

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Marbut v. Dudik No. COPP 2014-CFP-042	<u>Dismissal of Complaint</u>
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On October 8, 2014, Gary Marbut, a resident of Missoula, MT and a 2014 candidate for election to the Montana legislature from House District 94 (HD94) filed a complaint against Kimberly Dudik, also a resident of Missoula, MT and also a 2014 candidate to the Montana legislature from HD 94. Mr. Marbut alleged in his complaint that Ms. Dudik violated campaign practice laws by failing to display a proper political party identifier on a campaign flyer that Ms. Dudik's campaign sent to Missoula County residents.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this decision is that of attribution of campaign materials by inclusion of the candidate's party affiliation or party symbol.

COMPANION DECISION

The Decision in this Matter is accompanied by a Decision in *Lourie v. Rogan*, COPP-2014-CFP-045, released simultaneously with this Decision. The

Lourie v. Rogan Decision also addresses the issue of a proper party identification set out in a candidate's campaign material.

FINDING OF FACTS

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: On June 3, 2014, a primary election was held in Missoula County. Kimberly Dudik was the only HD 94 candidate on the primary ballot. Ms. Dudik passed through to the general election ballot as the Democratic nominee for election from HD 94. (Montana Secretary of State's Office).

Finding of Fact No. 2: Gary Marbut submitted sufficient signatures and paperwork to the Montana Secretary of State, qualifying as an Independent candidate for House District 94. Mr. Marbut is on the general election ballot as an independent candidate for election from HD 94. (Montana Secretary of State Office).

DISCUSSION

The complaint was filed Mr. Marbut, a candidate for election to the Montana legislature from HD 94 (FOF No. 2) against Ms. Dudik, the opposing candidate for election to the Montana legislature from HD 94 (FOF No. 1). The complaint alleges that Candidate Dudik distributed campaign literature in the 2014 HD 94 election that lacked the appropriate party designation. Under Montana law all election materials prepared by Candidate Dudik "...must state the candidate's party affiliation or include the party symbol." §13-35-225(2) MCA.

Candidate Marbut included a copy of an 8 ½ by 5 ½ glossy post-card style flyer (hereafter Flyer) distributed by Candidate Dudik.¹ Candidate

¹ Candidate Dudik stated she sent copies of the Flyer via "The Directory" in Missoula, MT to about 1,600 Missoula County residents the same week the general election absentee ballots were mailed or the week of October 6, 2014. (Investigator's notes)

Dudik is the Democratic Party nominee for election to the legislature from HD84. Candidate Dudik prepared the Flyer and under Montana law the Flyer "...must state [Candidate Dudik's] party affiliation or include the party symbol." §13-35-225(2) MCA. This required disclosure is known as an attribution. §13-35-225 MCA. The complaint asserts that such attribution is lacking.

The Flyer does not state in words that Candidate Dudik is the candidate of the Democratic Party. Both sides of the Flyer, however, have a printed image of an animal figure ($\frac{3}{4}$ inch and $\frac{3}{8}$ inch in size, respectively). Candidate Marbut believes that these images do not show the Democratic Party symbol (a donkey), but are instead a "minimalist use of an unidentifiable icon". (Missoulain, October 11, 2014). Ms. Dudik sharply disagrees, stating that she used a blue "kicking" donkey designed by the Democratic Party as a party symbol. (Investigator's notes).

This Matter thus presents for resolution the sole issue of whether or not the kicking donkey image used by Candidate Dudik is sufficient to meet the "party symbol" attribution requirement of §13-35-225(2) MCA. Resolution of this issue turns on an examination of the language of subpart 2 of the pertinent statute (§13-35-225(2) MCA). In turn, this examination first requires a review and discussion of subpart 1 of the pertinent statute.

Subpart 1, or §13-35-225(1) MCA, sets out the general and broader attribution requirements, specifying that election communication "must clearly and conspicuously include the attribution 'paid for by' followed by the name

and address of the person who made or financed the expenditure for the communication.” Subpart 1 is the most commonly invoked attribution measure as most COPP attribution complaints are filed because an election communication (in the form or sign, advertisement or flyer) appears without some or all of the information required by subpart (1). Generally, complaints of missing information are made through informal phone calls to the Commissioner’s office. COPP staff responds to these informal complaints by promptly contacting the errant campaign to instruct that any missing attribution information be added to the election communication.

Complaints about inadequate attribution can also take the form of formal written complaints filed with the COPP.² Commissioner Unsworth discussed the circumstances of subpart 1 attribution enforcement in *Campbell v. Brown*, May 9, 2008. Commissioner Unsworth noted that the COPP first promptly worked with the candidate to bring deficient election communication into compliance.³ Commissioner Unsworth then used the “clearly and conspicuously” language of subpart 1 to adopt the five size, location and color attribution requirements (adopted from comparable federal law), but declined to pursue a violation for a limited non-compliance (applying the *de minimis* principle without calling it such). *Id.*

² In the 2014 election cycle alone three formal complaints of subpart 1 violations have been filed: *Strizich v. Loney*, No. COPP 2014-CFP-034; *Cohenour v. Dooling*, No. COPP 2014-CFP-043; and, *Brastrup v. Ravndal*, COPP 2014-CFP-0040.

³ The 2013 legislature amended §13-35-225 by adding subsections (6) and (7) requiring that a prompt formal notice of the need for corrective action be made by the COPP once a formal attribution complaint is filed.

The subpart 1 discussion, above, sets the stage for discussion of subpart 2. Section 13-35-225(2) is a stand-alone subpart in that it does not depend on or refer to subpart 1. Subpart 2 reads in its entirety: “[c]ommunications in a partisan election financed by a candidate or a political committee organized on a candidate’s behalf must state the candidate’s party affiliation or include the party symbol.” Notably there is no requirement of “clearly and conspicuously” in subpart (2), that language appearing only in subpart (1).

Montana’s rules of statutory construction do not allow the “...insert[ion of] what has been omitted...” §1-2-201 MCA. The Montana supreme court repeatedly cites this legislative directive in interpreting a statute: “[i]n interpreting statutes, our role is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted . . .” [Section 1-2-101, MCA.](#)” *Lewis and Clark County v. Hampton*, 2014, MT 207, 376 Mont. 137, 333 P3d 205.

Applying, then, the standard statutory construction required by §1-2-201 MCA, the Commissioner determines that there is no subpart 2 attribution requirement that the party symbol or statement of party affiliation be clear and conspicuous. Instead, the only requirement is that there actually be a party symbol or statement of party affiliation included in the communication.

Complainant Marbut may wish a larger and different symbol of the Democratic Party, but a particular symbol is not required by statute. The Commissioner determines that the only requirements are that: 1) the party symbol or statement chosen by a candidate be actually in or on the

communication; and 2) there is some objective basis to claim symbol or statement designates party affiliation. It is therefore within a candidate's discretion to choose the size, manner, design and location of the statement or symbol of party affiliation.

Candidate Dudik's stylistic donkey party symbol passes the "be there" and objective designation test. The kicking donkey symbol is imprinted on the front and back of the brochure. The symbol is "there." Further, the kicking donkey symbol has "some objective basis" to serve as a party symbol as it was adopted by the Democratic Party and used as a party symbol by other 2014 Democratic candidates for public office.⁴

The Commissioner notes that Candidate Marbut should be thanked and not faulted for bringing this complaint. A discussion of this issue is important to both parties and long overdue. Candidate Marbut's complaint is brought against the party affiliation attribution made by a Democratic candidate for public office. However, the Commissioner notes that there is a companion complaint, *Lourie v. Rogan*, claiming an inadequate political party attribution by Republican candidate for public office.

Indeed, the issue of proper attribution of party affiliation has long been troublesome to candidates because of perceived unfairness by the opposing candidate in the manner in which a candidate chooses to emphasize or diminish the display the party affiliation. Much of this perception of unfairness has stemmed from an understandable linkage of the "clear and conspicuous"

⁴ Candidate Janet Ellis (Democrat for HD 81) uses the kicking donkey image on her campaign literature. (Commissioner's records).

attribution requirement of subpart 1 as also being a requirement of subpart 2. The Decision severs that linkage. A candidate can chose to emphasize or diminish the required attribution of party affiliation as he or she wishes, subject to the two requirements discussed above.

DECISION

This Commissioner hereby dismisses this complaint under analysis and for the reasons set out above.

DATED this 20th day of October, 2014.



Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana