

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Legard v Sanders County PAC No. COPP 2012-CFP-016  French v Sanders County PAC No. COPP 2012-CFP-018	Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act
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Sanders County PAC draws its identity and existence by registration as a political action committee or PAC. The Sanders County PAC registered with the Commissioner's Office (COPP) on January 21, 2011.

Paradise, Montana resident Kathleen French and Plains, Montana resident Patrick Legard filed identical complaints with the COPP against the Sanders County Political Action Committee, Robert Zimmerman, Patricia Ingraham and John/Jane Doe candidates. The Legard complaint was filed on June 11, 2012 and the French complaint on July 16, 2012.

**SUBSTANTIVE ISSUES ADDRESSED**

The substantive areas of campaign finance law addressed by this decision are: 1) Timely reporting of contributions to and expenditures by a PAC; and, 2) *De minimis* and/or excusable neglect theories as applied to a coordinated contribution to a candidate.

## FINDING OF FACTS

The facts necessary for this Decision are as follows:

Finding of Fact No. 1. Sanders County PAC was a political action committee or PAC at all times during the 2012 elections (Commissioner's Records).

Finding of Fact No. 2. The 2012 primary election in Montana was held on June 5, 2012. Secretary of State (SOS) website.

Finding of Fact No. 3. The Sanders County PAC filed its first campaign finance report on January 31, 2012 (Commissioner's Records). The PAC reported receipts of \$1,198.00 and expenditures of \$808.10 with a carryover balance of \$389.90. *Id.*

Finding of Fact No. 4. The Sanders County PAC filed its second campaign finance report on June 11, 2012. The report showed receipts of \$3,979.10 and expenditures of \$3,200.26, with a carryover balance of \$1,168.74 (Commissioner's records).

- i) All receipts of contributions involved transactions before May 20, 2012. *Id.*
- ii) \$435.84 of the expenditures involved transactions before May 20, 2013 with the additional funds spent: Printery for flyers on May 24, 2012 in the amount of \$2,184.80; Food costs on May 23, 2012 in the amount of \$159.62; bank cash on May 25, 2012 in the amount of \$420. *Id.*

## DISCUSSION

The Sanders County PAC was registered as a political action committee in Montana during the applicable 2012 election [see FF No. 1, 44.10.327(2)(b) ARM]. The Sanders County PAC accepted contributions and made expenditures in the 2012 Montana primary election [see FF Nos. 3, 4]. This Commissioner determines that the Sanders County PAC is an independent committee as defined by §13-37-226(5) MCA and 44.10.327(1)(b), (2)(b) ARM. Accordingly, this Commissioner further determines that this Matter concerns

the application of Montana's Campaign Practices law to the actions of an independent political committee.

### I. Applicable Political Committee Campaign Practices Law

The Sanders County PAC admits that it engaged in election activity, making election expenditures (July 11, 2012 PAC response to complaint). Montana's campaign related laws require full and timely disclosure of election related contributions and expenditures. A political committee is required to timely file a certification (§13-37-201 MCA), timely keep and maintain accounts of contributions and expenditures (§13-37-208 MCA) and timely file reports to the Commissioner's office of such contributions and expenditures (§13-37-226 MCA). The reports, once filed, are available for review by the public, thereby providing transparency and shared access to this information

In particular, as an independent committee the Sanders County PAC was required, under §13-37-226(5) MCA, to file a report:

- a) ...on the 12<sup>th</sup> day preceding the date of an election [by May 24, 2012] in which it participates by making an expenditure.
- b) ...within 24 hours of making an expenditure ... of \$500 or more ...if made between the 17<sup>th</sup> day (May 20, 2012) before an election and day of an election (June 5, 2012).

#### A. Pre-Election Report

The primary election took place on June 5, 2012 (FF No. 2). The Sanders County pre-primary campaign finance report was due 12 days pre-election, or no later than May 24, 2012, reporting through May 20,

2012 [§13-37-226(5) MCA]. The Sanders County PAC pre-primary report, had it been timely filed, would have disclosed: contributions of \$3,979.10, all of which were accepted before May 20, 2012 (FOF No. 4); and, expenses of \$534.84, those made before May 20 [FOF No. 4(ii)] .

The Commissioner finds that the Sanders County PAC pre-primary election report was late filed by 17 days on June 11, 2012 [FOF Nos. 6(a) and 8(b)]. The \$3,979.10 in contributions and \$534.84 in expenses that should have been reported on May 24, 2012 were not reported until June 11, 2012, that date being 17 days late.

B. 24 hour Pre-Election Report.

The Sanders County PAC had a May 24 expense of \$2,184.80 (FOF No. 4). The \$2,184.80 expenditure was made within 17 days of the election and was an amount greater than \$500. The expenditure needed to be reported within 24 hours or by May 25 (FOF No. 5).<sup>1</sup> The Commissioner determines that the \$2,184.80 expenditure was reported 16 days late, on June 11, 2012.

C. Coordination and Independent Expenditure Issue

The complaints allege that certain Sanders County PAC expenditures were coordinated with candidates such that these expenditures became contributions to the candidates. Coordination has been discussed and defined in prior Decisions by this Office. See *Bonogofsky v Kennedy* COPP 2010-CFP-15 and the cases cited therein.

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<sup>1</sup> The food costs on May 23, 2012 in the amount of \$159.62 and bank cash on May 25, 2012 in the amount of \$420 were timely reported on the June 11, 2012 PAC report.

The Sanders County PAC is not a corporation and thus can legally make contributions or expenses in a candidate race. Funds contributed to a candidate are, of course, subject to contribution limits and must be disclosed and reported by the candidate. A candidate contribution includes a third party election expense coordinated with a candidate, as a coordinated election expense is deemed to be an in-kind contribution to a candidate. See *Bonogofsky v Kennedy* and the cases cited therein. A coordinated expense/contribution must be reported/disclosed by the PAC and candidate.

The complaints further allege that a non-coordinated Sanders County PAC expense was an independent expenditure. An independent expenditure is that of a third party entity independent of a candidate, but focused on a candidate in the election. Any "independent expenditure" must be disclosed, reported, and attributed, albeit by the third party (in this case, Sanders County PAC) rather than the candidate. An independent expenditure, however, is not deemed to be a contribution to a candidate and therefore it is not subject to contribution limits or to reporting/disclosure by a candidate.

In this Matter Sanders County PAC agreed that the \$2,184.80 flyer cost was an election expense. The PAC further designated the apportionment between coordination and independent expenditure as follows: "[t]he expenditure by the PAC on behalf of the candidates who helped coordinate the flyer should have been reported as coordinated expenditures and the expenditures to the unknowing candidates should have been reported as independent expenditures." PAC response, July 11, 2012.

The Commissioner accepts the designation made by Sanders County PAC. The Commissioner attributes the flyer cost as follows: \$273.12 as a coordinated expense and \$1911.60 as an independent expenditure. The Commissioner accepts the PAC's July 11 response as making such a designation and accordingly finds the PAC 46 days late in disclosing/reporting the coordinated or independent expenditures. The Flyer was appropriately attributed at the time it was distributed so there is no attribution violation.

## II. Brooker/Fisher/Ingraham/Holden

The complaints alleged certain candidates coordinated with Sanders County PAC. The Sanders County PAC response identifies "Carol Brooker, Candace Fisher, Pat Ingraham and Geni Holden" as four candidates who knew of the expenditure and further provided invoices identifying the proportional amount of \$68.28 as an "in-kind donation" to each candidate.

Of these four candidates Holden certified that the total contributions to her campaign were less than \$500. Candidate Holden was not required to report [13-37-226(4) MCA]. The Commissioner finds that candidate Holden had no obligation to report or disclose the Sanders County PAC contribution.

The remaining three candidates did file campaign finance reports. Each of the three could lawfully accept the Sanders County PAC contribution. Candidates Fisher and Ingraham timely reported the \$68.28 Sanders County PAC in-kind contribution on their campaign finance reports filed 5-21-2012 (Commissioner's records). The Commissioner finds that candidates Fisher and Ingraham met their obligations to report and disclose the Sanders County PAC

in-kind contribution.

Candidate Brooker did not report/disclose the \$68.28 contribution in her campaign finance reports (Commissioner's records). The \$68.28 contribution being in excess of \$35.00<sup>2</sup>, the Commissioner finds that candidate Brooker failed to report/disclose a contribution as required by §§13-37-226, 229 MCA.

### III. April 14, 2012 Event

The complaint alleges that Sanders County PAC hosted a meet-the-candidates event on April 14, 2012 but did not report the costs of the event. The value of the rental cost for the place of the event was \$75.00, paid by Sanders County PAC member Mike Hashisaki (Commissioner's records). The Commissioner finds that this \$75 was a donation to, and expense of, Sanders County PAC that should have been (but was not) reported by Sanders County PAC in its June 11 report. The Commissioner further finds that this amount was expended to enhance general political discussion at an event open to the public and therefore need not be reported as an independent expenditure or coordinated expense to the benefit of any particular candidate.

The complaints further allege that food costs of the April 14 event should have, but were not, reported. Sanders County PAC replied that the food consumed at the event was prepared by PAC members in their own kitchen. Montana law excepts as a contribution "meals and lodging provided by individuals in their private residence..." 13-1-101((7) MCA. This Office treats

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<sup>2</sup> Disclosure as to the source of the contribution must be made under Montana law of any amount greater than \$35. §13-37-229

food prepared by a volunteer in a private home and brought to a potluck dinner as falling within that exception. See the Pink Book, p. 17.

The Commissioner determines that the food cost falls within the exception and is not a reportable election transaction to or by the Sanders County PAC. This determination is applied solely to these facts. The COPP recently determined that wine provided by a winery to a ballot issue PAC fundraiser was a reportable election transaction. *Buell v Footloose Montana* COPP 2010-CFP-11. The distinction lies in the commercial source of the donated item. In this Matter, had the food been catered by commercial entity owned by a Sanders County PAC member there would have been a reportable election transaction.

#### IV. Enforcement

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.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. In this matter Montana's campaign finance report filing requirements are mandatory: "shall file" [See §13-37-226 MCA]. The filing date requirements are

date certain. Therefore, any failure to meet a mandatory, date-certain filing date is a violation of §13-37-226 MCA. Likewise, the disclosure requirements for independent committee election expenditures are mandatory: "...shall report..." 44.10.531(4) ARM.

This Commissioner, having been charged to investigate and decide, hereby determines that sufficient evidence exists to show that the Sanders County PAC and candidate Brooker have, as a matter of law, violated Montana's campaign practice laws, including §§13-37-225, 226, 229 and 230 MCA. Having determined that sufficient evidence exists to show that a campaign practice violation has occurred, the next step is to determine whether there are circumstances or explanations that may affect adjudication of the violation and/or the amount of the fine.

A Commissioner is given discretion ["may", **See** §13-37-124(1) MCA] in regard to adjudication of a violation. The nature of the violation at issue in this matter implicates several past decisions by this Office involving the legal concepts of *de minimis* or excusable neglect .

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 9<sup>th</sup> circuit court of appeals in *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth* 556 F. 3d 1021, 1028-29 (9<sup>th</sup> Cir. 2009). In *Canyon Ferry* the 9<sup>th</sup> circuit prohibited civil enforcement of Montana's campaign finance disclosure requirements, as applied to limited ballot issue activity (limited photocopying, limited staff use and limited use of church property) carried out in support of a

ballot initiative. The Court found that these ballot issue services, while technically having some value, could not be subjected to civil enforcement as a violation Montana's campaign practices law because the "conduct neither causes an economic detriment to the Church nor carries an ascertainable market value." *Id.* at 1030. The Commissioner has further applied *de minimis* to an expenditure by an incidental committee. *Raffiani v. Montana Shrugged* COPP- 2010- CFP 17.

Both *Canyon Ferry* and *Raffiani* involved incidental committee activity. This Office has also applied the incidental committee *de minimis* standard to candidate election expenditures. See *In the Matter of the Fitzpatrick Complaint*, COPP- CFP-2011- 014 and *Royston v Crosby* No. COPP 2012-CFP-41. The Commissioner hereby applies the *de minimis* concept to the failure of the candidate Brooker to timely identify the \$68.28 in-kind contribution from the Sanders County PAC. The Commissioner has reviewed the facts in this matter and, as in *Royston*, has determined that there are no issues of avoidance, laundering or overall improper conduct. Further, the Commissioner notes that the Flyer involved in this Matter was fully attributed by the entity that prepared the Flyer. The only issue involved for candidate Brooker is the \$68.28 in unreported coordinated contributions. The Commissioner hereby directs candidate Brooker to, within 10 days of the date of this Decision, amend her 2010 campaign finance reports and report the \$68.28 PAC contribution. Under the facts and circumstances of this Matter upon such filing of an amended report the Commissioner determines the \$68.28 to be *de minimis*

such that no adjudication is warranted as to this amount.

The Commissioner does not apply *de minimis* to the Sanders County PAC activities. The failure to report an election transaction, the 17 day delay in reporting and disclosing the pre-primary election contributions/expenses, the 16 day delay in 24-hour reporting requirement for the flyer expense and the 46 day delay in disclosing coordinated and independent expenditures are all election violations and sufficient evidence exists as to teach of these violations. The dates set out for disclosure are mandatory. Candidates oppose each other relying on access to timely disclosed campaign information.<sup>3</sup> This Commissioner has refused to apply *de minimis* to a late filing of 71 days (**See Matters of Vincent** Nos. COPP-2013-CFP-006 and 009). In a ballot issue Matter Commissioner Murry did not apply *de minimis* to excuse late filings of one day, two days, and three days by citizen groups working on the ballot issue. *Harrington v Cap the Rate* COPP 2012-CFP-16. As a matter of general principle, *de minimis* cannot apply generally to late filing violations. To its credit the Sanders County PAC recognizes this and accepts that an appropriate penalty is due as the social cost of the error. (PAC response, July 11, 2012).

The Commissioner now considers excusable neglect. This Office has, based on certain facts, declined prosecution based on late filing by a period of 11 days [**See In the Matter of the Washburn Complaint** COPP-CFP-2013-002] and by a period of 17 days [**See In the Matter of the Complaint Against CMRG,**

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<sup>3</sup> The election involved in this Matter was a primary election but it was contested between conservative Republicans and “Republicans who are even more conservative” (*Missoulian*, April 12, 2011).

decided February 21, 2002]. These determinations were, in part, based on an excusable neglect theory stemming from the Commissioner's determination of genuine confusion among multiple parties over who was to file what and when. However, as discussed in detail in *Matters of Vincent* Nos. COPP-2013-CFP-006 and 009 intent and motive are not considered in an excusable neglect consideration.

Specifically it is noted that a showing of excusable neglect generally requires justification for error beyond mere carelessness or ignorance of the law. *Empire Lath & Plaster, Inc. v. American Casualty Co.*, 256 Mont. 413, 417, 847 P.2d 276, 278 (1993). Neglect that is "due to forgetfulness and the press of other, more important business is not sufficient to establish excusable neglect." *Foster Apiaries, Inc. v. Hubbard Apiaries, Inc.*, 193 Mont. 156, 161, 630 P.2d 1213, 1216 (1981). A party's busy schedule or inattentiveness to the matter does not constitute excusable neglect. *Matthews v. Don K. Chevrolet*, 2005 MT 164, ¶¶13-15, 327 Mont. 456, ¶¶13-15, 115 P.3d 201, ¶¶ 13-15. With this analysis in mind, the late filing violations in this Matter are not appropriate for application of an excusable neglect theory. While Sanders County PAC was a volunteer effort that fact alone is not sufficient to show excusable neglect.

Because there is a finding of violation and a determination that, as to late reporting, *de minimis* and excusable neglect theories are not applicable, civil adjudication and/or a civil fine is justified [§13-37-124 MCA]. This Commissioner has, through this decision, issued a "sufficient evidence" Finding and Decision justifying civil adjudication under §13-37-124 MCA.

Because reporting was required in both Lewis and Clark and Sanders counties, both counties are venue for an allegation of a campaign practice violation [§13-37-124 MCA]. By the choice of the Commissioner, this matter will now be submitted to (or “noticed to”) the Lewis and Clark County attorney for his review for appropriate civil action. §13-37-124(1) MCA. Should the County Attorney waive the right to prosecute [see, §13-37-124(2) MCA] or fail to prosecute within 30 days [see, §13-37-124(1) MCA] this Matter returns to this Commissioner for possible adjudication.

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 adjudication 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 Chapter 37, including those of §13-37-226. [See 13-37-128 MCA]. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

In regard to any such a fine the Commissioner has discretion to determine if mitigation is appropriate to reduce a fine based on the explanation of why a violation occurred or circumstances of payment. **See** *In the Matter of the*

*Complaint of MacLaren, COPP-2011-CFP-12 . Mitigation means “abatement or diminution of a penalty or punishment imposed by law.” Black’s Law Dictionary, Revised 4<sup>th</sup> Addition.* The Commissioner will consider the facts of this matter to determine whether mitigation will be applied to the amount of fine negotiated in this Matter, should Sanders County PAC choose to settle this Matter with a negotiated fine.

### **CONCLUSION**

Based on the preceding Discussion as Commissioner I find and decide that there is sufficient evidence to show that Sanders County PAC violated Montana’s campaign practices laws, including §§13-37-226, 229, and 230 MCA, and that a civil penalty action under § 13-37-128, MCA is warranted. Because this matter involves a reporting violation that occurred in both Lewis and Clark and Sanders Counties the Commissioner hereby chooses that this Matter be submitted to (or “noticed to”) the Lewis and Clark County Attorney for his review for appropriate civil action under section 13-37-124(1) MCA. Upon return to the Commissioner of this Matter by the County Attorney, this Commissioner will assess the amount of civil penalty, should Sanders County PAC choose to settle this Matter with a negotiated fine.

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DATED this 26<sup>th</sup> day of November, 2013.

A handwritten signature in black ink, appearing to read 'Motl', is written over a horizontal line. The signature is stylized and somewhat cursive.

Jonathan R. Motl  
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