

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Perkins v. Downing No. COPP 2020-CFP-017	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION
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On May 27, 2020, John Perkins of Helena, MT filed a campaign practices complaint against Troy Downing of Bozeman. The complaint alleged that candidate Downing failed to include the proper ‘paid for by’ attribution on campaign materials and failed to disclose a campaign contribution or expenditure activity as required.

SUBSTANTIVE ISSUES ADDRESSED

This decision addresses properly attributing (paid for by) an election communication and the proper reporting of a in kind candidate contribution to his own campaign.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: Troy Downing filed a C-1 Statement of Candidate as a Republican candidate for State Auditor with the COPP on June 26, 2019. (Commissioner’s Records).

Finding of Fact No. 2: On May 28, 2020, the COPP sent a letter to candidate Downing notifying him that this Complaint had been received. The letter informed candidate Downing that the attribution portion specifically was merited, as neither the paid campaign Facebook ad and the hand sanitizer/labels mentioned

by the Complaint contained a full 'paid for by' attribution as required, and provided candidate Downing twenty-four hours to bring the material into compliance. The Commissioner also contacted candidate Downing on May 28, 2020 and detailed the steps necessary for the campaign to come into compliance under Montana's attribution law. (Commissioner's Records).

Finding of Fact No. 3: On May 29, candidate Downing added an attribution message stating "Paid for by Troy Downing for Montana PO Box 6668, Bozeman, MT 59771" to his campaign's paid Facebook ad. Candidate Downing also provided his formal response to this Complaint (through Shelby Blake) the same day. The response stated that candidate Downing (referred to throughout the response as The COMMITTEE) "purchased small stickers for use at political campaigns and reported the expense...The campaign stickers are of a very small size and state, simply, "TROY DOWNING FOR MONTANA, Paid for by Troy Downing for Montana". Due to the extreme small size of the stickers, it was not practical to include the COMMITTEE address". No complete 'paid for by' attribution message was included within this response regarding these stickers, nor did the pictures of stickers provided include address or partisan affiliation as part of the attribution message or otherwise on the material. A copy of this sticker had not been provided to the COPP by the Downing campaign prior to this response. (Commissioner's Records).

The response additionally stated that "Troy Downing purchased 25 small bottles of hand sanitizer at the market price of \$50 on 04/22/2020 and donated these to the campaign for an event in Helena...A \$50 amendment to this report has been filed and includes this small in kind campaign donation". The response indicated that the campaign stickers described above had been affixed to the bottles of hand sanitizer prior to distribution by candidate Downing, and that as of May 29 the campaign had ceased distribution of these materials "pending an opinion of compliance from this office". (Commissioner's Records).

Finding of Fact No. 4: Candidate Downing originally filed a C-5 campaign finance report dated April 16, 2020 through May 14, 2020 on May 19. This report did not disclose candidate Downing's \$50 in-kind contribution of hand sanitizer to his campaign. (Commissioner's Records).

Finding of Fact No. 4A: Candidate Downing filed an amended version of his April 16, 2020 through May 14, 2020 campaign finance report on May 29, 2020. This version of the report disclosed

candidate Downing as receiving an in-kind contribution from himself of "WildRye Distillery" Hand Sanitizer #25 Bottles at \$2 per bottle", worth \$50.00 total. (Commissioner's Records).

DISCUSSION

The Commissioner examines each of the allegations in this matter.

Attribution

The Complaint alleges candidate Downing failed to include the required 'Paid for by' attribution on a variety of campaign materials. A COPP review conducted immediately after this Complaint was filed determined that one paid Facebook ad and hand sanitizer/labels contained a complete attribution statement.

§13-35-225(1)(a) and (2), MCA, provide the attribution requirements for candidates:

13-35-225. Election materials not to be anonymous -- notice -- penalty. (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. The attribution must contain:

(a) for election communications or electioneering communications financed by a candidate or a candidate's campaign finances, the name and the address of the candidate or the candidate's campaign

(2) Communications in a partisan election financed by a candidate or a political committee organized on the candidate's behalf must state the candidate's party affiliation or include the party symbol.

Each of the paid Facebook ad and hand sanitizer/labels qualify as election communications under §13-1-101(14), MCA because they support

candidate Downing directly, and the Downing campaign did not dispute the idea that it financed these materials.

Montana law requires an accelerated review (“as soon as practicable”) of a campaign practice complaint alleging an attribution violation. Accordingly, Candidate Downing was immediately contacted by the Commissioner’s office notifying of the attribution deficiency.

The law governing complaints of failure to properly attribute political material 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 material into compliance. §13-35-225(7)(a), MCA. The Commissioner, by both telephoning Candidate Downing and including the Notice of Non-compliant Election Communication within the complaint response letter, did this and hereby memorializes the Notice.

3. The Candidate is provided 24 hours to bring the material into attribution compliance (§13-35-225(7)(b), MCA).

Under Montana law the Candidate with the attribution deficiency is relieved of a campaign practice violation, provided he promptly carries out the attribution correction.

Candidate Downing did add a message to his paid Facebook ad stating it was “Paid for by Troy Downing for Montana PO Box 6668, Bozeman Montana 59771” within 24 hours (FOF No. 3). This statement, however, failed to include candidate Downing’s partisan affiliation. For that reason, the material was not brought fully into compliance, as the requirement of §13-35-225(2), MCA was

not met. The campaign's failure to bring the material into full compliance within 24 hours violates §13-35-225(6)(a)(ii), MCA.

Regarding the hand sanitizer/labels, candidate Downing's response to this Complaint stated that the campaign "purchased small stickers for use at political campaigns" and affixed the stickers to bottles of hand sanitizer for distribution at campaign events (FOF No. 3). The response goes on to state that "The campaign stickers are of a very small size, and state, simply, "TROY DOWNING FOR MONTANA, Paid for by Troy Downing for Montana. Due to the extreme small size of the stickers, it was not practical" to include candidate Downing's address on the stickers. The response's discussion of the stickers concludes by stating "The COMMITTEE¹ understands there is an exception to complete attribution if it is not practical to include. A sample of the sticker is included for review" and indicated the stickers would no longer be distributed by the campaign until receiving "an opinion of compliance" from the COPP. The response did not include a copy of the complete 'Paid for by' attribution for the stickers.

The Downing campaign is correct in its assertion that certain materials are exempted from including the full 'Paid for by' attribution due to their size limitations. However, that does not mean the materials may just be distributed without any attribution information being provided. §13-35-225(3) states that:

If a document or other article of advertising is too small for the requirements of subsections (1) and (2) to be conveniently included, the candidate responsible for the material or the person financing the communication shall file a copy of the article with the

¹ Throughout the response, candidate Downing is referred to as the COMMITTEE

commissioner of political practices, together with the required information or statement, at the time of its public distribution.

§13-35-225(3) is meant only to cover materials that are truly too small to contain a full attribution message (golf tees or golf pencils, for example), and this exception is very rarely granted. Even when the Commissioner determines a material is truly too small to include the full attribution, the candidate or committee financing the material is required to provide a copy of the material along with the full attribution statement to be considered compliant.

The Downing campaign did not provide a copy of the stickers in question to the COPP at any time before this Complaint was filed, nor did the campaign provide the full attribution information. The Downing campaign assumed the stickers qualified for the exemption provided under Mont. Code Ann. §13-35-225(3) without contacting the COPP. Had they done so, they would have been informed that the stickers did not qualify for this exemption, as they contained plenty of room to include the full attribution. Had the stickers been determined to be too small to include a full attribution message, the Downing campaign would have been required to provide the COPP with copies of the material in addition to the full attribution statement. The Downing campaign did neither, and the stickers were distributed on the sanitizer bottles without the full attribution message.

Candidate Downing did not take the necessary steps to bring both the Facebook ads and hand sanitizer bottle labels into compliance with Mont. Code Ann. § 13-35-225. Had candidate Downing simply and fully corrected the attribution information for the election communications as notified, the

Commissioner would have relieved the candidate of a campaign practice violation under §13-35-225(7)(b), MCA.

The failure to include the campaign address or partisan affiliation on the stickers is a violation of Mont. Code Ann. §13-35-225(1)(a) and (2). The campaign failed to bring the campaign material into full compliance within 24 hours of notice, a violation of Mont. Code Ann. §13-35-225(6)(a)(ii).

Reporting the Hand Sanitizer

The Complaint also alleges that candidate Downing failed to report hand sanitizer distributed by his campaign as either a contribution received or expenditure made by his campaign.

Candidate Downing's response stated that he personally "purchased 25 small bottles of hand sanitizer at the market price of \$50 on 04/22/2020 and donated these to the campaign for an event in Helena" (FOF No. 3). Despite donating \$50 worth of hand sanitizer to his campaign on April 22, candidate Downing did not disclose this in-kind contribution as being received on the relevant campaign finance report as originally filed (FOF No. 4). Candidate Downing amended the relevant finance report to include this in-kind contribution on May 29, 2020, after his receipt of this Complaint (FOF No. 4A).

When reporting contributions received, the candidate must include "the full name, mailing address, occupation, and employer, if any, of each person who has made aggregate contributions, other than loans, of \$35 or more to a candidate or political committee, including the purchase of tickets and other items for events, such as dinners, luncheons, rallies, and similar fundraising

events”, Mont. Code Ann. §13-37-229(1)(b). Further, 44.11.403(1), ARM states that “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”, while 44.11.403(2) adds that “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”.

By personally purchasing hand sanitizer and donating it to his campaign for distribution, candidate Downing’s campaign received a reportable in-kind contribution. Candidate Downing stated this contribution was made on April 22. 44.11.403(2), ARM dictates that it should have been disclosed on the financial report covering April 22. Candidate Downing failed to originally include this contribution on the relevant campaign finance report, disclosing it only after this Complaint was filed. By not originally disclosing his personal in-kind contribution of hand sanitizer to the campaign on the relevant campaign finance report, candidate Downing violated both §13-37-229(1)(b), MCA and 44.11.403(2), ARM.

FINDINGS

Candidate Downing ran a paid Facebook advertisement and affixed a campaign label on at least 25 hand sanitizer bottles which did not include a complete attribution statement. Upon finding merit in the attribution complaint, the Commissioner provided candidate Downing 24 hours to update the material with a full attribution statement. Candidate Downing failed to update the material following the notification.

Sufficiency Finding No. 1: Candidate Downing failed to properly attribute election communication materials on two occasions following notification.

The Commissioner finds candidate Downing violated Montana's campaign finance and practices law by failing to properly attribute election material, a violation of Montana campaign finance law.

Candidate Downing failed to timely report an April 22, 2020 in-kind contribution of hand sanitizer valued at \$50.00. The Commissioner notes candidate Downing included the contribution on an amended report upon receipt of the complaint.

Sufficiency Finding No. 2: There are sufficient facts to show that Downing campaign finance report failed to timely disclose an in kind contribution from the candidate in the amount of \$50.00.

The Commissioner finds candidate Downing violated Montana's campaign finance and practices law by failing to timely disclose an in kind contribution from the candidate in the amount of \$50.00.

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 Troy Downing 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).

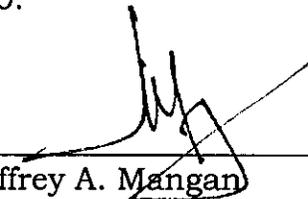
Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the above Sufficiency Findings, a civil fine is justified. Mont. Code Ann. § 13-37-124. The Commissioner hereby issues a "sufficient evidence" Finding and Decision justifying a civil fine or civil prosecution of Troy Downing. 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. §§ 13-35-225, 13-37-229(1)(b). *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 16 day of July 2020.



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