

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Vaughey v. Fasbender No. COPP 2020-CFP-038	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATIONS
---	---

On September 15, 2020, Linda Vaughey of Helena, MT filed a campaign practices complaint against Michael Fasbender, also of Helena. The complaint alleged that candidate Fasbender failed to report a campaign advertisement, professional photograph used by the campaign, a campaign float supporting his candidacy, and campaign yard signs as either contributions received or expenditures made by his campaign.

SUBSTANTIVE ISSUES ADDRESSED

The proper and timely filing of candidate campaign in-kind contributions and campaign expenditures.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: Michael Fasbender filed a C-1 Statement of Candidate as a candidate for County Commission in Lewis and Clark County with the COPP on March 17, 2020. Candidate Fasbender filed as a 'C' box candidate, indicating his combined campaign contributions and expenditures would exceed \$500.00. As a 'C' box candidate, candidate Fasbender had C-5 campaign finance reports due with the COPP on March 20, April 20, May 20, June 20, August 20, and September 20 of 2020. (Commissioner's Records.)

Finding of Fact No. 2: This Complaint contained copies of a campaign ad allegedly run by candidate Fasbender in the Helena Independent Record newspaper on May 10, 2020 that included a professional photograph of candidate Fasbender and his family and an attribution statement indicating it had been paid for by candidate Fasbender; copies of several posts made by candidate Fasbender to his Facebook page utilizing this professional photograph; a picture of a “GOP float” at the Lincoln Montana Independence Liberty Parade posted on Facebook by the Lewis & Clark County Republican Central Committee that included campaign signs supporting candidate Fasbender; and several pictures of publicly displayed campaign yard signs supporting candidate Fasbender. (Commissioner’s Records.)

Finding of Fact No. 3: On March 19, 2020, candidate Fasbender timely filed his initial C-5 campaign finance report, dated January 1, 2020 through March 15, 2020. This report did not disclose candidate Fasbender as receiving any contributions or making any expenditures. (Commissioner’s Records.)

Finding of Fact No. 4: On April 21, 2020, candidate Fasbender timely filed a periodic C-5 campaign finance report, dated March 16, 2020 through April 15, 2020. This report did not disclose candidate Fasbender as receiving any contributions or making any expenditures. (Commissioner’s Records.)

Finding of Fact No. 5: On May 20, 2020, candidate Fasbender filed a C-7 Notice of Pre-Election Contributions¹, dated April 16, 2020 through May 14, 2020. This C-7 disclosed candidate Fasbender as receiving one monetary contribution of \$550.00 from himself. (Commissioner’s Records.)

Finding of Fact No. 6: On June 22, 2020, candidate Fasbender filed a periodic C-5 campaign finance report, dated April 16, 2020 through June 22, 2020. This report disclosed candidate Fasbender’s monetary contribution of \$550.00 from himself but did not disclose any additional contributions received or expenditures made by the campaign. (Commissioner’s Records.)

Finding of Fact No. 6A: On September 21, 2020, candidate Fasbender filed an amended version of his April 16, 2020 through

¹ Form C-7, the Notice of Pre-Election Contributions, is meant to disclose contributions received of \$100.00 or more “if received between the 15th day of the month preceding an election in which the candidate participates and the day of the election” as dictated under §13-37-226(1)(c), Mont. Code Ann. Form C-7 is not meant to disclose expenditures and does not provide an option to do so.

June 22, 2020 periodic C-5 campaign finance report. This amended report disclosed candidate Fasbender as receiving one in-kind contribution valued at \$500.00 from himself for “reusing old campaign signs”, as well as one in-kind contribution valued at \$110.00 from an individual contributor for “public use of copyrighted photograph”. This amended report also disclosed candidate Fasbender as making one campaign expenditure of \$510.00 to the Helena Independent Record dated May 8, 2020. Platform was provided as “Helena IR”, Quantity as “Ad in voter information guide”, and Subject Matter was “Promoting candidate”. (Commissioner’s Records.)

Finding of Fact No. 7: Candidate Fasbender did not file a C-5 campaign finance report on or before August 20, 2020. (Commissioner’s Records.)

Finding of Fact No. 7A: On September 21, 2020, candidate Fasbender filed a periodic C-5 campaign finance report, dated June 23, 2020 through August 15, 2020. This report was originally due on or before August 20, 2020. (Commissioner’s Records.)

Finding of Fact No. 8: On September 21, 2020, candidate Fasbender timely filed a C-5 periodic campaign finance report, dated August 16, 2020 through September 15, 2020. (Commissioner’s Records.)

Finding of Fact No. 9: On September 24, 2020, candidate Fasbender emailed the COPP with his response to this Complaint. The response stated that candidate Fasbender placed a paid campaign ad in the Helena Independent Record in May of 2020 and Amended the relevant campaign finance report after receipt of the Complaint to disclose this expenditure. The response also stated that the campaign received permission from the photographer to use one copyrighted photograph on certain campaign materials, and that the relevant campaign finance report was amended after receipt of this Complaint to disclose that as an in-kind contribution received from the photographer; the response notes that the photo in question was “one of many family pictures that we had taken to celebrate the arrival of our new baby. It was not taken for nor paid by the campaign”. The response stated of the campaign float that the campaign did not own or operate it, nor did the campaign pay to participate; candidate Fasbender noted that candidates beyond himself had campaign signs displayed on this float. Candidate Fasbender states that he did participate in the parade by riding a horse alongside the float. Finally, the response stated that candidate Fasbender did utilize campaign yard signs purchased for

previous campaigns to support his current 2020 candidacy. (Commissioner's Records.)

Finding of Fact No. 10: On March 9, 2020, Michael Fasbender filed to run for Lewis & Clark County Commissioner District 2. The 2020 filing fee for Lewis & Clark County Commissioner was \$384.31. (Lewis & Clark County.)

DISCUSSION

The complaint alleges that candidate Fasbender failed to report several election contributions and expenditures on his campaign finance reports, including a paid campaign ad published in the Helena Independent Record newspaper, the use a professional photograph, a campaign float supporting his candidacy, and campaign yard signs promoting his candidacy. The Commissioner examines the allegations.

Contributions

Mont. Code Ann. §13-1-101(9), defines the term contribution:

- (9) (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) The term 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.
- (c) This definition does not apply to Title 13, chapter 37, part 6.

Similarly, §13-1-101(18), MCA, defines the term expenditure:

(18) (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) The term 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 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.

(c) This definition does not apply to Title 13, chapter 37, part 6.

Mont. Code Ann. §13-37-225(1) requires that candidates file "periodic electronic reports of contributions and expenditures made by or on the behalf of a candidate". §13-37-229, MCA, lays out the requirements for disclosing contributions received and expenditures made on these finance reports:

13-37-229. Disclosure requirements for candidates, ballot issue committees, political party committees, and independent committees. (1) The reports required under 13-37-225 through 13-37-227 from candidates, ballot issue committees, political party committees, and independent committees must disclose the following information concerning contributions received:

(a) the amount of cash on hand at the beginning of the reporting period;

(b) 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;

(c) for each person identified under subsection (1)(b), the aggregate amount of contributions made by that person within the reporting period and the total amount of contributions made by that person for all reporting periods;

(d) the total sum of individual contributions made to or for a political committee or candidate and not reported under subsections (1)(b) and (1)(c);

(e) the name and address of each political committee or candidate from which the reporting committee or candidate received any transfer of funds, together with the amount and dates of all transfers;

(f) each loan from any person during the reporting period, together with the full names, mailing addresses, occupations, and employers, if any, of the lender and endorsers, if any, and the date and amount of each loan;

(g) the amount and nature of debts and obligations owed to a political committee or candidate, in the form prescribed by the commissioner;

(h) an itemized account of proceeds that total less than \$35 from a person from mass collections made at fundraising events;

(i) each contribution, rebate, refund, or other receipt not otherwise listed under subsections (1)(b) through (1)(h) during the reporting period;

(j) the total sum of all receipts received by or for the committee or candidate during the reporting period; and

(k) other information that may be required by the commissioner to fully disclose the sources of funds used to support or oppose candidates or issues.

(2) (a) Except as provided in subsection (2)(c), the reports required under 13-37-225 through 13-37-227 from candidates, ballot issue committees, political party committees, and independent committees must disclose the following information concerning expenditures made:

(i) the full name, mailing address, occupation, and principal place of business, if any, of each person to whom expenditures have been made by the committee or candidate during the reporting period, including the amount, date, and purpose of each expenditure and the total amount of expenditures made to each person;

(ii) the full name, mailing address, occupation, and principal place of business, if any, of each person to whom an expenditure for personal services, salaries, and reimbursed expenses has been made, including the amount, date, and purpose of that expenditure and the total amount of expenditures made to each person;

(iii) the total sum of expenditures made by a political committee or candidate during the reporting period;

(iv) the name and address of each political committee or candidate to which the reporting committee or candidate made any transfer of funds, together with the amount and dates of all transfers;

(v) the name of any person to whom a loan was made during the reporting period, including the full name, mailing address, occupation, and principal place of business, if any, of that person and the full names, mailing addresses, occupations, and principal places of business, if any, of the endorsers, if any, and the date and amount of each loan;

(vi) the amount and nature of debts and obligations owed by a political committee or candidate in the form prescribed by the commissioner; and

(vii) other information that may be required by the commissioner to fully disclose the disposition of funds used to support or oppose candidates or issues.

(b) 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.

(c) A candidate is required to report the information specified in this subsection (2) only if the transactions involved were undertaken for the purpose of supporting or opposing a candidate.

By registering with the COPP as a 'C' box candidate, candidate Fasbender was required to file periodic campaign finance reports, 44.11.302(2), ARM. While candidate Fasbender generally did file such reports as required (see *Other Issues* for further discussion), he did not report receiving any contributions or making any expenditures prior to receipt of this complaint for any of the four specific activities noted by the complainant (FOF Nos. 3-7).

Newspaper ad

This complaint included a copy of an advertisement supporting candidate Fasbender allegedly published by the Helena Independent Newspaper on May 10, 2020 (FOF No. 2). The ad included an attribution statement of "Paid for by Mike Fasbender for County Commission, PO Box 651, Helena, MT 59624. Non-Partisan". No in-kind contributions received or expenditures made by the campaign pertaining to this advertisement were reported by candidate Fasbender on campaign finance reports filed with the COPP prior to the receipt

of this complaint. On September 21, 2020, candidate Fasbender amended the relevant finance report to disclose a campaign expenditure of \$510.00 for this ad (FOF No. 6A). Candidate Fasbender's response to this complaint confirmed his campaign had paid to run this advertisement (FOF No. 9).

The paid newspaper ad qualifies as a campaign expenditure under Mont. Code Ann. §13-1-101(18), as candidate Fasbender used campaign funds to purchase material of value meant to support his candidacy. In failing to disclose the \$510.00 expenditure on campaign finance reports prior to receipt of this complaint, candidate Fasbender failed to comply with the expenditure disclosure requirements of Mont Code Ann. §13-37-229(2), a Montana campaign finance and practice violation.

Sufficiency Finding No. 1: Candidate Fasbender failed to timely disclose an expenditure of \$510 for an election communication.

The Commissioner finds candidate Fasbender violated Montana campaign finance law by failure to timely disclose a campaign expenditure in the amount of \$510. The Commissioner notes candidate Fasbender did amend his June periodic campaign finance report to include the expenditure upon notice of the complaint.

Photographs

The complaint alleges candidate Fasbender used a professional photograph on several materials meant to support his candidacy (FOF No. 2). This complaint notes that the photograph in question was included in the campaign advertisement that appeared in the Helena Independent Record newspaper, a Facebook post made by candidate Fasbender on May 9, and a

Facebook post made by candidate Fasbender on May 13. The photograph is of candidate Fasbender and his family and includes a copyright from the photographer. Candidate Fasbender did not report the receipt of professional photographs as an in-kind campaign contribution on C-5 finance reports filed prior to this complaint, nor did he report any campaign expenditures to obtain professional photographs. Candidate Fasbender's September 21 amended campaign finance report disclosed the campaign as receiving an in-kind contribution from the photographer for use of this copyrighted material (FOF No. 6A). Candidate Fasbender's response indicated the campaign obtained permission from the photographer to use this copyrighted image on his campaign materials but that no campaign funds were expended to obtain the material (FOF No. 9).

The provision of this copyrighted photograph to candidate Fasbender's campaign would qualify as a campaign contribution because it represents the receipt of an object "of value" by the campaign meant to help support candidate Fasbender's candidacy, Mont. Code Ann. §13-1-101(9). Candidate Fasbender did not report this \$110 in-kind campaign contribution on his periodic C-5 finance report upon receipt of the contribution, a Montana campaign finance violation.

Sufficiency Finding No. 2: Candidate Fasbender failed to timely disclose an in-kind contribution valued at \$110 for the use of a photograph in election materials.

The Commissioner finds candidate Fasbender violated Montana campaign finance law by failure to timely report the receipt of an in-kind campaign

contribution. The Commissioner notes candidate Fasbender did amend his June periodic campaign finance report to include the in-kind contribution upon notice of the complaint.

Lincoln Campaign Parade Float and Rodeo

The complaint also alleges campaign signs supporting candidate Fasbender were publicly displayed on a float at a parade in Lincoln, Montana (FOF No. 2). The pictures included within the complaint were originally posted to Facebook by the Lewis & Clark County Republican Central Committee, which refers to the float as “the great GOP float”. The float displayed campaign signs for Montana candidate Julie Dooling and Montana candidate for the United States Senate Steve Daines in addition to candidate Fasbender. Candidate Fasbender’s response to this complaint stated that he neither owned or operated the float in question but he did participate by riding alongside the float (FOF No. 9). He further stated that he participated in the parade by riding a horse alongside the float but that participation in the parade was free for both himself and the float.

No evidence suggests that candidate Fasbender was involved in the creation or operation of this “great GOP float”. According to candidate Fasbender’s response, no fee was charged for participation in this parade. The facts in this case provide insufficient evidence that candidate Fasbender received a contribution as defined under Mont. Code Ann. §13-1-101(9). It appears participation on this particular float was determined by the Lewis & Clark County Republican Central Committee. The allegation that the Lincoln,

MT campaign float represents an unreported in-kind contribution received by candidate Fasbender is hereby dismissed.

On July 5, 2020, candidate Fasbender posted on his campaign's facebook page the following message with an image from the day's rodeo event (emphasis added):

"Action from the Lincoln Rodeo today. Thank you to all the workers and volunteers who made the event a success, and thank you to all the spectators who came out to enjoy the rodeo and parade. **Conspicuously placed orange sponsor sign in the background.** Happy Independence Day! God Bless America!!"

The post referred to a Fasbender campaign sign along the rodeo's sponsor fence. Candidate Fasbender has not reported the sponsorship expenditure on his campaign finance report, a Montana campaign finance violation.

Sufficiency Finding No. 3: Candidate Fasbender failed to disclose a sponsorship expenditure on his campaign finance report.

The Commissioner finds candidate Fasbender violated Montana campaign finance law by failure to report a sponsorship expenditure for the Lincoln rodeo held on July 4 and 5, 2020.

Campaign Yard Signs

The complainant also alleges yard signs supporting candidate Fasbender were not reported as campaign expenses on campaign finance reports filed by the candidate. The complaint included photographs of the signs publicly displayed in various locations. Candidate Fasbender did not report receiving any in-kind contributions for the use of old campaign signs or campaign expenditures for the purchase of new signs prior to this complaint. The September 21 amended C-5 finance report disclosed an in-kind contribution to

the campaign from candidate Fasbender for the re-use of campaign signs from a previous campaign (FOF No. 6A). Candidate Fasbender's response confirms the campaign re-used old yard signs to support his 2020 candidacy (FOF No. 9).

The reuse of old campaign signs by a candidate has previously been determined to represent a reportable contribution by the candidate. *Craft v Kluesner*, COPP-2018-CFP-036, for example, noted that "used or recycled campaign yard signs qualify as something "of value to support or oppose a candidate" and are reportable as in-kind contributions". In failing to timely and accurately report his campaign's re-use of old campaign yard signs, candidate Fasbender violated Montana's contribution disclosure requirements under Mont. Code Ann. §13-37-229(1).

Sufficiency Finding No. 4: Candidate Fasbender failed to timely disclose an in-kind contribution valued at \$500 for the re-use of previously purchased yard signs from an earlier campaign.

The Commissioner finds candidate Fasbender violated Montana campaign finance law by failure to timely report the receipt of an in-kind campaign contribution. The Commissioner notes candidate Fasbender did amend his June periodic campaign finance report to include the in-kind contribution upon notice of the complaint.

Other Issues

Mont. Code Ann. §13-37-226(1)(b), required candidates file C-5 finance reports on or before March 20, April 20, May 20, June 20, August 20, and September 20 of 2020. Candidate Fasbender did not file a campaign finance

report on or before May 20, 2020 for the period of April 15 to May 14, 2020. It appears candidate Fasbender instead filed a campaign finance form C-7 on May 20. At that specific time, the C-7 campaign finance form is designed to report contributions from May 15 to Primary election day. Candidate Fasbender did file a C-5 campaign finance report for the period of April 15 to June 15, 2020 (30 days late for the April 15 to May 14, 2020 reporting period). Additionally, candidate Fasbender failed to file his August 20 campaign finance report for the period of June 16 to August 15, 2020 as required, instead filing this report thirty-two days late, on September 21 (FOF Nos. 7, 7A). Failure to timely file campaign finance reports is a Montana campaign finance violation. A review of candidate Fasbender's finance reports indicate he failed to report the \$384.31 filing fee for the position of Lewis & Clark County Commissioner (FOF No. 10).

Sufficiency Finding No. 5: Candidate Fasbender failed to timely file his May 20 and August 20, 2020 periodic campaign finance reports.

Sufficiency Finding No. 6: Candidate Fasbender failed to report the \$384.31 filing fee for the position of Lewis & Clark County Commissioner.

The Commissioner finds candidate Fasbender violated Montana campaign finance law by failure to timely two periodic campaign finance reports and the failure to report the filing fee for the position of County Commissioner.

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 candidate Fasbender 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 Candidate Fasbender. 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).

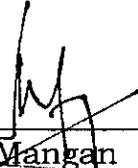
Should the County Attorney waive the right to prosecute (*id.*, at (2)) or fail to prosecute within 30 days (*id.*, at (1)) this Matter returns to this Commissioner for possible prosecution.

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 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(1)(b), 229. *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 30th day of September, 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