

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Donovan v. Buttrey No. COPP 2014-CFP-057	Finding of Sufficient Facts to Show a Violation of Montana's Campaign Practice Act
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On November 3, 2014, Carl Donovan, a resident of Great Falls, Montana filed a complaint against Ed Buttrey, also a resident of Great Falls, Montana. Mr. Donovan's complaint alleged a violation by Mr. Buttrey of Montana's laws requiring attribution of election communication made during a 2014 election.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign practice law addressed by this decision is that of attribution of election communication.

FINDINGS OF FACT

The following foundational findings of fact apply in this Matter.

Finding of Fact No. 1: Edward Buttrey was a 2014 candidate for election to the Montana legislature representing Senate District 11 (SD 11). (Secretary of State Elections website).

Finding of Fact No. 2: Edward Buttrey was running for re-election, having been previously elected to the Montana Senate in 2010. (Secretary of State Elections website).

DISCUSSION

Mr. Buttrey was a 2014 candidate for election to a Montana public office.

(FOF No. 1) Candidate Buttrey was therefore required to print on all election material a “paid for by” attribution, including the “name and address of the candidate.” §13-35-225 MCA.

The 2014 general election in Montana took place on Tuesday, November 4, 2014. On Thursday, October 30, 2014 a one page (printed both sides) glossy flyer advocating the re-election (see FOF No. 2) of Candidate Buttrey appeared as an insert in the Great Falls Tribune newspaper. (See Flyer accompanying complaint this Matter.) The Flyer advocated the election of Candidate Buttrey but lacked a “paid for by” attribution. (*Id.*) The following facts apply to this circumstance:

Finding of Fact No. 3: Candidate Buttrey engaged and paid a Great Falls area graphic designer by the name of Pete Swanson to prepare the Flyer. Mr. Swanson’s tasks included sending the final copy to the Great Falls Tribune for printing and insertion. (COPP interviews).

Finding of Fact No. 4: The required attribution language appeared on the draft Buttrey Flyer reviewed by Candidate Buttrey but was inadvertently omitted from the final copy sent by Mr. Swanson to the Great Falls Tribune. Candidate Buttrey did not review the final copy of the Flyer. (COPP interviews).

Finding of Fact No. 5: Mr. Swanson said that he was “responsible” for the failure to attribute error and that he was “heartsick” that he had caused problems for Candidate Buttrey. (COPP interviews).

Finding of Fact No. 6: Candidate Buttrey first learned of the lack of attribution when he was so informed by COPP staffer Mary Baker (who had learned of the failure to attribute through a phone call from a Great Falls resident) on October 30, 2014. On October 31, 2014 Candidate Buttrey published an ad in the Great Falls Tribune fully attributing the Flyer as an election communication paid for by the Buttrey campaign. (Baker notes, COPP interviews, COPP records).

Finding of Fact No. 7: There were 7,200 copies of the Buttrey Flyer inserted into the Great Falls Tribune on October 30, 2014. (COPP interviews).

The Commissioner determines that lack of attribution was the result of a mistake and not because of any effort to disguise or hide the identity of the person paying for the Buttrey Flyer (FOF Nos. 3-6). Nevertheless, over 7,000 copies of the Flyer were distributed without attribution. (FOF No. 7). The Commissioner must measure election violations by the harm caused and 7,200 Flyers lacking attribution, regardless of the reason for the lack of attribution and regardless of good-faith correction action, still causes public harm.¹

Accordingly, the Commissioner makes the following sufficiency finding.

Sufficiency Finding No. 1. The Commissioner determines that sufficient facts exist to show that Candidate Buttrey failed to attribute a campaign communication as required by §13-35-225 MCA.

In making this sufficiency finding the Commissioner recognizes that Candidate Buttrey faced this issue squarely. First, Candidate Buttrey corrected the mistake as quickly as he could (FOF No. 6), even before a complaint was filed. Then, Candidate Buttrey acted to quickly and thoroughly provide the Commissioner all information needed to make this Decision. Finally, through representations to the Commissioner, Candidate Buttrey apologizes to the people of Montana for the oversight.

¹ This Decision in this Matter is distinguishable from that in *Wells v. Lowy*, COPP 2014-CFP-049. The *Wells v. Lowy* matter involved a lack of attribution on a 215 email address list with a next day correction made to the exact same list. The remaining public harm, if any, in *Wells v. Lowy* was dismissed by *de minimis*. Here Candidate Buttrey made the best correction he could (next day publication in the Great Falls Tribune) but the best correction possible could not move the harm caused by 7,000 unattributed Flyers down to *de minimis*.

The Commissioner will consider Candidate Buttrey's actions as a mitigating factor when resolving or settling this matter. The Commissioner notes that Candidate Buttrey's actions set an example as to how a candidate should deal with a mistake in campaign practices – recognize the mistake as quick as you can, correct what you can as fast you can, deal squarely with the consequences of the harm to the public that you cannot correct and apologize.

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, to show that Candidate Buttrey has, as a matter of law, violated Montana's campaign practice laws, including, but not limited to §13-35-225 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.

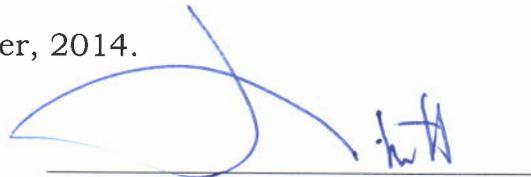
Candidate Buttrey was, by agency, involved in the failure to attribute. While Candidate Buttrey's agent actually made the mistake rather than Candidate Buttrey (FOF No. 5), Candidate Buttrey is still responsible for the errors of agents working on his campaign. Candidate Buttrey, to his credit, understands this concept and does accept that he should be held responsible. Excusable neglect cannot be applied to such choices. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. Likewise, the failure to attribute on 7,200 published Flyers cannot be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

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]. This 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 attribute occurred in Cascade County) this matter is referred to the County Attorney of Cascade 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 §13-35-225(1) 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. Candidate Buttrey’s actions are worthy of consideration as mitigation.

DATED this 7th day of November, 2014.



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