

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Blake v Vote Yes Whitefish No. COPP 2012-CFP-005	Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana’s Campaign Practices Act
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Vote Yes Whitefish (VYW) draws its identity and existence through registration, with the Commissioner, as a political action committee or PAC. VYW has been registered as a PAC since April 19, 2011. Whitefish resident Jennifer Asebrook was listed as treasurer of VYW¹ throughout the entire time it has been registered as a political committee.

On February 23, 2012, Whitefish resident Rick Blake filed a complaint against VYW alleging violations based on the late filing of campaign finance reports.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: 1) Timely reporting of contributions to and expenditures by a PAC; 2) *De*

¹ VYW principals interviewed by the Commissioner’s investigator agreed that Asebrook was listed as treasurer “in name only” with other volunteers assigned the duty of actually preparing and filing campaign finance reports for VYW. (Commissioner’s records.)

minimis and/or excusable neglect theories; and, 3) Mitigation as applied to late filing.

FINDING OF FACTS

The facts necessary for this Decision are as follows:

Finding of Fact No. 1. VYW is a political action committee or PAC

(Commissioner's records).

Finding of Fact No. 2. VYW's PAC registration forms state it exists to support levy requests for Whitefish schools. (Commissioner's records).

Finding of Fact No. 3. A mill levy vote was held on May 3, 2011 for the Whitefish School District No. 44 (Flathead County, Montana) operating levy.

Both the Whitefish elementary and high school proposed mill levies were approved in the May 3, 2011 vote. (Certificate of Election, Flathead County, Commissioner's records).

Finding of Fact No. 4. VYW was involved in the 2011 mill levy vote, advocating for passage of the mill levy. (Commissioner's records).

Finding of Fact No. 5. VYW's involvement in the 2011 mill levy vote was reported on January 10, 2014, through a VYW campaign finance report for 4-18-2011 through 12-30-2011. The report shows receipts of \$925.00 and expenditures of \$901.60. (Commissioner's records).

Finding of Fact No. 6. A mill levy vote was held on May 8, 2012 for the Whitefish School District No. 44 (Flathead County, Montana) operating levy. The Whitefish high school proposed mill levy was approved in the May 8, 2012 vote. (Certificate of Election, Flathead County, Commissioner's records).

Finding of Fact No. 7. VYW was involved in the 2012 mill levy vote, advocating for passage of the mill levy. (Commissioner's records).

Finding of Fact No. 8. VYW's involvement in the 2012 mill levy vote was reported on January 10, 2014, through a VYW campaign finance report for 1-05-2012 through 12-31-2012. While there is a 4 day gap between the two VYW reports (see FOF No. 5) the later report is consecutive as it begins with the \$23.40 cash balance left if the earlier report. The report shows receipts of \$25,645 and expenditures of \$25,408.29. (Commissioner's records).

DISCUSSION

VYW was registered as a political action committee in Montana during the applicable 2011 and 2012 school bond elections [See FOF Nos. 4-8, See 44.10.327(2)(b) ARM]. VYW accepted contributions and made expenditures in the 2011 and 2012 Whitefish school mill levy elections (*Id.*). This Commissioner finds that VYW is an independent committee as defined by §13-37-226(5) MCA and 44.10.327(1)(b), (2)(b) ARM. Accordingly, this Commissioner determines that this Matter concerns the application of Montana's Campaign Practices law to the actions of an independent political committee.

I. Campaign Practices Law Violations

Montana's campaign practices law has provisions applying to the election expenditure activity of an independent committee. VYW admits that it engaged in election activity, making election expenditures. Accordingly, as an independent committee the VYW is required to file a

report:

a) ...on the 12th day preceding the date of an election in which it participates by making an expenditure

c) ...not more than 20 days after an election in which it participates

by making an expenditure. §13-37-226(5) MCA.

Montana's campaign related laws require full and timely disclosure of campaign contributions and expenditures. A political committee is required to timely file a certification (§13-37-201 MCA), timely keep and maintain accounts of contributions and expenditures (§13-37-208 MCA) and timely file reports to the Commissioner's office of such contributions and expenditures [§13-37-226 MCA]. The reports, once filed, are available for review by the public, thereby providing transparency and shared access to this information.

A. Election Reports

This Commissioner has determined that VYW had pre-election and election contributions and expenditures in regard to the 2011 and 2012 Mill Levy votes. (FOF Nos. 4-8). The school levy elections took place on May 3, 2011 and May 8, 2012. (FF No. 4.) VYW's pre-election PAC reports were due 12 days pre-election or no later than April 21, 2011, and April 26, 2012. (Commissioner's Website Information, 2011 and 2012). VYW's post-election reports were due 20 days post-election or no later than May 23, 2011 and May 28, 2012. The 2011 pre and post-election reports were late filed on January 10, 2014. The 2012 pre and post-election reports were late filed on January 31, 2014.

(Commissioner's records.) The earliest due report (pre-election 2011) was late filed by 32 months while the latest due report (post-election 2012) was late filed by 19 months.

The Commissioner has listed above, Montana law holding that late filings of pre-election and/or post-election campaign finance reports are violations of campaign practices law. The Commissioner determines that sufficient facts exist to show that VFW violated Montana Campaign Practice law by late filing campaign finance reports.

B. Attribution

The documents produced are properly attributed with "Paid for by Vote Yes! Whitefish - Jen Asebrook, Treasurer - P.O. Box 1766, Whitefish, MT. 59937." The Commissioner determines that there are not sufficient facts to show an attribution violation.

II. Enforcement

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must act on a complaint as the law mandates that the Commissioner ["shall investigate," *See*, §13-37-111(2)(a) MCA] investigate any alleged violation of campaign practices law. The mandate to investigate is followed by a mandate to take action as the law requires that if there is "sufficient evidence" of a violation the Commissioner must ("shall notify", *See* §13-37-124 MCA) initiate consideration for prosecution.

Second, having been charged to make a decision, the Commissioner must

follow substantive law applicable to a particular campaign practice decision. In this matter Montana's campaign finance report filing requirements are mandatory: "shall file" [See §13-37-226 MCA]. The filing date requirements are date certain. Therefore, any failure to meet a mandatory, date-certain filing date is a violation of §13-37-226 MCA. Likewise, the disclosure requirements for independent committee election expenditures are mandatory: "...shall report..." 44.10.531(4) ARM.

This Commissioner, having been charged to investigate and decide, hereby determines that VYW has, as a matter of law, violated Montana's campaign practice laws, including §§13-37-225, 226, MCA. Having determined that a campaign practice violation has occurred, 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.

A Commissioner is given discretion ["may", See §13-37-124(1) MCA] in regard to prosecution of a violation. VYW has offered the Commissioner's investigator an explanation for the late filing based on the volunteer nature of the group, leading to failure to designate an individual to be responsible for filing the reports. VYW's explanation implicates several past decisions by this Office involving the legal concepts of *de minimis* or excusable neglect.

The concept of a *de minimis* exception to civil enforcement of a violation of Montana's campaign practice law is set out and defined by the 9th circuit court of appeals in *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth* 556 F. 3d 1021, 1028-29 (9th Cir. 2009). In *Canyon Ferry* the 9th circuit

prohibited civil enforcement of Montana’s campaign finance disclosure requirements, as applied to limited ballot issue activity (limited photocopying, limited staff use and limited use of church property) carried out in support of a ballot initiative. The Court found that these ballot issue services, while technically having some value, could not be subjected to civil enforcement as a violation Montana’s campaign practices law because the “conduct neither causes an economic detriment to the Church nor carries an ascertainable market value.” *Id.* at 1030. The Commissioner has further applied *de minimis* to an expenditure by an incidental committee. *Raffiani v. Montana Shrugged*, COPP-2010-CFP-017.

VYW’s failures can be measured in the number of days by which it late filed. The Commissioner does not apply *de minimis* to VYW’s late filing failures. The Commissioner has refused to apply *de minimis* to a late filing of 71 days [See *Matters of Vincent*, Nos. CPP-2013-CFP-006 and 009] and does not do so in this Matter as it involves late filing of hundreds of days.

The Commissioner now considers excusable neglect. This Office has, based on certain facts, declined prosecution based on late filing by a period of 11 days (See *In the Matter of the Washburn Complaint*, COPP-2013-CFP-002) and by a period of 17 days (See *In the Matter of the Complaint Against CMRG*, decided February 21, 2002). These determinations were, in part, based on an excusable neglect theory stemming from the Commissioner’s determination of genuine confusion among multiple parties over who was to file what and when. However, as discussed in detail in *Matters of Vincent*, Nos. CPP-2013-CFP-006

and 009, intent and motive are not considered in an excusable neglect consideration.

Specifically it is noted that a showing of excusable neglect generally requires justification for error beyond mere carelessness or ignorance of the law. *Empire Lath & Plaster, Inc. v. American Casualty Co.*, 256 Mont. 413, 417, 847 P.2d 276, 278 (1993). Neglect that is "due to forgetfulness and the press of other, more important business is not sufficient to establish excusable neglect." *Foster Apiaries, Inc. v. Hubbard Apiaries, Inc.*, 193 Mont. 156, 161, 630 P.2d 1213, 1216 (1981). A party's busy schedule or inattentiveness to the matter does not constitute excusable neglect. *Matthews v. Don K. Chevrolet*, 2005 MT 164, ¶¶13-15, 327 Mont. 456, ¶¶13-15, 115 P.3d 201, ¶¶ 13-15.

Counsel for VYW, while acknowledging *Empire Lath and Plaster* as current Montana law, urges a reconsideration of the excusable neglect theory to a more relaxed standard (first set out in a bankruptcy proceeding) leading to an equitable decision taking into account of all relevant factors surrounding a party's omission. *Pioneer Inv. Services Co. v. Brunswick Associates Limited Partnership* (1993) 113 S. Ct. 1489. There was no citation to application of a relaxed excusable neglect standard to campaign practices and it seems unlikely that there could be. This Matter demonstrates why.

Montana law dictates that school district bonds, such as the Bond involved in this matter, may not be issued unless authorized by electors in an appropriate school district election. See § 20-9-421 MCA. The school bonds supported by VYW were passed by voters. Among the remedies that that could

be sought for a campaign practice violation is the remedy of voiding the election. §13-35-107 MCA. That remedy has now passed as “[a]n action to void a bond election must be commenced within 60 days of the date of the election in question.”

VYW’s disclosure of the amount, sources and method of receiving and spending \$26,000 in two bond elections came 19 to 32 months after the date of the election. The timing of campaign finance reports under §13-37-226 is mandatory with reports due before an election so that voters can, if they wish, review the information in the reports prior to voting. Improprieties, to the extent addressed by §13-37-226 MCA, are also time limited. VFW’s late filing, while allowing this issue to be resolved, does not remove the harm caused by its late filing. The Commissioner determines an equitable analysis, even if made, could not excuse VFW’s actions any more than could excuse VFW for the harm caused by late reporting. With the above analysis in mind, the late filing violations in this Matter are not appropriate for application of an excusable neglect theory.

Because there is a finding of violation and a determination that, as to late reporting, *de minimis* and excusable neglect theories are not applicable, civil prosecution and/or a civil fine is justified (*See* §13-37-124 MCA). This Commissioner has, through this decision, issued a “sufficient evidence” Finding and Decision justifying civil prosecution under §13-37-124 MCA. Because reporting was required in Lewis and Clark County the violation occurred there and it is the county of venue for an allegation of a campaign

practice violation. See §13-37-124 MCA. The Commissioner will submit to [or “notice to”] the Lewis and Clark County attorney for his review for appropriate civil action. §13-37-124(1) MCA. Should the County Attorney waive the right to prosecute [§13-37-124(2) MCA] or fail to prosecute within 30 days [§13-37-124(1) MCA] this Matter returns to this Commissioner for possible prosecution. *Id.*

Most of the Matters decided by a Commissioner are referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil prosecution as the Commissioner has discretion [“may then initiate” See §13-37-124(1) MCA] in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In 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 Chapter 37, including those of §13-37-226. [See 13-37-128 MCA]. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

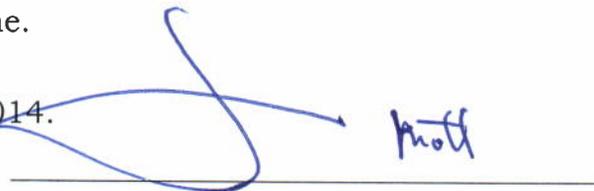
In regard to any such a fine the Commissioner has discretion to determine if mitigation is appropriate to reduce a fine based on the explanation of why a violation occurred or circumstances of payment. See *In the Matter of the Complaint of MacLaren*, COPP-2011-CFP-12. Mitigation means “abatement or diminution of a penalty or punishment imposed by law.” *Black’s Law*

Dictionary, Revised 4th Addition. The VYW effort was a largely volunteer effort. While there was paid staff in the campaign office, the administrative functions, including campaign reporting, were completely volunteer. The VFW response raised mitigation related issues concerning the personal circumstances of the volunteer in charge of filing the campaign finance reports. The Commissioner will further consider the role of, and incapacity of, the volunteer as a potential factor in determining the amount of fine negotiated in this Matter, should VYW choose to settle this Matter with a negotiated fine.

CONCLUSION

Based on the preceding Discussion as Commissioner I find and decide that there is sufficient evidence to show that VYW violated Montana's campaign practices laws, including §§13-37-225, 226 MCA, and that a civil penalty action under § 13-37-128, MCA is warranted. Because this matter involves a reporting violation that occurred in Lewis and Clark county the Commissioner submits the Matter to [or "notices to"] the Lewis and Clark County Attorney for his review for appropriate civil action under section 13-37-124(1) MCA. Upon return to the Commissioner of this Matter by the County Attorney, this Commissioner will assess the amount of civil penalty, should VYW choose to settle this Matter with a negotiated fine.

DATED this 19th day of March, 2014.



Jonathan R. Motl
Commissioner of Political Practices