

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Oestreicher v. American Bridge PAC No. COPP 2020-CFP-027	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN FINANCE VIOLATION
---	---

On June 12, 2020, Jeffrey Oestreicher of Helena, MT, filed a campaign practices complaint against AB PAC aka American Bridge 21st Century. The complaint alleged that AB PAC failed to register as a Political Committee in the State of Montana, failed to file financial reports disclosing Montana expenditure activity as required, and failed to properly attribute campaign material.

SUBSTANTIVE ISSUES ADDRESSED

Proper filing of a Federal Political Committee under Montana’s campaign finance and practices law, proper reporting of an expenditure, and proper application of a ‘paid for by’ attribution.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: Within the formal Complaint, complainant Oestreicher included a screenshot from an online ad financed by AB PAC that references Montana Gubernatorial candidates Greg Gianforte and Tim Fox by both name and image. The ad includes an attribution statement of “Paid for by AB PAC.

www.americanbridgepac.org. Not authorized by any candidate or candidate’s committee. AB PAC is responsible for the content of

this advertisement”. This ad was run as a paid ad on Facebook by AB PAC from May 26, 2020-June 22, 2020. (Commissioner’s Records.)

Finding of Fact No. 1A: Greg Gianforte ran as a Republican in Montana’s 2020 Primary election as a candidate for the office of Governor. Tim Fox currently serves as Montana’s Attorney General and ran as a Republican in Montana’s 2020 Primary election as a candidate for the office of Governor. (Commissioner’s Records.)

Finding of Fact No. 1B: Montana’s Primary election was held on June 2, 2020. (Commissioner’s Records.)

Finding of Fact No. 1C: According to the elections calendar maintained by Montana’s Secretary of State’s office, absentee ballots were to be made available for voting in person no later than May 4, 2020.¹ Ballots were mailed to registered absentee voters on May 8, 2020. (Commissioner’s Records.)

Finding of Fact No. 1D: The COPP identified March 9, 2020, as the start of the Electioneering period in Montana based on the absentee ballot mailing date of May 8, 2020. (Commissioner’s Records.)

Finding of Fact No. 2: AB PAC is currently registered as a Federal Political Committee with the Federal Election Commission (FEC). AB PAC did not register as a committee in the State of Montana with the COPP for the Primary election. The current Statement of Organization states that the committee “Supports/Opposes more than one Federal candidate”. AB PAC’s website describes the organization as “the largest research, video tracking, and rapid response organization in Democratic politics”, with a focus on “taking back all facets of our government. That means flipping state legislatures, protecting and expanding our majority in the House, winning governor’s mansions, taking back the Senate, and above all else, removing Donald Trump from the White House”.² (Commissioner’s Records.)

Finding of Fact No. 3: On May 27, 2020, AB PAC emailed the COPP a hard copy C-7E report. The report discloses AB PAC as making one expenditure of \$500 to Facebook for “Advertising”, dated May 26. The C-7E did not provide any additional information to describe the expenditure. On May 28, COPP staff responded to AB PAC’s email to confirm the COPP’s receipt of the C-7E and explained that “For Montana, ‘advertising’ – for transparency – would not be

¹ <https://sosmt.gov/wp-content/uploads/2020-Election-Calendar.pdf>

² <https://americanbridgepac.org/about-us/>

sufficient. Would need to put the dates run, subject content of ads and platform/type of advertising (boost/post/digital ad, etc)". (Commissioner's Records.)

Finding of Fact No. 4: On June 23, 2020, AB PAC responded to this Complaint (through the firm Perkins Coie). In the response, AB PAC took responsibility for financing and distributing the ad referenced in this Complaint, stating "On May 26, the Committee made its first and only expenditure for Montana's Primary election, to Facebook to run the advertisement. The committee spent \$500 on the Advertisement". The response re-iterated the fact that AB PAC is a Federal Political Committee currently registered with the FEC and provided a copy of the committee's most recent Federal Statement of Organization. The response also asserted that:

As a federal PAC, the Committee is not required to register with the COPP or file state reports if it instead files a copy of its federal report and federal Statement of Organization. The expenditure for the advertisement is reportable on the Committee's upcoming quarterly federal report on July 15, 2020. At that time, the Committee will file with the COPP a copy of that report, which will fully disclose the source and disposition of all contributions and expenditures used in elections in Montana.

And,

the Committee provided "sufficient disclosure regarding who made or financed the communication," making any departure from the attribution requirements *de minimis*. The omission of the treasurer's name and mailing address in the attribution was an unintended oversight that the Committee immediately corrected upon realizing the error, by updating the attribution to provide the name of the Committee's treasurer and the Committee's mailing address.

The response then included an image of the ad with an updated attribution message stating "Paid for by AB PAC, Rodell Mollineau, Treasurer, 455 Massachusetts Ave. NW, Suite 650, Washington, DC 20001. Not authorized by any candidate or candidate's committee". (Commissioner's Records.)

Finding of Fact No. 5: On July 15, 2020, AB PAC emailed the COPP a copy of its Quarter 2 Finance Report, due and filed with the FEC that day. This report disclosed AB PAC as making one expenditure of \$500 to Facebook on May 26, described as "digital advertising".

No additional information was provided to describe the expenditure. (Commissioner's Records.)

DISCUSSION

The Commissioner examines each of the allegations found in the complaint.

Part One: Committee Registration

The first allegation raised by the Complainant in this matter concerns AB PAC's committee registration. Specifically, the Complaint argues that the fact AB PAC had not previously registered with the COPP as a Montana Political Committee is a violation of Montana campaign finance law.

In this matter, AB PAC became involved in Montana elections through expenditure activity. Under Montana law, a political committee is formed when a "person other than an individual...makes an expenditure...for an electioneering communication" of \$250 or more, Mont. Code Ann §13-1-101(31)(a)(iii) and (d). The ad referenced in this Complaint qualifies as an electioneering communication as defined by Mont. Code Ann. §13-1-101(16), as the paid ad was publicly aired after March 9, 2020, clearly references two registered Montana Gubernatorial candidates (Greg Gianforte and Tim Fox), but does not expressly advocate support for or opposition to either candidate (FOF Nos. 1, 1A, 1D). AB PAC does not dispute its involvement in a Montana election by making an electioneering communication, arguing only that it has not violated its reporting and registration requirements in Montana.

Federally filing committees who become Montana political committees through Montana expenditure activity, may qualify for an alternative method

for filing campaign finance reports in compliance with Montana law, Mont. Code Ann. § 13-37-227. “The commissioner shall adopt rules under which committees filing periodic reports with the federal election commission ...shall report in accordance with this title”, *id.* The rule that the Commissioner adopted, 44.11.305, ARM, lists the registration and financial reporting requirements for Federal political committees that become involved in Montana elections through expenditure or contribution activity.

Subsection (1)(a) defines a “federally filing committee” as “any committee that files reports with the federal election commission on a monthly or quarterly basis pursuant to the Federal Election Campaign Act of 1971, as amended”. AB PAC had registered as a Federal Political Committee with the FEC prior to this election cycle and has been filing financial reports with the FEC on a quarterly basis (FOF Nos. 2, 4). AB PAC has made expenditure or contribution activity in various state and federal elections, including Montana’s (FOF No. 2). Therefore, AB PAC qualifies as a “federally filing committee” under Montana law.

44.11.305(1)(a), ARM, states in full that (emphasis added):

If a federally filing committee's reports filed with the federal election commission fully disclose the source and disposition of all contributions and expenditures used in elections in Montana, the commissioner shall accept copies of such reports in lieu of the periodic reports prescribed by the Campaign Finances and Practices Act. Such reports need to be filed with the commissioner only for periods in which a federally filing committee receives contributions from Montana sources or makes expenditures in elections in Montana. A copy of a statement of organization (FEC Form 1) shall accompany the first report, and copies of any amendments thereto shall be filed with the commissioner.

However, a later portion of the rule limits the application of

44.11.305(1)(a) by stating:

If a federally filing committee cannot satisfy the requirements set forth in these rules, it shall file reports on the COPP's forms for the periods in which the committee makes expenditures and contributions in Montana. Such reports shall contain the information required by 13-37-229 through 13-37-232, MCA, and these rules.

44.11.305(1)(c) (emphasis added).

A political committee is required to file a Statement of Organization within 5 days of making an expenditure, Mont. Code Ann. § 13-37-201(2)(b). Here, the AB PAC first came to the attention of the COPP by filing a form C-7E reporting its expenditure of \$500 to Facebook to run its advertisement on May 27, 2020 (FOF 3). The AB PAC timely filed this required disclosure within two business days of making an expenditure during the last days of a campaign, Mont. Code Ann. § 13-37-226(2)(d) and in compliance with ARM 44.11.305(1)(c)(FOF 3). The Commissioner's office notified the committee that its general disclosure of "advertising" was not adequate to meet the requirements of Montana law the next day. The AB PAC did not correct its reporting in response to the COPP's instruction. The AB PAC also did not file its FEC Form 1 (Statement of Organization) along with its initial report to the Commissioner in violation of ARM 44.11.305(1)(a). Stated another way, the people of Montana were on notice that AB PAC had made an expenditure in the primary election, but was deprived of the knowledge that the PAC intended to rely on the Federal filing committee law. The COPP did not receive the AB

PAC's Federal statement of organization until June 23 almost a month after it was due with its initial report.

Sufficiency Finding No. 1: AB PAC failed to file its Federal Form 1, Statement of Organization, within 5 days of making an electioneering communication expenditure in Montana's 2020 primary election.

Montana 44.11.502(7), ARM requires federally filing committees to provide its Federal statement of organization (or file a Montana committee statement of organization) with its initial report, in this matter, the AB PAC's filing of Montana's C-7E form on May 27, 2020. The Commissioner finds AB PAC failed to timely file its statement of organization, a Montana campaign finance and practice violation.

Part Two: Reporting the Expenditure

This Complaint also alleges that AB PAC failed to properly report its Montana expenditure activity. The Complainant asserts that AB PAC was required to disclose the expenditure via a C-6 committee finance report filed with the COPP, an action AB PAC did not take.

As discussed in *Part One*, the ad in question qualifies as an electioneering communication. AB PAC claims direct responsibility for the ad, stating it spent \$500 on May 26 to run the ad on Facebook (FOF No. 4). On May 27, AB PAC emailed the COPP a C-7E Notice of Pre-Election Expenditures disclosing this \$500 Facebook expenditure, and on July 15 the committee emailed the COPP a copy of its Quarter 2 FEC finance report, which again disclosed the expenditure (FOF No. 3, 5).

44.11.305(1)(b), ARM, allows federally filing committees to file copies of FEC finance reports with the COPP in lieu of Montana committee finance reports so long as the Federal report/s “fully disclose the source and disposition of all contributions and expenditures used in elections in Montana”. By disclosing its Montana expenditure on both a C-7E filed directly with the COPP and on a FEC finance report appropriately provided to the COPP, AB PAC timely reported its Montana expenditure. The allegation that AB PAC failed to report this Montana expenditure activity is dismissed.

While AB PAC timely reported this Montana expenditure activity, the committee did not fully comply with Montana reporting and disclosure requirements. While allowing federally filing committees to file FEC finance reports instead of Montana committee finance reporting forms, 44.11.305(1)(a), ARM clearly states that the committee must “fully disclose” the expenditure of funds used for Montana elections. 44.11.305(1)(c), ARM adds that “If a federally filing committee cannot satisfy the requirements set forth in these rules, it shall file reports on the COPP’s forms for the periods in which the committee makes expenditures and contributions in elections in Montana. Such reports shall contain the information required by 13-37-229 through 13-37-232, MCA, and these rules” (emphasis added).

Mont. Code Ann. §13-37-229(2)(b) states that

“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”.

44.11.502(7), ARM, additionally states that expenditures must be reported with “purpose, quantity, subject matter” information. AB PAC described its expenditure as only “advertising” on the C-7E filed with the COPP, and “digital advertising” on the FEC finance report (FOF No. 3, 5). In neither case did AB PAC directly disclose that the ad in question was a paid advertisement run on Facebook, nor did they name the candidates mentioned in the advertisement, provide a description of the content of the ad, or provide relevant quantity/run date information. Further, it is unclear if the \$500 expenditure also included the advertisement’s production cost.

Sufficiency Finding No. 2: AB PAC failed to provide purpose, quantity, and subject matter detail in reporting its Montana electioneering communication expenditure.

Mont. Code Ann. §13-37-229(2)(b), MCA and 44.11.502(7), ARM requires committees to disclose the specific services and relevant purpose, quantity, and subject matter information of those services. By failing to do so, the Commissioner finds AB PAC violated Montana campaign finance and practice law.

Part Three: Attribution

The final allegation raised by this Complaint is that the AB PAC ad did not include all required elements of the ‘Paid for by’ attribution. Mont. Code Ann. §13-35-225(1)(b), requires “for election communications, electioneering communications, or independent expenditures financed by a political committee, the name of the committee, the name of the committee treasurer, deputy treasurer, secretary, vice chairperson, or chairperson, as designated

pursuant to 13-37-201(2)(b), and the address of the committee or the named committee officer”. The attribution message originally included by AB PAC on the ad did not meet these requirements, as it failed to include both the name of the committee treasurer and the committee address (FOF No. 1).

Montana law requires an accelerated review (“as soon as practicable”) of a campaign practice complaint alleging an attribution violation. Accordingly, AB PAC was contacted by the Commissioner’s office upon receipt of the complaint. In its response, AB PAC stated the lack of committee treasurer or address information in its attribution was an oversight, and provided an updated attribution statement adding the name of the committee treasurer and the committee address (FOF No. 4). The response also provided a screenshot of the ad with this amended attribution message applied. AB PAC both notified the COPP of what the complete attribution message should have stated and updated the attribution message on the ad to comply with the requirements of Mont. Code Ann. §13-35-225(1)(b).

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

1. The Commissioner is to immediately assess the merits of the attribution Complaint. §13-35-225(5), MCA. The Commissioner found merit to the attribution Complaint and hereby memorializes that finding.
2. The Commissioner shall notify the committee of the merit finding, requiring the committee to bring the material into compliance. §13-35-225(6)(a), MCA. The COPP by providing Notice of Non-compliant Election Communication, did this and hereby memorializes the Notice.

3. The committee is provided 2 business days to bring the material into attribution compliance §13-35-225(6)(a)(ii), MCA.

Under Montana law the committee with the attribution deficiency is relieved of a campaign practice violation, provided it promptly carries out the attribution correction. AB PAC has met these duties and is therefore relieved of a campaign practice violation under Mont. Code Ann. §13-35-225(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. 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 AB PAC 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).

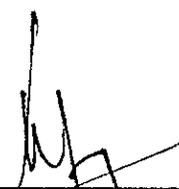
Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the above Sufficiency Findings, a civil fine is justified. Mont. Code Ann. § 13-37-124. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying a civil fine or civil prosecution of AB PAC. 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. §§13-37-201(2)(b), 13-37-229(2)(b), and 44.11.305, ARM. *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 27th day of August 2020.



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