

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Kenat v. Van Dyk No. COPP-2014-CFP-004	DISMISSAL OF COMPLAINT IN PART FOR LACK OF SUFFICIENT FACTS, IN PART AS DE MINIMUS AND IN PART AS FRIVOLOUS
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On January 27, 2014, Billings resident Brian Kenat filed a complaint with the COPP against Billings senator Kendall Van Dyk (Senate District 25, hereafter SD 25) alleging candidate Van Dyk violated Montana campaign finance and practice laws during his 2010 campaign by: accepting contributions that were over the limit; failing to accurately report the occupation and employer of one of his contributors; accepting general election contributions before an opponent was named in the primary election; and, failing to properly create a separate account for primary election funds.

SUBSTANTIVE ISSUES ADDRESSED

There are no substantive areas of campaign law addressed by this complaint as all issues raised lack factual, policy or legal support.

FINDING OF FACTS

The foundational facts necessary for this Decision are as follows:

1. Senate District 25, serving Montanans living in the Billings area, is one of 50 such elected offices to the Montana Legislature. (Secretary of State (SOS) Website).
2. Senate District 25 was open for election of its senator in the 2010 elections. *Id.*
3. On June 8, 2010, a SD 25 primary election was held. Three candidates were on the ballot for Senate District # 25: Kendall Van Dyk (Democrat), Linda Wetzel (Democrat) and Roy Brown (Republican). Mr. Van Dyk advanced to the general election with 1,208 votes, defeating Ms. Wetzel who had 332 votes. Mr. Brown received 2,071 votes and also advanced to the general election. *Id.*
4. On November 2, 2010, a general election was held. Candidate Van Dyk was elected to office, defeating candidate Brown. (Secretary of State's Office, investigative notes).

DISCUSSION

The complaint in this matter alleges certain actions taken in the 2010 Van Dyk campaign violate Montana's campaign practice laws. Each category of violation is discussed separately below.

1. Excess Campaign Contributions

The complaint alleges that 6 individuals made contributions in excess of limits to candidate Van Dyk's 2010 SD 25 campaign. Those individuals listed in the complaint are Gregar Lind, Hollis Edwards, James Manley, John Edwards, Kelly Edwards, and Russell Shay.

An individual could contribute \$160 per election to the 2010 SD 25 election. See §13-37-216 MCA (2010 code), with amounts adjusted for inflation by 44.10.338 ARM. Candidate Van Dyk faced two 2010 SD 25 elections, those being a primary and a general election. FOF Nos. 3 and 4. Candidate Van Dyk therefore was allowed to accept (and an individual allowed to make) a maximum \$160 contribution to each election for a total of \$320. §13-37-216 MCA (2010 code), with amounts adjusted for inflation by 44.10.338 ARM.

The Commissioner's investigator has examined candidate Van Dyk's campaign finance reports. The information in the campaign finance reports does not support, but rejects, the excess contribution complaints concerning Gregar Lind, Hollis Edwards, John Edwards, Kelly Edwards and Russell Shay. Each of these five individuals contributed, and candidate Van Dyk accepted, a total of \$320 split equally between the two elections.¹ These complaints are dismissed for lack of sufficient facts.

This leaves the complaint concerning the James Manley contribution. James Manley contributed to the campaign of Candidate Van Dyk, as did Julia Manley, the spouse of James Manley. In total, James and Julia Manley contributed \$640, an allowable amount for two contributors. Candidate Van Dyk's campaign finance reports, however, attributed \$480 of that amount to James Manley and \$160 to Julia Manley. (Commissioner's records). This accounting was described as an error by the Van Dyk campaign which filed an amended campaign finance report attributing \$320 each to James and Julia

¹ A copy of the summary of this part of the Commissioner's investigator's work is attached as Exhibit 1.

Manley. The amended campaign finance report was filed after and in response to the complaint in this matter.

The Commissioner notes that a demand for an interpretation resulting in further restrictions on individual contributions is presumed to be contrary to Montana policy and federal constitutional principles. *Landsgaard v. Peterson*, COPP-2014-CFP-008. Only courts, not administrative agencies, have jurisdiction to decide issues requiring determinations of constitutionality. *Brisendine v. Dep't of Commerce*, 253 Mont. 361, 366, 833 P. 2d 1019, 1021-22 (1992). Agencies, however, are required to construe statutes or regulations in a manner that affords recognition of constitutional issues so as to interpret law in a manner that would render its use constitutional. *City of Great Falls v. Morris* 206 MT ¶19, 332 Mont. 85, 134 P. 3d 692. An interpretation that restricts individual contributions beyond the plain meaning of law is not favored as further limits on a base level contribution do not serve the anti-corruption interests that underlie Montana policy and provide the underpinning for the federal constitutional analysis that today substantially governs allowable campaign practice regulation by any state. *Landsgaard v. Peterson*, COPP-2014-CFP-008.

Accordingly, the Commissioner construes this complaint as being directed solely to the improper reporting by the Van Dyk campaign of a proper and lawful \$640 contribution (\$320 each by James Manley and Julia Manley). In that regard, the total amount of \$640 was reported by Van Dyk campaign. The error was in reporting the \$640 incorrectly by apportioning \$160 to Julia

Manley and \$480 to James Manley, rather than \$320 to each. That reporting error is just that (a reporting error) and it does not turn a legal contribution into an illegal campaign contribution. The Commissioner chooses not to interpret law in a manner that places restrictions on a lawful base level campaign contribution. *City of Great Falls v. Morris* 206 MT ¶19, 332 Mont. 85, 134 P. 3d 692, *Landsgaard v. Peterson*, COPP-2014-CFP-008.

Properly framed as a campaign bookkeeping or reporting error, the Van Dyk campaign failure must be dismissed as *de minimis*. The concept of a *de minimis* exception to civil enforcement of a violation of Montana's campaign practice law is set out and defined by the 9th circuit court of appeals in *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth* 556 F. 3d 1021, 1028-29 (9th Cir. 2009). The *de minimus* actions in *Canyon Ferry* were taken by a party involved in a ballot issue campaign. This Office has also, based on certain facts, declined prosecution of a candidate activity, after finding a violation of law based on failure of a candidate to properly label and disclose on a website. *See In the Matter of the Fitzpatrick Complaint*, COPP- CFP-2011-014. The failure to properly divide a \$640 contribution, fully and timely disclosed by the Van Dyk campaign, into its two lawful \$320 contribution amounts is *de minimis*. There is no harm to the public or opposing candidate caused by this failure that justifies any prosecution.

2. Unlawful Delay in Refunding an Excess Contribution

The complaint alleges a three month delay in refunding an excess contribution to James Edmiston. Again the complaint erroneously cites to

campaign data. James Edmiston made three contributions: \$160 on May 21, 2010, \$110 on May 23, 2010 and \$160 on August 10, 2010. (Commissioner's records). The excess contribution (that is, an amount greater than \$320) was created by the August 10 contribution of \$160. The excess contribution amount (\$110) created by the August 10 contribution was returned to Mr. Edmiston 19 days later, on August 29, 2010.

There is no applicable time frame established under Montana law for refunds of excess contributions. The only "refund" requirement is set out at ARM 44.10.330 and, in the event that a candidate does not win the primary election, it requires a refund of the general election contributions made prior to the date of the primary election. There is no time set (following the date of the primary election) by which such a refund must be made.

The time span of the \$110 refund is the 19 days between August 10 and August 19, 2010. The Commissioner takes administrative notice that the Van Dyk campaign had sufficient funds such that it did not make use of the \$110 during that 19 day time period. Further, the Commissioner notes that no campaign finance reports were filed during that time period.² Therefore there was no disclosure to the public issue involved in this matter. Under these facts there is no reasonable basis to interpret law in a manner that would require an earlier refund action by the campaign. The Commissioner determines that the 19 day refund time period was not a violation of Montana's campaign practice

² A 2010 legislative candidate would have filed campaign finance reports in June of 2010 (20 days following the primary election) and in October of 2010 (12 days preceding the general election). §13-37-226(3) MCA.

laws.

3. Failing to Completely Report the Name of a Contributor

The complaint alleges a technical deficiency in the manner in which the campaign reported the occupation and employer of contributor Bryce Bennett. Again, the complaint is factually inaccurate as Bryce Bennett's position was "Director of Winning" and his employer was "Forward Montana." (Commissioner's records). The disclosure made by Van Dyk meets the requirements of §13-37-229(2) MCA. This complaint is dismissed as lacking support in facts and law.

4. Acceptance of General Election Funds During Primary

Montana law applies the \$160 individual contribution limit (for a 2010 legislative campaign) per election, with a contested primary and a general election counting as two elections. §13-37-216 MCA. Montana law therefore allows an individual to contribute \$320 to a candidate who is involved in a primary and general election. *Id.* Montana law requires that a candidate separate primary and general contributions into separate accounts and bans use of general election contributions for the primary election.³

The Complaint demands an interpretation restricting the timing of a contributor's ability to make a \$160 contribution to general campaign, arguing that the separate general election contribution cannot engage until another candidate files and creates a contested primary. There is no such timing limitation set out in Montana law with applicable law stating: "[i]f there is a

³ The Van Dyk campaign made such a separation and accounting of primary and general contributions. There is no allegation that this separation was done improperly.

contested primary, then there are two elections to which the contribution limits apply.” §13-37-216(6) MCA. ARM 44.10.330 adds: “a candidate in a contested primary may receive contributions designated for the general election during the primary election period.”⁴ Emphasis added.

Candidate Van Dyk was involved in a contested primary. The statute and regulation governing contributions made in regard to a contested primary (see above) are clear when read in the entirety, as is required by §1-2-101 MCA. Under statute and regulation a contributor could make and a candidate could accept two full limit contributions “during the primary election period.” An interpretation is not required, particularly an interpretation imposing restrictions on the timing of a base level individual contribution. Such an interpretation proposes a limit that runs counter to Montana campaign practice policy and federal constitutional law which merge to discourage interpretations restricting base level contribution involvement of individual contributors. *Landsgaard v. Peterson*, COPP-2014-CFP-008. The Commissioner declines to make this interpretation and rejects this complaint as without support in law or policy. Because this interpretation actually runs counter to policy and law and requires no use of facts other than those supplied by the complaint it is deemed frivolous. *Id.*

OVERALL DECISION

This Commissioner, having duly considered the matters raised in the

⁴ The general election contributions “must be maintained in a separate account and not be used until after the primary election.” ARM 44.10.330(2)(c). General election contributions must be returned to the donor if the candidate loses and does not advance to the general election. ARM 44.10.330(3).

Complaint, and having completed his review and investigation, hereby holds and determines, under the above stated reasoning, that as to some of the complaints in this Matter: there is insufficient evidence to justify a civil or criminal adjudication against Mr. Van Dyk under §13-37-124(1) MCA; there is no basis in law for a civil or criminal adjudication against Mr. Van Dyk under §13-37-124(1) MCA; or, that the complaints were dismissed as *de minimis* or frivolous . The Commissioner hereby dismisses this complaint in full.

DATED this 13th day of March, 2014.



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Jonathan R. Motl
Commissioner of Political Practices
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NAME	ALLEGED AMOUNT	DATE (on report)	Amount Primary	Amount General	Total Primary to date	Total General to date	TOTAL	Reporting Period
Anderson, David	\$200	11/4/2009	\$0	\$40	\$160	\$40	\$200	5/1/09-5/23/10
		11/4/2009	\$160	\$0	\$160	\$40		
Anderson, Kai	\$320	11/4/2009	\$0	\$160	\$160	\$160	\$320	5/1/09-5/23/10
		11/4/2009	\$160	\$0	\$160	\$160		
Bennett, Bryce	Wrong Emp/Occ.	5/18/2010	Forward Montana	is a 501 (c)(4) NP	registered w/SOS	Winning a section	on website	5/1/09-5/23/10
Blewett, Alexander 3	\$320	11/23/2009	\$0	\$160	\$160	\$160	\$320	5/1/09-5/23/10
		11/23/2009	\$160	\$0	\$160	\$160		
Browning, Aaron	\$320.00	7/12/2009	\$50.00	\$0	\$159.98	\$36.66		5/1/09-5/23/10
		8/2/2009	\$36.66	\$0	\$159.98	\$36.66		5/1/09-5/23/10
		8/28/2009	\$36.66	\$0	\$159.98	\$36.66		5/1/09-5/23/10
		8/30/2009	\$36.66	\$0	\$159.98	\$36.66		5/1/09-5/23/10
		9/30/2009	\$0	\$36.66	\$159.98	\$36.66		5/1/09-5/23/10
		6/8/2010	\$0.00	\$0	\$159.98	\$56.66		5/24/10-6/23/10
		8/1/2010	\$0	\$53.35	\$159.98	\$160		6/24/10-10/16/10
		9/1/2010	\$0.00	\$49.98	\$159.98	\$160	\$320	6/24/10-10/16/10
Edmiston, James	\$430	5/21/2009	\$160.00	\$0.00	\$160.00	\$110		5/1/09-5/23/10
		5/23/2010	\$0	\$110	\$160	\$110		5/1/09-5/23/10
		8/10/2010	\$0	\$160	\$160	270 (less \$110)		6/24/10-10/16/10
REFUND		8/29/2010					Less \$110 = \$320 TOTAL	6/24/10-10/16/10
Edwards, Hollis	\$470?	11/4/2009	\$150	\$0	\$150	\$0	\$310	5/1/09-5/23/10
		8/9/2010	\$0	\$160	\$150	\$160		6/24/10-10/16/10
Edwards, John	\$470 ?	11/4/2009	\$150	\$0	\$150	\$0	\$310	5/1/09-5/23/10
		8/9/2010	\$0	\$160	\$150	\$160		6/24/10-10/16/10

Edwards, Kelly	\$ 480?	10/7/2009	\$160	\$0	\$160	\$0	\$160	\$0	\$320	5/1/09-5/23/10
		8/9/2010	\$0	\$160	\$160	\$160	\$160	\$160		6/24/10-10/16/10
Gibson, Michael	\$200	10/7/2009	\$100	\$0	\$160	\$40	\$160	\$40		5/1/09-5/23/10
		2/4/2010	\$0	\$40	\$160	\$40	\$160	\$40	\$200	
		2/4/2010	\$60	\$0	\$160					
Gordon, Tylynn	\$320	11/4/2009	\$0	\$160	\$160	\$160	\$160	\$160	\$320	5/1/09-5/23/10
		11/4/2009	\$160	\$0	\$160					
Jenkins, Amelia	\$320	11/4/2009	\$0	\$160	\$160	\$160	\$160	\$160	\$320	5/1/09-5/23/10
		11/4/2009	\$160	\$0	\$160					
Lehner, David	\$320	9/13/2009	\$160	\$0	\$160	\$160	\$160	\$160	\$320	5/1/09-5/23/10
		12/6/2009	\$0	\$160	\$160					
Lind, Gregar	390 ?	12/23/2009	\$130	\$0	\$130	\$0	\$130	\$0		5/1/09-5/23/10
		8/9/2010	\$0	\$100	\$130	\$100	\$100	\$100		6/24/10-10/16/10
		10/31/2010	\$0	\$60	\$130	\$160	\$130	\$160	\$290	10/17/10-11/17/10
Manley, James	\$480	6/8/2010	\$160	\$0	\$160	\$0	\$160	\$0	\$320	5/24/10-6/23/10
		9/27/2010	\$0	\$160	\$160	\$160	\$160	\$160		6/24/10-10/16/10
Manley, Julia		6/8/2010	\$160	\$0	\$160	\$0	\$160	\$0	\$320	5/24/10-6/23/10
	Amended 2/26/14	11/1/2010	\$0	\$160	\$160	\$160	\$160	\$160		10/17/10-11/17/10
Murphy, Patrick	\$250	11/4/2009	\$0	\$90	\$160	\$90	\$160	\$90	\$250	5/1/09-5/23/10
		11/4/2009	\$160	\$0	\$160					5/1/09-5/23/10
Rich, Curtis	\$320	11/4/2009	\$0	\$160	\$160	\$160	\$160	\$160	\$320	5/1/09-5/23/10
		11/4/2009	\$160	\$0	\$160					
Schultz, Lora	320 ?	9/3/2009	\$100	\$0	\$160	\$65	\$160	\$65		5/1/09-5/23/10
		1/8/2010	\$60	\$0	\$160	\$65	\$160	\$65		

