

BEFORE THE COMMISSIONER
OF POLITICAL PRACTICES

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| Bonogofsky v. Assembly Action Fund No. COPP-2010-CFP-0009 | Summary of Facts and Finding of Sufficient Evidence To Show a Violation of Montana's Campaign Practices Act |
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Debra Bonogofsky of Billings was a candidate for the Montana House of Representatives, District 57, (HD 57) in the 2010 primary. On June 21, 2010 Bonogofsky filed a complaint with this Office against Assembly Action Fund (AAF). The complaint asserted specific campaign violations (failure to attribute and failure to report certain expenses).

On September 3, 2010 Bonogofsky filed another complaint against the opposing candidate (*Bonogofsky v. Kennedy*, COPP-2010-CFP-0015) and it alleged coordination between the Kennedy campaign and MCRTW such that certain election expenditures by MCRTW became coordinated contributions to the Kennedy campaign. The Decision in *Bonogofsky v. Kennedy*, COPP-2010-CFP-0015 is released simultaneously with this Decision.

I. INTRODUCTION

The 2010 HD 57 primary election involved two candidates, Debra Bonogofsky and Dan Kennedy. Kennedy defeated Bonogofsky in the June 8,

2010 primary election by a vote of 1,467 to 1,218 and, with no Democrat having filed, became a representative to the Montana legislature from HD 57. (SOS website).

Bonogofsky filed her post-election complaint against AAF because she believed that AAF made unreported and undisclosed 2010 HD 57 election expenditures. Bonogofsky complained that the AAF election expenditures were coordinated with Candidate Kennedy such that they became contributions to Candidate Kennedy's campaign.

An election expense such as those addressed in this Decision falls into one of three types of election expense. The first type is that of a candidate election expense. A candidate election expense includes money spent in an election that is contributed to and expended by a candidate. Candidate election expenses are, of course, subject to prohibitions and contribution limits and they must be attributed, disclosed and reported by the candidate. A candidate election expense includes a third party election expense coordinated with a candidate, as a coordinated expense is deemed to be an in-kind contribution to a candidate.

The companion *Bonogofsky v. Kennedy* Decision has determined that the AAF expenses are election expenses. The *Kennedy* Decision further determined that the AAF expenses are an in-kind contribution to Candidate Kennedy, through coordination.

The *Bonogofsky v. Kennedy* decision means the MCRTW election expenses do not fall into one of the remaining two types of election expense;

that is, the AAF expenses are neither an independent expenditure nor an issue advocacy expenditure. An independent expenditure is that of a third party entity independent of a candidate, but focused on a candidate in the election. Any “independent expenditure” must be disclosed, reported, and attributed, albeit by the third party rather than the candidate. An independent expenditure, however, is not attributed as a contribution to a candidate and therefore it is not subject to contribution limits or to reporting by a candidate.

The third type of election expense is that made coincident to the election by a third party entity independent of a candidate, but with the use of the money focused on an issue and not on a candidate. This election expense is called issue advocacy. This “issue advocacy” expense is not considered to be a candidate related election expense and therefore is not subject to campaign practice requirements. Specifically, Montana law does not require that an issue advocacy election expense be attributed, reported or disclosed.¹

II. SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: 1) Coordination; and, 2) Illegal Corporation Contributions.

III. DISCUSSION

This Decision does not repeat, but incorporates and relies on, the determinations and reasoning set out in *Bonogofsky v. Kennedy*, COPP-2010-CFP-0015. The *Bonogofsky v. Kennedy* Decision determined that certain

¹ The 2012 Montana Legislative session considered several bills that would have required reporting and reporting and disclosure of any election expense, including issue advocacy, made within 60 days of the date of an election. None of these bills passed into law. A 2014 ballot initiative has been proposed to address this issue.

election expenses made by or orchestrated by WTP were coordinated with Candidate Kennedy such they became in-kind contributions to Candidate Kennedy. Among these expenditures was the cost of two election Slicks and radio ads paid for by AAF.

The basis for a finding of Coordination, as explained by *Bonogofsky v. Kennedy*, means that Candidate Kennedy and AAF acted together such that in-kind expenses made by AAF became in-kind corporate contributions to Candidate Kennedy. Coordination is a two way street. *Bonogofsky v. Kennedy* found sufficient evidence that Candidate Kennedy accepted an illegal AAF election expenses as an in-kind contribution to his campaign. This companion Decision finds sufficient evidence that AAF, as the other part of the coordinated expense, made a coordinated illegal election expense.

IV. FINDINGS

The Commissioner incorporates the *Bonogofsky v. Kennedy* findings as to AAF election expenses in the 2010 Montana HD 57 election. These findings include a finding of election expense and coordinated election expenses. In addition *Bonogofsky v. Kennedy* found that AAF was a Colorado not for profit corporation.

V. SUMMARY OF CAMPAIGN PRACTICE VIOLATIONS

The Commissioner finds there is sufficient evidence to show that AAF violated Montana's campaign practice laws, including but not limited to §13-35-227(1) MCA. Section 13-35-227 MCA prohibits corporate contributions to any Montana candidate for public office. The *Bonogofsky v. Kennedy* Decision

found sufficient evidence to show that Candidate Kennedy violated §13-35-227(2) MCA, the subsection of law that prohibits a candidate from accepting a corporate contribution. In this Decision the Commissioner finds sufficient evidence to show that AAF violated subsection one, the prohibition on a corporation making such an election contribution.

Because a AAF election contribution was prohibited in any amount, AAF could not cure the contribution by attribution, registration, reporting or disclosure. There is no involvement of these additional provisions of Montana Campaign Practices Act. Section 13-35-227 MCA is enforced under the civil provisions of Chapter 37, specifically § 13-37-128 MCA. See § 13-35-227(4) MCA.

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 adjudication of the violation and/or the amount of the fine.

VI. 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 make, a decision 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 adjudication.

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, to show that AAF has, as a matter of law, violated Montana's campaign practice laws, including but not limited to §13-35-227 MCA. 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 adjudication of the violation and/or the amount of the fine.

The many decisions to act or to not act made by AAF in this matter were choices. Excusable neglect cannot be applied to such choices. See discussion of excusable neglect principles in *Matters of Vincent*, CPP-2013-CFP-0007 and 0011. Montana has determined that political discourse is more fairly advanced when election funding is kept fair and, through disclosure, the public is informed as to the identity of those who seek to influence elections. There can be no excuse, but only punishment, for illegal election contributions such as are involved in this matter.

Likewise, the amounts of money are too significant to be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, CPP-

2013-CFP-007 and 011. With the above analysis in mind, this Matter is also not appropriate for application of the *de minimis* theory.

Because there is a finding of sufficient showing of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil adjudication and/or a civil fine is justified, §13-37-124 MCA. This Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil adjudication under §13-37-124 MCA. This matter will now be submitted to (or “noticed to”)² 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 adjudicate (§13-37-124(2) MCA) or fail to adjudicate within 30 days (§13-37-124(1) MCA) this Matter returns to this Commissioner for possible adjudication. *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 adjudication 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

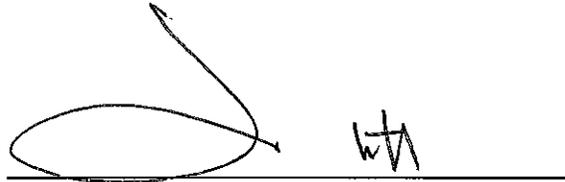
² Notification is to “...the county attorney in which the alleged violation occurred...” §13-37-124(1) MCA. The failure to attribute occurred in Yellowstone County and the failure to report occurred in Lewis and Clark County. This Commissioner chooses to Notice this matter to the county attorney in Lewis and Clark County.

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*.

CONCLUSION

Based on the preceding discussion as Commissioner I find and decide that there is sufficient evidence to show that AAF violated Montana's campaign practices laws. This matter is hereby submitted to [or "noticed to"] the Lewis and Clark County Attorney for his review for appropriate civil action.

Dated this 16th day of October, 2013.

A handwritten signature in black ink, consisting of a large, stylized loop followed by the initials 'JM'. The signature is written above a horizontal line.

Jonathan R. Motl
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