

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

| | |
|--|---|
| Gibson v. Montana Democratic Party No. COPP 2014-CFP-053 | Final Decision and Findings of Sufficient Facts to Show a Campaign Practice Violation |
|--|---|

On October 30, 2014, Steve Gibson, a resident of East Helena, Montana filed a complaint against the Montana Democratic Party (MDP) alleging a campaign practice violation. Mr. Gibson was the Republican nominee for election to the Montana legislature from House District 84 (HD84). Mr. Gibson was opposed by Mary Ann Dunwell, the Democratic nominee for election to the Montana legislature from HD 84.

Mr. Gibson's complaint alleges that a flyer attacking his candidacy (*see* attachment to Complaint) was received by HD 84 voters on or after October 29, 2014. Mr. Gibson's complaint states he received no notice of the flyer and cites to the provisions of Montana's "Clean Campaign Act", requiring notice for any campaign related Flyer delivered in the 10 days prior to an election.

FOUNDATIONAL FACTS

The facts necessary for determination in this matter are as follows:

Finding of Fact No. 1: Steve Gibson (R) and Mary Ann Dunwell (D) were the 2014 candidates for election to the Montana legislature representing HD 84. (Secretary of State (SOS) website).

Finding of Fact No. 2: Steve Gibson was running for re-election, having served in the Montana House in 2012. Ms. Dunwell defeated Mr. Gibson with 1,885 votes to his 1,862 votes and is currently the representative from HD 84. (SOS website).

DISCUSSION

To date the COPP has engaged in minimal discussion of the overall reporting and disclosure requirements for entities making independent expenditures in Montana elections.¹ Instead, independent expenditure discussion has focused on whether or not a particular third party election expense advocated for or against a candidate (“express advocacy”) such that it became a reportable election expense.²

Independent expenditures are third party election expenditures that are not coordinated with the candidate.³ Independent expenditures in Montana elections increased following the 2010 *Citizens United* decision by the US Supreme Court. Independent expenditures are generally carried out in the form of an election communication (in Candidate Gibson’s case, a flyer) issued by a third party (MDP, in Candidate Gibson’s case) attacking a candidate

¹ The COPP has discussed narrow issues regarding independent expenditures in Montana elections as early as 2003. See *Haines v. Bianco*, (March 2003, Commissioner Vaughey).

² See *Bonogofsky v. NGOA*, COPP-2010-CFP-008.

³ Independent expenditures are those “not made with, at the request of suggestion of, or the prior consent of a candidate...” 44.10.323(3) ARM

(Gibson).

The 2014 Montana election cycle involved significant independent expenditure activity by multiple entities in multiple elections. The entities making the independent expenditures, as shown by this Decision, did so within a reporting and disclosure culture that lacked the adherence to transparency that is seen in reporting and disclosure by the campaigns of the candidates themselves. There have been five complaints filed over 2014 independent expenditure activity, including the complaint in this matter.⁴

As explained in this Decision, entities involved in independent expenditures will need to adapt such that they fully and timely report and disclose independent expenditures, with those independent expenditures listed on a candidate-by-candidate basis. This disclosure, timely made according to candidate, is what Montana law requires and it is what the press, public and the opposing candidate need if there is to be transparency in election expenditures.

1. Notice Laws Were Not Violated

Montana law requires that any entity producing an attack flyer provide notice to the affected candidate of printed material “intended for public distribution in the 10 days prior to an election...” (§13-35-402(1) MCA). The printed material must be provided to the candidate if “...disseminated by direct mail, on the date of the postmark...” (§13-35-402(3)(b) MCA).

⁴ The four additional complaints concerning 2014 independent expenditure activity are: *Shellnutt v. Planned Parenthood*, COPP-2014-CFP-058; *Perea v. MDP*, COPP-2014-CFP-055; *Buttrey v. MDP*, COPP-2014-CFP-050 and, *Kary v. MDP*, COPP-2014-CFP-059.

The following findings of fact apply:

Finding of Fact No. 3: The MDP flyers attacked Candidate Gibson's stance on public lands. The MDP attack flyer was mailed once. (Commissioner's records).

Finding of Fact No. 4: The MDP public lands attack flyer was "dropped" or mailed on October 24, 2014. (Commissioner's records).

Finding of Fact No. 5: There was no postmark date on the MDP attack flyer. (Commissioner's records).

The Commissioner notes that the 2014 Montana general election took place on November 4, 2014. Montana law requires that notice be given for any attack flyer "intended for public distribution in the 10 days prior" to the November 4 election. (§13-35-402(1) MCA).

The 10 days prior to the November 4 election was the period of October 25 through November 3, 2014. There were no postmarks on the MDP attack flyer (FOF No. 5). The Commissioner therefore determines that the date mailed or "dropped", as reported by the mail house, is the equivalent of the postmark date.⁵ The Commissioner has determined that this mail date is the date that will be used to measure the date of "intended for public distribution" under §13-35-402(1) MCA. *Buttrey v. MDP* COPP-2014-CFP-050.

With the above in mind, the Commissioner determines that the MDP attack flyer was mailed October 24, the 11th day before the election. Because this fell outside the 10 days prior to the election MDP was not required to provide

⁵ The Commissioner's investigator confirmed the mailing dates with the mail house handling the Flyer.

copies of the attack flyer to candidate Gibson. Consequently, there is no violation of the notice provisions of §13-35-402.

2. The MDP Has Failed to Adequately Report and Disclose

Once a complaint is filed the Commissioner "...shall investigate any other alleged violation ..." (§13-37-111(2)(a) MCA). This investigation authority includes authority to investigate "all statements" and examine "each statement or report" filed with the COPP. §§13-37-111, 123 MCA. The Commissioner is afforded discretion in exercising such investigative authority. *Powell v. Motl* OP-07111 Supreme Court of Montana, November 6, 2014 Order. The Gibson complaint, once filed, triggered a review by the Commissioner of the adequacy of the independent expenditure information reported and disclosed by the MDP.

Under Montana law independent expenditures "must be reported in accordance with the procedure for reporting other expenditures". *Hanes v. Bianco*, ARM 44.10.323(3) and ARM 44.10.531(4). Section 13-37-225 MCA requires that the MDP file "periodic reports of ... expenditures made ...on behalf of a candidate...." (Emphasis added). The reports must include "debts and obligations owed" by the MDP. §13-37-230(1)(g) MCA. Independent expenditure reporting requires "reporting of the name of the candidate...the independent expenditure was intended to benefit...." ARM 44.10.531(4).

The Commissioner determines that the MDP campaign finance reports did not meet these requirements. The MDP reports disclosed approximately \$204,000 in independent expenditures, but did so in lump sum reporting in 12

line item reports set out in three campaign finance reports.⁶ The pre-election line item report lists the independent expenditures as being for “printing-mail/IE in SD11, 13, 14, 22, 24, 32, 42, and 49”. (MDP C-6 report form). The 24 hour C-7E reports include in the lump sum “IE Mail” expenditures for “HD 48, 84, 97, 52, 96 and 92”.

Because these latter lump sum independent expenditure reports covered 8 senate and 6 house districts there is no particular expenditure disclosed as to Candidate Gibson (or any candidate) as required by §13-37-225 MCA. Further, listing by house district (rather than by candidate name) does not meet specific requirements of Montana’s independent expenditure law: “shall report the name of the candidate”. ARM 44.10.531(4).

Sufficiency Finding No. 1: The Commissioner determines that sufficient facts exist to show that the MDP violated Montana law by failing to report and disclose the independent expenditures in the Gibson election in the manner required by law. (Commissioner’s records).

The Commissioner notes that the MDP and its counsel have been fully cooperative in responding to and addressing the issues raised by this complaint. In responding to the complaint the MDP notes that others, including the Montana Republican Party, also engaged in 2014 reporting and disclosure methods similar to that used by the MDP. The MDP’s observation may be correct, but it does not excuse errant conduct. Instead, given the increasing use of independent expenditures, it assigns urgency to this Decision that holds all entities making independent expenditures to the full reporting

⁶ The MDP filed an October 23, 2014 pre-election report (on form C-6) and later (on October 24 and October 28) file two 24 hour reports (on forms C-7).

and disclosure standards set by Montana law. The Commissioner will, however, consider the definitional nature of this Decision, along with a prompt corrective independent expenditure report filing by the MDP, as factors to apply to mitigation of the fine involved in this matter.⁷

3. Other Entities Making Independent Expenditures

The Commissioner has designated Mary Baker to reach out to all political committees or other entities that engaged in independent expenditure activity during the 2014 election cycle. Those political committees will be asked to self- assess (and correct if necessary) the sufficiency of their 2014 campaign finance reporting as measured by this Decision.

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

⁷ The Commissioner notes the COPP on-line political committee campaign finance report form (at Schedule B) sets out a separate form for reporting of independent expenditures. That form prompts the listing of the amount, purpose, date and candidate for any independent expenditure, thereby bringing reporting and disclosure into compliance with law.

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 the MDP 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 properly and 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.

Likewise independent expenditures are emerging as an important component of spending in candidate races such that issues dealing with independent expenditures 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). The Commissioner hereby, through this decision, issues a "sufficient evidence" Finding and Decision justifying civil prosecution under §13-37-124 MCA. Because of the nature of violations (the failure to timely report occurred in Lewis and Clark County) this matter is referred to the County Attorney of Lewis

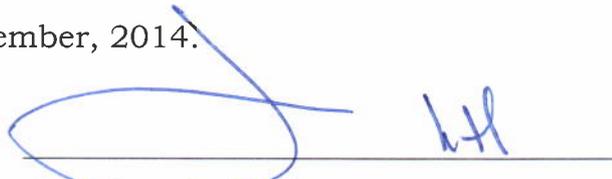
and Clark County for his consideration as to prosecution. §13-37-124(1) MCA. Should the County Attorney waive the right to prosecute (§13-37-124(2) MCA) or fail to prosecute within 30 days (§13-37-124(1) MCA) this Matter returns to this Commissioner for possible prosecution. *Id.*

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 to the COPP 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 MDP showed complete cooperation and willingness to explain the oversight in a manner that accepted responsibility. That cooperation, along with the first time nature of this Decision, will be

recognized as a factor supporting mitigation.

DATED this 25th day of November, 2014.



Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana
P. O. Box 202401
1205 8th Avenue
Helena, MT 59620
Phone: (406)-444-4622