

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

MDP v. MRLCC  No. COPP 2016-CFP-029	DISMISSAL OF COMPLAINT BASED ON LACK OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION AND ON APPLICATION OF PRINCIPLE OF EXCUSABLE NEGLECT
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On September 22, 2016, the Montana Democratic Party (MDP) of Helena, Montana filed a complaint against the Montana Republican Legislative Campaign Committee (MRLCC) of Helena, Montana for failing to timely report and disclose campaign contribution information.

**Discussion**

The Complaint triggers a review of several campaign practice issues. Each issue is discussed separately below.

1. The MRLCC Timely Reported

The Complaint alleges that the MRLCC, a political party committee, failed to timely report and disclose expenses and contributions involved in 2016 candidate campaigns for election to public office.

Finding of Fact No. 1: The MRLCC first filed a statement of organization (Form C-2) for Montana's 2014 elections, refiling a C-2 form in March of 2016 for Montana's 2016 elections. All MRLCC statements list its Montana political committee type as a "political party" committee. (COPP records.)

The Complaint asserts that MRLCC should be filing under the "statewide" candidate filing schedule. Accordingly, the Complaint alleges that MRLCC has failed to file four of nine required campaign finance reports.

Finding of Fact No. 2: The MRLCC filed five 2016 campaign finance (C-6) reports. Those reports were filed on: April 7 (reporting through March 4); May 3 (reporting through April 28); May 24 (reporting through May 21); June 22 (reporting through June 22); and, August 9 (reporting through August 4). (COPP records.)

Finding of Fact No. 3: The MRLCC's campaign finance reports show in-kind contributions to certain Republican House and Senate candidates. The MRLCC's C-2 form lists its purpose as "support Republican legislative candidates." (COPP records.)

Reporting and disclosure is required so that the public, press and candidates understand the contribution and expenditure of funds used in support of a particular candidacy. The MRLCC is a 2016 political committee that was formed to contribute to 2016 candidates running for service in Montana's legislature (FOF No. 3). The MRLCC has filed 2016 campaign finance reports showing it made contributions solely to Montana legislative candidates (*id.*).

As a political committee contributing solely to Montana legislative (district) candidates, the MRLCC files on the same schedule as district candidates. (§13-37-226(2), MCA.) This means that the MRLCC was required to file on the 35<sup>th</sup> and 12<sup>th</sup> day preceding an election and the 20<sup>th</sup> day after an election.

(§13-37-226(2)(a), MCA.)

Montana's 2016 primary election was held June 7, 2016 thus requiring that MRLCC file a 35<sup>th</sup> day pre-primary report (due May 3), a 12-day pre-primary election report (due May 26, 2016) and a 20-day post-primary election report (due June 27, 2016). The MRLCC timely filed all three of these reports (FOF No. 2).<sup>1</sup>

Montana's general election will be held on November 8, 2016. MRLCC's 35<sup>th</sup> day pre-general report is due October 4, 2016 and therefore cannot be untimely as measured by the date of this Complaint.<sup>2</sup> There being no failure by MRLCC to file reports on time, any allegation of failure to timely file is dismissed.

In dismissing this allegation the Commissioner notes the Complainant attached a brochure that showed MRLCC campaign support for U.S. Congressional candidate Ryan Zinke and Terry Gauthier, a candidate for election from state Senate District 40. The Zinke activity, however, does not qualify as a Montana statewide activity. Under Montana's campaign practice laws "candidate" means someone who files a declaration for nomination (§13-1-101(8)(a), MCA) for a public office limited to a "state, county, municipal, school or other district office" (§13-1-101(38),MCA).<sup>3</sup> Campaigns for federal offices, such as U.S. Congress, are not regulated by the COPP. Inclusion of support for

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<sup>1</sup> Campaign finance reports disclose contributions and expenditures "5 days before the date of filing." §13-37-228(2), MCA. The MRLCC, while sometimes filing early, still reported through the proper period and therefore met the requirements of law.

<sup>2</sup> It appears that MRLCC was reporting under the "90<sup>th</sup>, 35<sup>th</sup> and 12<sup>th</sup>" day pre-election requirements of §13-37-226(4), MCA and therefore reported more often than required.

<sup>3</sup> Only "candidates for a state office" or "state district office" or any other Montana public office need file campaign finance reports with the COPP. §13-37-226, MCA.

Candidate Zinke does not make the MRLCC activity “statewide” activity for Montana campaign finance reporting purposes.

2. The MRLCC Expenditures Are Not Reported in Sufficient Detail

Once a complaint is filed the Commissioner “shall investigate any other alleged violation ...” §13-37-111(2)(a), MCA. This investigative 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 this authority. *Powell v. Motl*, OP-07111, Supreme Court of Montana, November 6, 2014 Order.

The Commissioner examines the sufficiency of expense detail provided by the MRLCC campaign finance reports. The MRLCC reported expenditures on its campaign finance reports in the following detail:

Finding of Fact No. 4: The MRLCC’s 2016 campaign finance reports show expenditures as follows:

- a. The April 7 report shows \$800 to Marilyn Miller for “bookkeeping,” and \$8,073.97 to the Political Company for “consulting, fundraising letter and reimbursement.”
- b. The May 3 report shows \$800 to Marilyn Miller for “bookkeeping and reporting,” and \$4,000 to the Political Company for “consulting.”
- c. The May 26 report shows \$400 to Marilyn Miller for “bookkeeping and reporting,” and \$5,585.61 to the Political Company for “consulting and fundraising.”
- d. The June 22 report shows \$400 to Marilyn Miller for “bookkeeping and reporting,” and \$2,000 to the Political Company for “consulting.”
- e. The August 9 report shows \$400 to Marilyn Miller for “bookkeeping and compliance reporting,” and \$3,227.28 to the Political Company for “consulting.” (COPP records.)

Three of the MRLCC campaign finance reports described in FOF No. 4 list a payment to the Political Company solely as a “consulting” expenditure. This

generic expenditure listing does not provide the “purpose, quantity, subject matter” expense reporting detail required by 44.11.502(7), ARM.<sup>4</sup> Nor, does this listing meet Montana’s statutory requirement of detail required for campaign finance reports: “[r]eports of expenditures made to a consultant, advertising agency, polling firm, or other person that performs services for or on behalf of a candidate or political committee must be itemized and described in sufficient detail to disclose the specific services performed by the entity to which payment or reimbursement was made.” §13-37-229(2)(b), MCA.<sup>5</sup>

Sufficiency Finding No. 1: There are sufficient facts to show that the MRLCC’s campaign finance reports failed to disclose detail describing the specific services provided by its consultant expenditures.

This Decision marks the first time that the COPP has examined a single word (or group of words) listing a campaign expense in a campaign finance report and determined whether the word or group of words provided “sufficient detail” of the expense as required by law.<sup>6</sup> Prior COPP Decisions, have looked at narrow issues of campaign finance report disclosure such as whether: 1) the disclosure failed to report the expense at all; or, 2) the disclosure failed to

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<sup>4</sup> The COPP’s Accounting and Reporting Manual for Candidates at P. 19 adds that “[a] common [expense reporting] mistake is the reporting of consultants. Reports of expenditures to a consultant ...must be itemized and must be described in sufficient detail to disclose the specific services performed.”

<sup>5</sup> This statute was formerly numbered §13-37-230(2), MCA.

<sup>6</sup> The COPP touched on this issue in *O’Hara v. Pinocci*, COPP-2014-CFP-027 (Initial and Final Decisions) with those Decisions focusing on the general deficiency of the method and manner of reporting, rather than the lack of “sufficient detail” stemming from the use of a single word like “consultant.” The COPP came closest to this issue in *Clark v. Datsopoulos*, COPP-2014-CFP-033B wherein the COPP investigator retrieved a “detailed invoice” from the campaign consultant. The COPP then compared the campaign reporting to the invoice and determined that the campaign finance report was deficient because it failed to disclose the “mailing, printing, radio and management services” listed in the invoice.

report a particular activity, as revealed by examination of receipts or other documents showing the detail of that particular expense.

These previous COPP Decisions determined a campaign practice violation by a political committee or candidate for failure to report in-kind value of paid staff or vendors providing services to the campaign.<sup>7</sup> Other Decisions determined a campaign practice violation by a political committee for failure to itemize expenditures according to each candidate served by the expenditures.<sup>8</sup> Still other Decisions determined a campaign practice violation by a candidate for failure to disclose any part of the name, mailing address, occupation or employer of a contributor to their campaign.<sup>9</sup>

Based on the facts of this Matter, the Commissioner reaches the next issue – that is, that there is an affirmative duty on the part of a candidate or committee to use a word or words in their campaign finance report that provide “sufficient detail to disclose the specific services” covered by the expenditure. In this Matter, the use of the word or words “bookkeeping” or “bookkeeping and compliance reporting” sufficiently describe and thereby disclose the specific services provided by Marilyn Miller to the MRLCC (FOF No. 4). In contrast, the

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<sup>7</sup> “The COPP has a 20 year-plus history of interpreting Montana’s contribution [expense] law ...to require reporting and disclosure of the in-kind value of express advocacy use of paid staff by any entity involved in a campaign.” *Hamlett v. MGN*, COPP-2012-CFP-053. See also *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Clark v. Bannan*, COPP 2010-CFP-023; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; *Bonogofsky v. Wittich*, COPP-2010-CFP-031; *Madin v. Sales*, COPP-2010-CFP-029; *Bonogofsky v. Prouse*, COPP-2010-CFP-033; *Bonogofsky v. Wagman*, COPP-2010-CFP-035; *Petrini v. Houck*, COPP-2015-CFP-011; and *Clark v. Datsopoulos*, COPP-2014-CFP-033B.

<sup>8</sup> *Gibson v. Montana Democratic Party*, COPP 2014-CFP-053; *Shellnutt v. Planned Parenthood*, COPP-2014-CFP-058; *Perea v. MDP*, COPP-2014-CFP-055; *Buttrey v. MDP*, COPP-2014-CFP-050; *Kary v. MDP*, COPP-2014-CFP-059; and *Gibson v. MDP*, COPP-2014-CFP-062.

<sup>9</sup> *O’Hara v. Erb*, COPP 2016-CFP-012; *Essman v Patients for Reform*, COPP-2012-CFP-034; and *Adams v. Brown*, COPP-2015-CFP-005.

use of the words “consulting”, “fundraising” or “reimbursement” are not sufficient to describe or disclose the specific services of the “The Political Company” (FOF No. 4).

The Commissioner incorporates two safeguards into this Decision, given the first time nature of this determination and the likelihood that there are other candidates and committees in a similarly deficient reporting status. First, the MRLCC is directed to immediately file an amended campaign finance report providing the “specific services” detail in regard to The Political Company.<sup>10</sup>

Second, contingent on an amended campaign finance report being filed, the Commissioner hereby excuses (dismisses) the MRLCC from a campaign practice violation for the deficiencies examined in the above section. This dismissal is based on the principle of excusable neglect (see discussion, below).<sup>11</sup> Excusable neglect principles will not be applied to excuse future campaign practice violations for failures to adequately disclose “specific services” in campaign practice reports filed after the date of this Decision.

### 3. The MRLCC Failed to Properly Complete Its C-2 Form

The Commissioner next examines the Statement of Organization (Form C-2) filed by the MRLCC. Under Montana law “a statement of organization ... shall include ... the name, office sought and party affiliation (if any) of each candidate on whom the committee makes a reportable election expenditure” 44.11.201(1)(f), ARM. The MRLCC filed its C-2 form for the 2016 elections

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<sup>10</sup> MRLCC should list the specific services detail in the “purposes” reporting cell in its amended campaign finance report. The cell allows 150 characters of reporting space and if more space is needed, MRLCC should contact a COPP compliance specialist who will assist them in further filing.

<sup>11</sup> Excusable neglect was similarly applied in *Thomas v. Gianforte*, COPP-2016-CFP-001.

listing is purpose as “support Republican legislative candidates.” (FOF No. 3.)

There were no names of candidates listed on the MRLCC Statement of Organization.

Sufficiency Finding No. 2: There are sufficient facts to show that the MRLCC’s failed to disclose the names of candidates on its Statement of Organization.

In making this finding the Commissioner notes that the C-2 form’s broad “purpose” statement was likely thought by the MRLCC to meet the exception to ARM 44.11.201(f) allowing for the name of the party, rather than the name of the candidate. This exception, however, applies only when the committee “is supporting the entire ticket of any party.” *Id.*

In this Matter the MRLCC’s campaign finance reports show that it acted such that it cannot claim this “entire ticket” exception:

Finding of Fact No. 5: The MRLCC’s campaign finance reports show in-kind contributions, including “strategic planning,” to Republican primary election candidates, including at least two candidates involved in contested Republican primary elections. (COPP records.)

By supporting only certain candidates in Republican primary elections the MRLCC did not support the entire Republican Party ticket. The “entire ticket” exception does not apply.<sup>12</sup>

In making this determination the Commissioner again, below, applies the principle of excusable neglect to excuse the MRLCC from an immediate

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<sup>12</sup> The MRLCC listed some Republican candidates by name on the in-kind addendum to its campaign finance reports (FOF No. 3). The listing of some candidates on a campaign finance report, however, does not satisfy the separate obligation of MRLCC to list all candidates supported or opposed on its C-2 form. *Roberts v. MSSA*, COPP-2016-CFP-005.

campaign practice violation.<sup>13</sup> The Commissioner does this because the political party committee status of MRLCC, and all other Montana political party committees, will be reviewed following the 2016 election cycle. The 2015 Montana legislature passed a law (the Disclose Act) that limits political party committees to those formed by political party organizations.<sup>14</sup> The Commissioner considered but did not make inquiry on this issue to the MRLCC as he intends to make such an inquiry on a uniform basis to all political party committees after November 8, 2016, the final date of 2016 electoral activity.<sup>15</sup>

### **ENFORCEMENT OF SUFFICIENCY FINDINGS**

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner “shall investigate” any alleged violation of campaign practices law. §13-37-111(2)(a), MCA. 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,

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<sup>13</sup> This dismissal is contingent on the MRLCC filing an amended C-2 form listing the appropriate names of candidates.

<sup>14</sup> *See* discussion in *O'Hara v. Madison County*, COPP-2016-CFP-011 and *see* Advisory Opinion COPP-2016-AO-013.

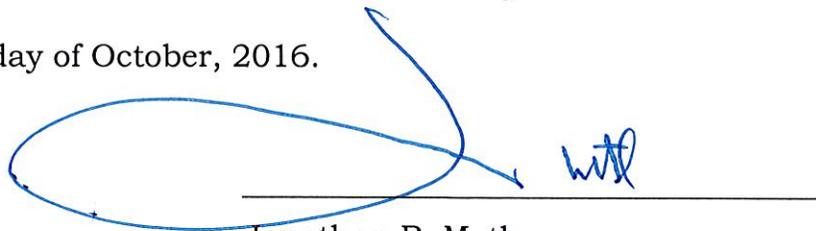
<sup>15</sup> The Commissioner will make a political committee determination, including reclassification, after the close of 2016 elections so as to eliminate any adverse impact brought about by a change made near the date of 2016 elections.

to show that MRLCC's 2016 campaign practices violated Montana's campaign practice laws, including, but not limited to the laws set out in the Decision. 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 fully and timely report and disclose cannot generally be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law as it relates to failures to file and report. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009. In this Matter, however, application of excusable neglect is appropriate for the reasons set out above. Excusable neglect is therefore applied to dismiss Sufficiency Findings Nos. 1 and 2. See comparable application in *Thomas v. Gianforte*, COPP-2016-CFP-0001.

Because the findings of violation are excused by application of excusable neglect principles, this Matter is dismissed in its entirety.

DATED this 3rd day of October, 2016.



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