

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Cohenour v. Dooling No. COPP 2014-CFP-043	<u>Dismissal of Complaint By</u> <u>Application of <i>De Minimis</i> Principle</u>
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On October 14, 2014, Jill Cohenour a resident of East Helena, Montana, filed a complaint against Joe Dooling, a 2014 candidate for the Montana legislature from Senate District 42 (SD 42). Ms. Cohenour alleged in her complaint that Mr. Dooling violated campaign practice laws by failing to properly attribute required information in certain radio campaign ads.

**SUBSTANTIVE ISSUES ADDRESSED**

The substantive area of campaign practice law addressed by this decision is that of attribution of campaign materials, with enforcement measured by application of *de minimis* principle.

**FINDING OF FACT**

The foundational fact necessary for this Decision is as follows:

Finding of Fact No. 1: On June 3, 2014, a primary election was held. Jill Cohenour (D) and Joe Dooling (R) advanced to the general election. (Montana Secretary of State's Office).

## DISCUSSION

The complaint alleges that Candidate Dooling distributed campaign literature in the 2014 SD 42 general election that lacked the appropriate party designation. Under Montana law all election materials prepared by Candidate Dooling "...must state the candidate's party affiliation or include the party symbol." §13-35-225(2) MCA. The Commissioner makes the following further Findings related to this Complaint:

Finding of Fact No. 2: A radio spot ran by Candidate Dooling in mid-October did not have the required political party attribution. (Commissioner's records).

Finding of Fact No. 3: On October 14, 2014, Candidate Dooling agreed that the political party attribution was missing from a radio ad and acted to insure that the attribution was added. (COPP interview with Candidate Dooling).

Finding of Fact No. 4: Candidate Dooling, through an interview with the Commissioner, apologized to the public for his oversight and stated that the errant ad attribution had been corrected. (COPP interview with Candidate Dooling).

Candidate Dooling failed to comply with Montana's attribution law by failing to list his political party in a radio ad. (FOF Nos. 2 and 3). Candidate Dooling explained the error as unintentional (FOF No. 4) and apologized to the people of Montana for his error. *Id.* The omission was promptly corrected. (FOF No. 3).

Having decided that this a matter of oversight, not intention, the issue the Commissioner next addresses is whether Candidate Dooling's oversight can be excused as *de minimis*. *De minimis* is an established concept of law meaning

that “the law does not care for, or take notice of, very small or trifling matters.” Black’s Law Dictionary 4<sup>th</sup> Edition.

The COPP began to regularly apply a *de minimis* exception to civil enforcement of a technical or minor violation of Montana’s campaign practice, when directed to do so law by the 9<sup>th</sup> circuit court of appeals in that Matter of *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F. 3d 1021, 1028-29 (9<sup>th</sup> Cir. 2009). The *de minimis* actions in *Canyon Ferry* were the limited use of staff and copying expenditures by a party involved in a ballot issue campaign.

While not always identifying it as *de minimis*, Commissioners have long used the concept to dismiss prosecution of technical violations: no prosecution for lack of address, *Shannon v. Andrews*, COPP-2012-CFP-035 (Commissioner Murry); no prosecution for failure to list political party affiliation or funding source on a candidate website display, *Fitzpatrick v. Zook*, COPP-2011-CFP-014 (Commissioner Gallik); and no prosecution when full name of committee treasurer omitted, *Ellis v. Yes on CI-97*, April 15, 2008 (Commissioner Unsworth). This Commissioner has applied *de minimis* to excuse technical violations for: omitting a ‘paid for by’ attribution, *Ulvestad v. Brown*, COPP-2013-CFR-025; accepting a contribution of \$40 over the allowed amount, *Rodda v. Bennett*, COPP-2014-CFR-013; failing to register/attribute as a political committee, *Royston v. Crosby*, COPP-2012-CFP-041; failure to fully attribute on a candidate letter, *Ponte v. Buttrey*, COPP-2014-CFP-007; failure to properly apportion total allowed amount of contribution between husband and

wife, *Kenat v. Van Dyk*, No. COPP-2014-CFP-004, and failure to list political party *Strizich v. Loney*, COPP 2014-CFP-034.

Further, this Commissioner, in a January 31, 2014 advisory opinion to Emilie Boyles, generally placed the *de minimis* principle in Montana campaign practice law as follows:

Second, there is a *de minimis* exception to Montana's definition of campaign contribution. This means that costs, fees or charges associated with a minor amount of campaign speech need not be reported. The *de minimis* principle holds that robust election speech is favored such that minimal election speech actions cannot be burdened with any requirements. This principle would apply to except small cost amounts (such as one time electronic campaigning costs) from disclosure or reporting requirements.

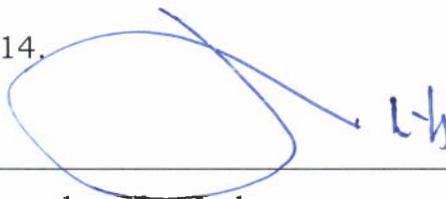
COPP-2014-AO-003, Boyles. The constitutional considerations inherent in the "robust election speech issue" raised in the advisory opinion are discussed in *Landsgaard v. Peterson*, COPP-2014-CFP-008.

Turning now to the Candidate Dooling's activity, the Commissioner notes that an after-the-fact correction is not possible in regard to a radio ad. On the other hand, there was a full §13-35-225(1) MCA general attribution on the ad, with the only missing part being the §13-35-225(2) MCA political party affiliation. Further, Candidate Dooling corrected his error as soon as possible and apologized to the public. With these (and the above) considerations in mind, the Commissioner finds that the technical violation in this Matter is dismissed under the *de minimis* principle.

## DECISION

This Commissioner, having duly considered the matters raised in the Complaint, and having completed his review and investigation, hereby holds and determines, under the above stated reasoning, that the above described violation of attribution standards is dismissed as *de minimis* . The Commissioner hereby dismisses this complaint.

DATED this 21st day of October, 2014.



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