

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Bomboy v. Todd No. COPP 2014-CFP-030	Decision and Finding of Sufficient Facts Showing a Certain Violation of the Montana Campaign Practices Act
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Jim Bomboy is a resident of Billings, Montana. Gregory Todd is a sitting Montana District Court Judge for the 13th Judicial District, Yellowstone County, Montana. Judge Todd is an unopposed candidate for reelection as Judge in the 2014 general election. On May 27, 2014, Mr. Bomboy filed a complaint with the COPP alleging that Judge Todd engaged in campaign practice violations in connection with campaign spending and by late filing his campaign finance report.

DISCUSSION

The Montana Campaign Practice Act applies to a candidate for the elected office of Judge: "...candidates for nonpartisan offices, including judicial offices, must be nominated and elected according to the provisions [of Title 13]". §13-14-111 MCA. Judge Todd is such a 2014 candidate for judicial office and the Montana Campaign Practices Act therefore applies to his candidacy. The

foundational facts necessary to consider the complaint are as follows:

Finding of Fact No. 1: In December of 2000, Gregory R. Todd was appointed to District Court Judge of the 13th Judicial District, Department 4, Yellowstone County. Judge Todd was appointed by former Governor Marc Racicot to replace retiring Judge Maurice Colberg Jr. In 2002, Judge Todd ran unopposed as a candidate for the position and was elected on November 5, 2002 to serve a six year term. (Secretary of State's (SOS) Website, Helena Independent Record article January 12, 2008).

Finding of Fact No. 2: On March 13, 2008, Judge Todd submitted a C1 Statement of Candidate form with the Commissioner of Political Practices Office (COPP) to run for a second term as District Court Judge, 13th Judicial District, Department 4, Yellowstone County. Jeffrey Mrachek was listed as the Treasurer for Judge Todd's campaign. Judge Todd ran unopposed in the race and was reelected to the position on November 4, 2008. (SOS Website, Commissioner's records).

Finding of Fact No. 3: On February 6, 2014, Judge Todd submitted a C1 Statement of Candidate form with the COPP as the Incumbent candidate to run for a third term as District Court Judge, 13th Judicial District, Department 4, Yellowstone County. Jeffrey Mrachek was listed as the Treasurer for Judge Todd's campaign. (Commissioner's records).

The Commissioner now addresses the issues raised by the Bomboy complaint.

1. Excess Contribution

Montana law required that Judge Todd in his capacity as a 2014 candidate for judicial office (hereafter Candidate Todd) file his first campaign finance report on or before May 22, 2014, reporting contributions and expenditures through May 17, 2014. (§13-27-226(3) MCA). Candidate Todd's campaign, however, filed an additional voluntary campaign finance report on March 10, 2014. (Commissioner's records).

Mr. Bomboy looked to the voluntarily filed first campaign finance report and

saw that the campaign treasurer, Jeffrey Mrachek, was listed as making two contributions of \$170 and \$160. Mr. Bomboy complained that these amounts were in excess of the \$170 contribution limit for individuals contributing to Candidate Todd's campaign. (§13-37-215(1)(a)(iii) MCA adjusted for inflation by ARM 44.10.338).

Candidate Todd's campaign filed (albeit late, see this Decision below) the required 12 day pre-election report, taking campaign finance reporting through May 17, 2014. The Commissioner makes the following finding of fact in regard to this part of the Decision:

Finding of Fact No. 4: Candidate Todd's pre-election report disclosed an excess of contribution of \$160 from one individual. (Commissioner's records).

Each campaign finance report, including the preelection report of Candidate Todd's campaign, is subject to a mandatory inspection by COPP staff within 20 days of the filing date of the report. (§13-37-121 MCA). The COPP staff person who conducted the 20 day inspection of Candidate Todd's campaign pre-election finance report was Kym Trujillo. On June 5, 2014, Ms. Trujillo's inspection determined that the Todd Campaign's pre-election report disclosed an excess contribution from one contributor. Montana law requires that, following inspection, the "commissioner shall immediately notify the person of the noncompliance." Ms. Trujillo promptly notified the Todd campaign of noncompliance and on June 6, 2014 the Todd campaign refunded the excess contribution, sending proof (a copy of the refund check) to the Commissioner.

Mr. Bomboy filed the complaint in this Matter on May 27, 2014. The date of complaint filing therefore fell within the 20 day inspection period (May 23 to June 11, 2014) period of the required pre-election campaign report.¹ This complaint therefore presents the issue of whether a candidate can be held to a violation for accepting an excess campaign contribution when that excess contribution was discovered and corrected during the 20 day inspection period.

The Commissioner hereby determines, based on the facts of this Matter, that the Todd campaign did not engage in a campaign practice violation based on a particular, corrected excess campaign contribution. In way of explanation, the Commissioner has already determined that “[t]he policy of Montana does not favor “got you” campaign practice complaints. Instead, where it is possible to do so, Montana law favors correcting campaign reporting errors.”² *Landsgaard v. Peterson*, COPP-2014-CFP-008. Here, there was one excess campaign contribution, promptly corrected when discovered during the 20 inspection period.³ The excess contribution was fully disclosed and the money had not been used or spent by the campaign, meaning that the only harm lay in the appearance of impropriety stemming from the disclosure. In the circumstances of this Matter the Commissioner applies the *de minimis*

¹ The earlier filed campaign practice report does not affect this analysis as the Commissioner’s office conducted its inspection after the required report was filed, reporting through May 17, 2014.

² Each campaign finance report is inspected within 20 days of filing by the Commissioner’s staff (§13-37-121(1) MCA) and COPP staff are directed to notify the campaign of any readily identifiable issues or non-compliance with reporting requirements. The campaign is then allowed to correct.

³ The COPP has a staff of six people, three of whom (Mary Baker, Kym Trujillo and Karen Musgrave) work full time on campaign finance report inspections during the 20 day inspection periods. Those staff identify and work with candidates to correct hundreds of mistakes in campaign finance reports comparable to the above excess campaign contribution issue.

principle to any claim of campaign practice violation stemming from this particular excess contribution. (See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009).

2. Payment of Filing Fee As a Campaign Expense

Candidate Todd's pre-election campaign finance report shows that candidate Todd paid the \$992.34 candidate filing fee to the Montana Secretary of State, with the candidate later being reimbursed for that expense by the campaign account.⁴ Mr. Bomboy complains of the campaign's payment of the filing fee, citing to Montana statutes that do not require the listing of the filing fee as a campaign expense. §13-1-101(11)(b)(ii) MCA.

Mr. Bomboy misunderstands the meaning of the above statute. The fact that a filing fee need not be listed as a campaign expense does not mean that a candidate's campaign committee cannot choose to pay the filing fee, at which point the payment does become a campaign expense that must be reported. In fact, many campaigns do list and pay the filing fee as a campaign expense. (Commissioner's records).⁵ This part of the complaint is dismissed as lacking a basis in law.

3. Closing Report Issues Associated with the 2008 Campaign

Candidate Todd filed his closing report for his 2008 campaign (see FOF No.

⁴ The campaign finance report, while understandable, lacks a final reconciliation showing repayment of the Candidate's "loan" made by payment of the filing fee.

⁵ See May 21 and May 22, 2014 Form C-5 for 2014 legislative candidates Tammi Fisher and Ronalee Skees reporting a campaign expense of the \$15 candidate filing fee. See also the June 4, 2014 Form C-5 report of PSC candidate John Campbell reporting a campaign expense of \$979.80 for the candidate filing fee. See further, the May 27, 2000 and May 21, 2012 C-5 reports for governor candidates William Fisher and Ken Miller reporting a filing fee of \$1,791.27 and \$1,945.29, respectively, as a campaign expense.

2) on November 18, 2009. That report disclosed an expense payment of \$774.66 to Jeffrey Mrachek for “campaign accounting and reporting” services. (Commissioner’s records). This expense payment used the remaining funds in Candidate Todd’s campaign account, creating a zero balance.

Mr. Bomboy complains that this expense “disposed of surplus campaign funds in a manner inconsistent with Montana law.” Because this complaint can be dismissed for other reasons the Commissioner does not discuss or address the statute of limitations issues that would come into play had there been a finding of sufficient facts showing a campaign practice violation.⁶

Mr. Bomboy’s surplus campaign fund complaint is without merit and is rejected. There is nothing wrong with the timing or process by which the campaign of Candidate Todd acted to create and file the closing report to the candidate’s 2008 campaign.⁷ Surplus campaign funds are those funds remaining after the candidate files a closing campaign report (§13-37-240 MCA). The \$774.66 expense was reported by the closing report and, because of the expense, all campaign funds were spent and there were no funds left over as surplus campaign funds.

Further, there is nothing wrong with the amount or nature of the final \$774.66 expense listed in the closing report. Closing reports are necessary because they “close” a campaign, sometimes after a campaign takes in post-

⁶ The statute of limitations is set out at §13-37-130 MCA.

⁷ The COPP accounting and reporting manual for candidates, at page 18, describes closing reports as follows: “Closing reports must be filed when all debts and obligations are satisfied and no further campaign activity is anticipated following an election. Although there is no specific date set in statute, you [the candidate] are encouraged to submit closing reports as soon as possible after the election.”

election contributions and makes post-elections expenses (§13-37-228(3) MCA). Mrachek Popp & Associates is an accounting firm located in Billings, Montana. (Commissioner's records). It is not unusual or improper for the accountant handling the campaign records to charge a fee for doing so. Nor is there anything alarming about the \$774.66 amount charged by Mr Mrachek. There is no merit to the Bomboy complaint concerning the 2008 closing campaign report.

4. Late filing of the May 22, 2014 campaign report

Mr. Bomboy complains that the required pre-election campaign finance report for Candidate Todd was late filed. Montana law requires that district court judge candidates file their campaign finance report "on the 12th day preceding the date on which an election is held." §13-37-225(3) MCA. In 2014 that 12th day preceding the primary election was May 22, 2014. Candidate Todd's campaign, however, filed its campaign finance report on June 5, 2014 (Commissioner's records). That filing was therefore 14 days late.⁸

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. Further, there can be no correction of a failure to timely file since any late filing means that the public and the opposing candidate could have been harmed by untimely, late access to the candidate's campaign information. Still further, there can be no general application of a *de*

⁸ Mr. Mrachek, the campaign treasurer, took responsibility for the late filing, telling Kym Trujillo on June 5, 2014 that he let the filing date "slip past him."

minimis principle to a late filing, as a late filing as brief as one-day can lead to a determination of a campaign practice violation. See the 24 hour supplemental filing requirement for certain post-reporting expenditures and contributions. (§13-37-226(1)(d) MCA).⁹ The Commissioner determines that sufficient facts are shown to establish a violation based on the late filing of the Todd campaign's pre-election campaign finance report.

ENFORCEMENT OF SUFFICIENCY FINDINGS

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must act on, an alleged campaign practice violation 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. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence, as set out in this Decision,

⁹ This Office has, however, 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-CFP-2013-002) and by a period of 17 days (See *In the Matter of the Complaint Against CMRG*, decided February 21, 2002). The legal basis for declining prosecution was not specified in those Decisions but, upon review of those Matters, this Commissioner determined that those decisions to decline prosecution were 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. See discussion in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

to show that Candidate Todd's campaign has, as a matter of law, violated Montana's campaign practice laws, including, but not limited to §13-37-226 MCA and all associated ARMs. 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 timely file was due to oversight. Excusable neglect cannot be applied to oversight. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

Turning to a second level of analysis, on one hand the campaign reporting error was in an uncontested race and could be argued to cause no harm to the public so as to be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. On the other hand, the Commissioner has limited discretion to apply *de minimis* to untimely reporting. Reporting is only valid when it is timely accomplished and any delay demonstrates harm, as shown by the 24 hour reporting that is required for certain contributions and expenditures. There needs to be special circumstances to apply *de minimis* to late reporting and those do not exist when the failure to report is just plain, simple human oversight.

Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil/criminal prosecution and/or a civil fine is justified (See §13-37-124 MCA). The Commissioner

hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution under §13-37-124 MCA. Because of nature of violations (the failure to timely report occurred in Lewis and Clark County) this matter is referred to the County Attorney of Lewis and Clark County for his consideration as to prosecution. §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 and 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 or criminal 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 law, including those of §13-37-226 MCA. (See 13-37-128 MCA). Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

At the point this Matter is returned for negotiation of the fine or for litigation, mitigation principles will be considered. See discussion of mitigation

principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. The Commissioner notes that Mr. Mrachek showed complete cooperation and willingness to explain the oversight in a manner that accepted responsibility. That cooperation will be recognized as a factor supporting mitigation.

DATED this 16th day of June, 2014.



Jonathan R. Motl
Commissioner of Political Practices