

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Dascher v. Valley County Sheriff's Deputies No. COPP 2014-CFP-044	Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act DISMISSAL OF COMPLAINT UPON APPLICATION OF <i>DE MINIMIS</i> PRINCIPLE
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On October 15, 2014, Donna Dascher and Joe Horn, both residents of Glasgow, Montana, filed complaints against "Valley County Sheriff's Deputies for Glen Meier" (VC Deputies). Glen Meier is the current Sheriff for Valley County and Mr. Meier is running for re-election in 2014. Ms. Dascher alleged that VC Deputies cannot support or oppose a candidate by paying for an advertisement in support of their own Sheriff. Mr. Horn alleged that VC Deputies violated campaign practice laws by failing to register as a political committee.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: independent expenditures; political committee registration; naming and labeling of political committees; attribution; and, *de minimis*.

FINDING OF FACTS

The facts necessary for this Decision are as follows:

Finding of Fact No. 1: The Valley County Sheriff/Coroner position is non-partisan position with a 4 year term. Glen Meier has held the position of Valley County Sheriff since 2002. Sheriff Meier was re-elected in 2006, 2010 and is currently running for re-election in 2014. (Valley County Clerk & Recorder's Office).

Finding of Fact No. 2: On June 3, 2014, a primary election was held in Valley County. Glen Meier and Joe Horn passed through the primary election as candidates for the position of Valley County Sheriff. The names of both candidates will appear on the general election ballot. (Valley County Clerk & Recorder's Office).

Finding of Fact No. 3: Glasgow is the county seat of Valley County. "The Glasgow Courier" is a local newspaper that is published once a week on Wednesdays. (Glasgow Courier).

Finding of Fact No. 4: On October 1, October 8 and October 15, 2014, a 3 x 3 ¾ inch advertisement ran in the Glasgow Courier Newspaper. The advertisement read: "Re-elect Glen Meier Valley County Sheriff. The Valley County Deputies support incumbent Glen Meier for Sheriff. If you have any questions or concerns about the current issues of this election, please feel free to contact Undersheriff Vernon Buerkle, Chief Deputy Reed Mesman, Deputy Luke Stromment, Deputy Matt Remmich, Deputy Alex Esteves, Deputy Wayne Shipp or Deputy Chris Richter at any time. We would be happy to answer any of your questions. Help us keep the integrity of our current Sheriff's Office by re-electing Glen Meier. Paid for by the Valley County Sheriff's Deputies for Meier." On October 15, 2014 the Courier ran a paid advertisement opposing Candidate Horn in the form of a letter signed by Deputy Esteves and paid for by Valley County Deputies for Glen Meier. (Glasgow Courier Newspaper).

Finding of Fact No. 5: From October 6 to October 12, 2015 several radio advertisements ran on KLTZ radio and KLAN radio, both Valley County radio stations. The advertisements spoke in support of Sheriff Meier. The advertisements stated that they were paid for by "Valley County Deputies for Glen Meier." (KLTZ/KLAN radio station).

Finding of Fact No. 6: On October 10, 2014, the COPP office received an informal complaint (phone call) concerning the advertisements run in the Glasgow Courier Newspaper and the local KLTZ and KLAN radio stations “paid for by Valley County Deputies for Glen Meier.” That same day COPP staff contacted Vernon Buerkle, Undersheriff for Valley County Sheriff’s Office, to inquire about the advertisements. Mr. Buerkle stated that he and other deputies had indeed run the advertisements and that Sheriff Meier knew nothing about it. Mr. Buerkle told the staff person that he was unaware that he and the other deputies needed to register as a political committee with the COPP. Mr. Buerkle assured the staff person he would comply with the COPP requirements immediately. (Commissioner’s records).

Finding of Fact No. 7: On October 13, 2014, Vernon Buerkle contacted the Glasgow County Courier and both radio stations and informed them of the error regarding the attribution. Mr. Buerkle placed amended attributions that read: “Paid for by Valley County Sheriff’s Deputies for Glen Meier, Vernon Buerkle, Treasurer, 92 Bonnie Street, Glasgow, MT 59230.” (Investigative notes).

Finding of Fact No. 8: On October 14, 2014, “Valley County Sheriff’s Deputies for Glen Meier” submitted a C-2 Statement of Organization form to register as a Political Action Committee (PAC) with the COPP. Vernon Buerkle was listed as treasurer. (Commissioner’s records).

Finding of Fact No. 9: Mr. Buerkle took care to explain to the Commissioner’s investigator that any work he did regarding the election was done after work hours and used private materials, supplies and resources. The investigator confirmed that all fax numbers, emails and any other indices of communication were consistent with Mr. Buerkle’s assertion and did not show any use of public equipment, time or materials. (Investigator’s notes, Commissioner’s records).

Finding of Fact No. 10: On October 15, 2014, the COPP Office received two separate complaints concerning advertisements run in the Glasgow Courier and the local radio stations that ran in support of Sheriff Glen Meier and were paid for by “Valley County Sheriff’s Deputies for Glen Meier.” The Commissioner accepted both complaints and combined them into one for Decision. (Commissioner’s records).

Finding of Fact No. 11: On October 16, 2014, the Valley County Sheriff's Deputies for Glen Meier submitted their response to both complaints. The response stated that the deputies did not have any contact with Glen Meier about the campaign advertisements and that as soon as they were notified by the COPP that they were out of compliance, they corrected and filed whatever paperwork they needed. (Response to the complaint).

Finding of Fact No. 12: On October 17, 2014, the Commissioner's investigator contacted the Glasgow Courier who confirmed Vernon Buerkle amended the campaign advertisements to run with the new attribution starting Wednesday, October 22nd (weekly printing). The Commissioner's investigator also contacted KLTZ/KLAN radio and confirmed that the new attributions were added to any continued advertisements. The station confirmed that the new advertisements were set to run through October 24th on each station. (Investigative notes).

Finding of Fact No. 13: On October 17, 2014, the PAC submitted their first C-6 campaign finance report. (Commissioner's records).

DISCUSSION

Mr. Buerkle organized or worked with the Valley County Sheriff's deputies [hereafter VC deputies] who banded together to place Ads in support of the political candidacy of their boss and co-worker, Candidate Meier (FF Nos. 4, 5, 6). Mr. Buerkle did not know that this meant that the group of deputies needed to register a political committee and report and disclose the money raised and spent (FF No. 6). The complaints in this Matter allege that the actions of the VC Deputies violate several of Montana's campaign practice laws.

1. The Ads Are A Campaign Expense

The VC Deputies contributed money and their names to media ads in support of Candidate Meier and to an ad opposing Candidate Horn (FF Nos. 4 and 5). The Ads expressly advocated a vote for ("re-elect") Candidate Meier (FF

No 5) and a vote against Candidate Horn. The Ads were campaign expenditures under Title 13: "...anything of value made for the purpose of influencing the results of an election." §13-1-101(11)(a) MCA.

2. The VC Deputies are a Political Committee

Under Montana law the VC Deputies group became a political committee in that it was "...a combination of two or more individuals ...who makes a contribution or expenditure...to support...a candidate..." §13-1-101(22) MCA. Under §13-37-201 MCA a political committee "shall file" a certification "which must include an organizational statement and the name and address of all officers within 5 days after it makes an expenditure..."

The VC Deputies made its first expenditure on or about October 1, 2014 (FOF No. 4) and was required to register as a political committee by October 6, 2014. (Id.) VC Deputies late submitted its registration on October 14, 2014 (FOF No. 8).

Sufficiency Finding No. 1: The Commissioner determines that VC Deputies failed to timely register as a political committee, as required by law.

Having determined that VC Deputies is a political committee, the Commissioner next examines the reporting, disclosure and contribution limit issues that are incident to a political committee designation.

3. VC Deputies Became An Independent Political Committee

Montana law defines types of political committees at 44.10.327, ARM. The type of political committee is important because it determines reporting and disclosure obligations. Because VC Deputies supported a

particular candidate (Meier) it could be classified a particular candidate committee under 44.10.327(2)(a)(ii) ARM. As a particular candidate committee VC Deputies should fall within the reporting requirements of §13-37-226(4) MCA. However, since this section of law fails to include reporting by particular candidate committees involved in local candidate elections, it is necessary to turn to an independent committee classification in order to determine reporting requirements.

VC Deputies is also an independent committee because it supported Candidate Meier and opposed Candidate Horn (FOF No. 4), thereby becoming a political committee or PAC under 44.10.327(2)(b)(i) ARM. Indeed, VC Deputies registered as a PAC. (Commissioner's records). As a PAC, VC Deputies was required to register and file a campaign finance report according to rules established by the Commissioner. The 2014 general election PAC reporting deadline was October 23, 2014 (COPP reporting calendar). VC Deputies timely filed its first campaign finance report on October 17, 2014. (Commissioner's records).

4. Contribution Limits Do Not Apply

Montana law sets limits on the amounts that an individual or political committee can contribute to a candidate for political office. §13-37-216 MCA. Those limits could come into play if there is evidence of coordination. *See Bongofsky v. National Gun Owners Alliance*, COPP-2010-CFP-008. In this Matter the Commissioner determines that there is no evidence of connection or "coordination" alleged or shown between

the candidate and the VC Deputies (FF No. 11).

There being no issue of coordination, the Commissioner determines that the VC Deputies' expenditure was an independent expenditure. This finding is consistent with ARM 44.10.323(3) definition of an independent expenditure as "...communications expressly advocating the success or defeat of a candidate or ballot issue...". Independent expenditures are not subject to contribution limits and the VC Deputies' expenditures did not violate contribution limits.

5. Attribution is Required

The VC Deputies' ads were an election communication and, as such, an attribution was required. §13-35-225 MCA. The Ads sufficiently identify the "paid for" group as "Valley County Deputies" but do not list the committee treasurer or address. The attribution was promptly corrected to the full language once the COPP informed VC Deputies of PAC requirements.

Sufficiency Finding No. 2: The Commissioner determines that VC Deputies failed to completely attribute certain ads.

6. A Sheriff's Deputy Can Endorse Candidate Meier

Complainant Dascher alleged inappropriate campaigning acts were taken by the deputies. This complaint, if valid, would be referred by the COPP to the Valley County Attorney's office for enforcement under §2-2-144 MCA. As explained below, this complaint is without support in law so no such referral is made.

A Valley County Sheriff's Deputy cannot "use public time, facilities,

equipment, supplies....” to support Candidate Meier. §2-2-121(3)(a) MCA. Montana law, however, does not “...restrict the right of a public officer or public employee to express personal political views.” §2-2-121(3)(c) MCA. The facts of this matter show that the deputies acted appropriately within these personal political limits (FOF No. 9). The money used to fund VC Deputies came solely from donations by individual deputies (Commissioner’s records). There is no evidence of use of any public resource. *Id.*

Further, the Montana Attorney General (AG Opinion, January 31, 2005) has determined that: “[a] title or a uniform is simply an accouterment of a public employee’s or officer’s position. A sheriff is not required to shed all associations, including his uniform, with his official position in order to exercise his protected right to express personal political beliefs.” See also Matter of *Fasbender v. Toole*, Ethics Opinion, February 21, 2012 (the Honorable Thomas Honzel, Deputy Commissioner). Accordingly, a deputy may use his title in stating his personal political beliefs.

7. Application of *De Minimis*

The VC Deputies failed to comply with Montana’s political committee registration and attribution laws. (SF Nos. 1 and 1). Mr. Buerkle, on behalf of VC Deputies, explained the error as unintentional (FOF No. 8) and apologized to the people of Montana for his error. *Id.* The omission was promptly corrected, even before the complaints in this Matter were filed. (FOF Nos. 7 & 8).

Having decided that this a matter of oversight, not intention, the issue the Commissioner next addresses is whether VC Deputies' 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 4th 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 9th 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 (9th 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 and *Brastrup v. Ravndal*, COPP-2014-CFP-040; 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 and *Cohenour v. Dooling*, COPP-2014-CFP-043.

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 VC Deputies activity, the Commissioner notes that the political committee's violations were technical in nature. Further, when called to attention the violations were promptly corrected. Finally, there is little demonstrable harm since the public information purpose of PAC registration and attribution was met with the information placed in the ads. With these (and the above) considerations in mind, the Commissioner finds that the

technical violations set out in sufficiency findings 1 and 2 in this Matter are dismissed under the *de minimis* principle.

FINDINGS OF CAMPAIGN PRACTICE VIOLATION

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 prosecution.

This Commissioner, having been charged to investigate and decide, hereby determines that VC Deputies has, as a matter of law, committed a violation of Montana’s campaign practice laws. 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.

The principle of *de minimis* does apply to this Matter for the reasons discussed above, this Decision. The Commissioner further recognizes that a *de minimis* application must be made when required by the facts of the Matter. *Id.*

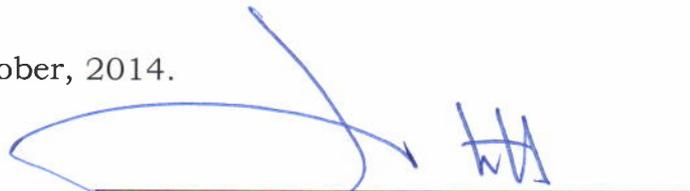
Because there is a finding of violation and a determination that *de minimis* is applicable, civil prosecution and/or a civil fine is not justified (See §13-37-124 MCA). This Commissioner hereby dismisses this matter from prosecution.

While the facts of this Matter allow application of the *de minimis* principle, most Matters before the Commissioner do not allow application of such a principle resulting in prosecution. See *Baker v Key*, COPP-2011-CFP-32. Montana's laws and rules generally require reporting and disclosure of campaign expenditures or contributions. The Commissioner, subject to the *de minimis* limit discussed above, must enforce reporting and disclosure as the law requires this and enforcement promotes fair speech leading to better civic discourse which, in turn, leads to more effective governance.

CONCLUSION

Based on the preceding discussion as Commissioner I find and decide that there is sufficient evidence to show that VC Deputies violated Montana's campaign practices laws. These violations, however, are excused upon application of the *de minimis* principle such that prosecution is not justified and will not be pursued.

DATED this 24th day of October, 2014.



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