 2017, blog post, the use of phrasing such as “It was a group effort to build this website” suggests that not one single professional entity was utilized. The narrative supports the MCDCC’s assertion that their website was built and designed by individuals who came together and volunteered their own time and resources.

The term contribution is defined by §13-1-101(9), MCA, as:

(a) "Contribution" means:

(i) 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;

(ii) an expenditure, including an in-kind expenditure, that is made in coordination with a candidate or ballot issue committee and is reportable by the candidate or ballot issue committee as a contribution;

(iii) the receipt by a political committee of funds transferred from another political committee; or

(iv) the payment by a person other than a candidate or political committee of compensation for the personal services of another person that are rendered to a candidate or political committee.

(b) "Contribution" does not mean services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee or meals and lodging provided by individuals in their private residences for a candidate or other individual.

Emphasis must be placed on subsection (b), which specifically exempts “services provided without compensation by individuals volunteering a portion or all of their time”. Based on all available evidence, those individuals who did work on the MCDCC 2017 website build did so as volunteers “without compensation”.

Because the MCDCC’s website work was carried out by volunteers, the efforts of the involved individuals would not qualify as reportable contributions. The MCDCC was under no obligation to report the time spent by its volunteers in conjunction with the building or design of the website as contributions. The allegation that the MCDCC failed to report in-kind contributions is hereby dismissed.

### *Part Three: Timely filing of Committee Finance Reports*

Once a complaint is filed the Commissioner “shall investigate any other alleged violation ...” Mont. Code Ann. §13-37-111(2)(a). This investigative authority includes authority to investigate “all statements” and examine “each statement or report” filed with the COPP. §13-37-111, 123, MCA. The Commissioner is afforded discretion in exercising this authority. *Powell v. Motl*, OP-07111, Supreme Court of Montana, November 6, 2014 Order.

MCDCC file three separate committee finance reports on November 26, 2018. Upon review, the committee filed its October 9, 2018, finance report 48 days late and its October 29, 2018, 28 days late (FOF Nos. 8, 9). Mont. Code Ann. §13-37-226 provides the timeframe for the filing of political party committee finance reports. Late filing of reports causes delay in providing the required information to the public. The Commissioner notes MCDCC timely filed its November 26 post-election committee finance report (FOF No. 10).

Sufficiency Finding No. 1: The MCDCC failed to timely report 2018 committee finance activity on two occasions. (FOF Nos. 8, 9)

### **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 MCDCC 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 MCDCC. 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

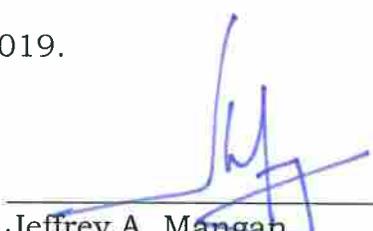
County Attorney waive the right to prosecute (*id.*, at (2)) or fail to prosecute within 30 days (*id.*, at (1)) this Matter returns to this Commissioner for possible prosecution.

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, including those of Mont. Code Ann. § 13-37-226. *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 24<sup>th</sup> day of May 2019.



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