

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

McKamey v. Pinocci No. COPP 2016-CFP-020	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION
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On May 27, 2016, Wendy McKamey, a resident of Great Falls, Montana, filed a complaint against Randall Pinocci, also a resident of Great Falls, Montana. Ms. McKamey and Mr. Pinocci were both primary election candidates seeking 2016 election to the Montana legislature from House District 19 (HD 19). The Complaint alleges that Candidate Pinocci failed to properly report, attribute or disclose his 2016 primary election campaign activity.

Foundational Findings of Fact

The following finding of facts are necessary before proceeding to discussion of this Matter:

Finding of Fact No. 1. Wendy McKamey and Randall Pinocci were June 7, 2016 primary election candidates for Republican Party nomination to the general election to be elected Representative from HD 19. (Montana Secretary of State Website.)

Finding of Fact No. 2. Candidate McKamey (1,230 votes) prevailed over Candidate Pinocci (766 votes) in the 2016 Republican primary election. Ms. McKamey (R) will face Elaine Olsen (D) in the 2016 general election from HD 19. (Montana Secretary of State Website.)

Discussion

The Complaint alleges that Candidate Pinocci failed to report, disclose, account and/or attribute campaign activity associated with ads and articles published in a news-journal style publication called the “Montana Christian Journal.” The Complaint allegations include issues that have not previously been addressed by a Commissioner.

1. Late Reporting of A Campaign Expense

The Complaint alleges that the campaign costs (including the cost of a campaign ad placed in the Montana Christian Journal) were not properly or timely reported or disclosed by Candidate Pinocci.

Finding of Fact No. 3. The Montana Christian Journal is an arm (dba or doing business as) of the Montana Christian Business Directory, LLC. In turn Montana Christian Business Directory, LLC is a Montana company registered with the Montana Secretary of State, with Douglas Miller listed as registered agent.¹ (Montana Secretary of State, Business Records archive.)

Finding of Fact No. 4. Since April of 2013 the Montana Christian Business Directory has published 13 issues of the Montana Christian Journal, with Volume 3, No. 2 (Issue 3:2) being the last published issue. (Montana Christian Journal Website.)

Finding of Fact No. 5. Issue 3:2 was not dated but was published in advance of the 2016 Montana primary elections. The Issue features a photo of three primary election candidates

¹ The Montana Christian Journal “press kit 2016” states that in 2013 Douglas Miller purchased the Montana Christian Business Journal.

on the front page, bearing the caption “Christians Will Decide the Next Primary Election.” Thirteen of the 32 pages of Issue 3:2 consist, in whole or part, of ads or stories about 2016 Montana candidates or ballot issues. (Montana Christian Journal: Issue 3:2.)

Finding of Fact No. 6. On April 29, 2016 Candidate Kantorowicz was billed (the bill was marked as paid) \$390 for a half page ad in the Montana Christian Journal.² (Commissioner’s Records.)

Finding of Fact No. 7. On May 24, 2016 Candidate Pinocci filed a pre-primary campaign finance report showing, in relevant part, that the campaign reimbursed Randy Pinocci personally for:

- a) An expenditure of \$710 “to reimburse expense for half page print ad and 2000 flyers.”
- b) An expenditure of \$652 to for costs of a “1543 piece mailer with postage and labels.” (Commissioner’s Records.)

Finding of Fact No. 8. On June 1, 2016 Candidate Pinocci filed an amended pre-primary campaign finance report showing, in relevant party, that the campaign reimbursed Randy Pinocci personally for:

- a) An expenditure of \$710 “to reimburse MT Christian Journal for half page ad and 2000 flyers.”
- b) An expenditure of \$652 to for “reimburse for Innovative Postal Service Inc. Invoice 1543 piece mailer 5/21/2016 with postage and labels.” (Commissioner’s Records.)

The 2016 Montana primary election took place on June 7, 2016. Under Montana law Candidate Pinocci was required to file campaign finance reports on the 35th day (May 3, 2016) and 12th day (May 26, 2016) before the primary election. (§13-37-226(2)(a), MCA.) Candidate Pinocci’s campaign was required to timely report each expense and contribution. (§13-37-228, MCA.³)

The Complaint alleges that Candidate Pinocci did not timely or completely

² The \$390 half page charge paid by Candidate Kantorowicz was consistent with the amount paid by Candidate Pinocci.

³ Reporting must include all expenses by and contributions to the campaign that occur more than 5 days before the reporting deadline. §13-37-228(2), MCA.

report the ad cost, document purchase costs and mailing costs associated with the use of Issue 3:2 by the Pinocci campaign. The Pinocci campaign, however, timely filed its pre-election campaign finance report and disclosed expenses associated with ad payment, document purchase (“flyers”) and postage costs (FOF No 7).

Because there was no failure to timely report by Candidate Pinocci, this leaves only the allegation that the expense reporting, while timely, did not provide the detail required by Montana law. We begin the analysis of this issue by noting that Candidate Pinnoci’s expense reporting in this Matter is vastly improved from his past reporting, some of which presented information in a manner best described as unintelligible.⁴ Because Candidate Pinnoci’s current expense reporting is timely and intelligible the issue addressed by the Commissioner is narrow – that is whether the reporting provides the detail required by Montana law.

There is guidance as to the expense detail that must be provided by a campaign finance report. Montana law requires that a candidate’s campaign finance report “must disclose the following information concerning expenditures made ...the full name, mailing address, occupation, and principal place of business, if any, of each person to whom expenditures have been made ...during the reporting period, including the amount, date and purpose for each expenditure.” §13-37-229(2)(a), MCA. COPP’s accounting guide to candidates adds that “[t]he purpose has to be specific and include quantity and subject

⁴ See *O’Hara v. Pinocci*, COPP-2014-CFP-027 and *O’Hara v. Pinocci*, No. COPP-2015-CFP-007 (Initial and Final Decisions).

matter.”⁵

Candidate Pinocci’s expense reporting, as set out in campaign finance report documents, does not meet the required detail as to the purpose of the expenditure. The initial report identifies only Randy Pinocci as the party who was paid for costs for document production, ad publication and postage/handling (FOF No. 6).⁶ The amended report adds detail as to the entity that printed Issue 3:2 (Montana Christian Journal) and the entity that conducted the mail effort (Innovative Postal Services). Neither the original or amended report, however, provides the address of Montana Christian Journal or Innovative Postal Services, nor did the reports provide the division of the \$710 expense between ad and printing costs. Such detail was and is required by Montana law.

Candidate Pinocci, however, met the requirements of law by providing the required detail in documents filed contemporaneously with his campaign finance reports.⁷ Those documents, placed hard copy in Candidate Pinocci’s candidate file, provided all further detail, including addresses and expense items billed, required by Montana law. Those documents, while meeting reporting requirements, could be inspected by the public, including the

⁵ *COPP Accounting and Reporting Manual for [2016] Candidates and Treasurers*, p. 30.

⁶ Candidate Pinocci routinely uses his personal account to pay a campaign expense and then reimburses himself from his campaign account. Candidate Pinocci was instructed as follows regarding this practice: “Any such in-kind contribution/expenditure by a candidate and his or her campaign must be a small minority of campaign expenditures and must result in the expenditure being full, understandably and timely disclosed and reported. *O’Hara v. Pinocci*, COPP-2014-CFP-027, p. 16.

⁷ Candidate Pinocci’s treasurer, Lorna Kuney, supplemented the amended campaign finance report by providing copies of the bills to Candidate Pinocci from Innovative Postal Services and Montana Christian Journal.

complainant, only upon review of the hard copy documents stored in the candidate's campaign file maintained in the Helena office of the COPP.⁸

Based on the above discussion the Commissioner determines that there are insufficient facts to show Candidate Pinocci failed to timely and completely report campaign expenses. This portion of the Complaint is dismissed.

2. The Montana Christian Journal (Self Distribution)

The Complaint implicitly questions the campaign status of the Montana Christian Journal.

Finding of Fact No. 9. The Montana Christian Journal is not registered with the COPP as a political committee and therefore reports no campaign expenditures or contributions. (Commissioner's Records.)

Setting aside ads paid for by candidates, Issue 3:2 of the Montana Christian Journal is replete with articles favoring, including endorsements of, certain candidates running in 2016 contested primary elections. (FOF No. 5.) Further, Issue 3:2 was published in advance of the 2016 primary election and proclaims on the cover page that "Christians Will Decide the Next Primary Election".

Unless an exception applies, there can be no doubt but that Issue 3:2 supports a candidate such that a portion of the cost of the Issue is a reportable campaign expenditure under Montana law. §13-1-101(17)(a)(i), MCA. There is,

⁸ Historically the COPP has accomplished a portion of public disclosure by placement of certain non-routine campaign related documents (amended campaign finance reports, supplements to reports, email communication between COPP staff and the candidate) in a candidate's campaign file. The COPP's candidate campaign files are open for public review and documents placed in a candidate file count as part of a candidate's reporting and disclosure. At this time, however, these documents are not scanned, converted to PDF and placed in the more transparent electronically available FileNet folder for each candidate. The COPP implemented a system of electronic filing of most campaign finance reports (with instant public access to the reports) for the 2016 Montana election cycle. The COPP staff intends to work to increase transparency through a system of scanning and copying of all campaign-related documents into FileNet candidate folders in time for the 2018 Montana election cycle.

however, an exception (the press exemption) that does apply.

The U.S. Congress “first enacted a press exemption to campaign finance law in 1974.”⁹ Montana law followed with a similar exemption enacted in the mid-1970s.¹⁰ At present Montana excludes as a campaign expenditure “the cost of any bona fide news story, commentary, blog, or editorial distributed through the facilities of any broadcast station, newspaper, magazine or other periodical publication of general circulation.” §13-1-101(17)(b)(iii), MCA.

Application of the press exemption in Montana law has been acknowledged, without discussion, by past Commissioners.¹¹ Commissioner Unsworth used the press exemption to dismiss, without comment, a complaint alleging unreported campaign activity stemming from the video-taping and subsequent showing of election related candidate interviews. *Raffiani v. Montana Shrugged*, Dismissal Letter, November 19, 2000 (Commissioner Unsworth).

There being no definite guidance in Montana law interpreting statutory language, the Commissioner next examines Federal Election Commission and federal court interpretation of the comparable federal press exemption. The applicable federal interpretations of the press exemption are summarized in the 2016 Harvard Law Review article referenced in Note 3 of this Decision. As applied to this Matter, the Commissioner considers the factors summarized in

⁹ *Harvard Law Review* “Defining the Press Exemption” Vol. 129, p. 1384, 1389 (2016).

¹⁰ The Montana press exemption law is found as an exemption to the definition of “expenditure” set out in Chapter 1 of Title 13 of the Montana Code.

¹¹ It was raised by complaint but not addressed in the Decision in *Harrington v. 400% Is Too High*, July 3, 2012 (Commissioner Murry). It was referenced but not defined in *Huntley v. Paxinos*, May 11, 2000 (Commissioner Vaughey).

the law review article and determines that: the Montana Christian Journal has been periodically published for the past three years;¹² the Montana Christian Journal derives revenues from advertising;¹³ the self-distributed copies Montana Christian Journal were not “paid-for” by a candidate or political party;¹⁴ and the Montana Christian Journal is distributed through its own network of churches and other outlets.¹⁵

With the above considerations in mind, the Commissioner determines that Issue 3:2 of the Montana Christian Journal qualifies as a periodical publication of general circulation that is exempted from consideration as a campaign expenditure under Montana law. §13-1-101(17)(a)(i), MCA. The Commissioner, having provided some guidance on the press exemption specifically directs interested parties to further review the cases cited and discussed in the law review article listed at Note 3.¹⁶

3. The Montana Christian Journal (Candidate Distribution)

A separate print run of Volume 3, Issue No. 2 of the Montana Christian Journal was paid for and distributed by candidates.

Finding of Fact No. 10. Montana Senate District 10 includes House Districts 19 and 20. (Records, SOS.)

Finding of Fact No. 11. Lola Sheldon-Galloway, a Republican candidate for nomination from HD 22 paid \$400 for 2500 copies of Issue 3:2, or \$0.16 each. (Commissioner’s Records.)

¹² A regular periodical, as opposed to a one-time publication indicates a communication that qualifies for the press exemption. Harvard Law Review at p. 1393;

¹³ Id.

¹⁴ Id., p. 1388.

¹⁵ Id., p. 1402.

¹⁶ This Decision conforms with that of Fitzpatrick v Kantorowicz COPP-2016-CFP-019.

Finding of Fact No. 12. Randy Pinocci, a Republican candidate for nomination from HD 19 paid \$320 for 2000 copies of Issue 3:2, or \$0.16 each. (Commissioner's Records.)

Finding of Fact No. 13. A May 7, 2016 Montana Christian Journal invoice No. 778 (to Randy Pinocci) states that "additional copies [of Issue 3:2] may be requested and sold at a rate of \$0.16 each in sets of 2000, full price." (Commissioner's Records.)

Finding of Fact No. 14. A bill to Candidate Pinocci shows that it cost \$0.4226 (\$0.2626 postage plus \$0.16 label and address) to attribute, address, permit and mail each of 1,543 copies of Issue 3:2 to the addresses of HD 19 voters. (Commissioner's Records.)

There is no press exception for copies of Issue 3:2 that are purchased by or distributed by a candidate's committee, as opposed to self-distribution of copies by the Montana Christian Journal (see above discussion, at 2). The Montana Christian Journal and the several candidates explicitly recognized this fact and established an amount (\$0.16 per copy) that was paid and reported by the candidate as a campaign expense (FOF Nos. 11-13).

The Complaint challenges the amount paid by Candidate Pinocci asserting that the amount paid does not cover the costs of "printing or layout" of Issue 3:2. The Complaint offers no data or other information that would show another cost basis for purchase of Issue 3:2. The Commissioner's investigator determined that the price charged of \$0.16 per copy of Issue 3:2 is within the range of a "volunteer enhanced" fair market value cost, taking into consideration the fact that Montana Christian Journal has one paid staff

person and limited overhead cost.¹⁷

Consequently, the Commissioner does not find sufficient facts to support a determination that Candidate Pinocci reported improperly as to the cost of and distribution of the copies he purchased of Issue 3:2.

4. Campaign Contributions to Other Candidates

Volume 3, Issue No. 2 was 32 pages in length of which 13 contained articles or ads advocating, at least in part, the primary election of candidates. (FOF No. 5.) Candidate Pinocci paid to deliver Issue 3:2 to 1,543 voter addresses in SD 10 (FOF No. 14).

Finding of Fact No. 15. Issue No. 3:2 contains ads advocating a 2016 primary election vote for: Greg Gianforte (full page, Governor); Kristen Juras (full page, Supreme Court); as well as multiple ads of varying size advocating a vote for legislative candidates Lola Sheldon-Galloway, Sheridan Buck, Randy Pinocci and JC Kantorowicz. (Commissioner's records.)

The Complaint asserts that Candidate Pinocci failed to properly report and disclose the value of campaign funds spent on behalf of other candidates for 2016 primary election to Montana public offices. This value came about because Issue 3:2, paid for and delivered to 1,543 HD 19 voter addresses, advocated a vote FOR Candidate Pinocci and a vote FOR candidates Kantorowicz, Sheldon-Galloway, Buck, Juras and Gianforte (FOF No. 15).

Under Montana law a candidate's committee is a "person" for reporting and disclosure purposes. §13-1-101(28), MCA. In turn, "a person making an independent expenditure shall report the name of the candidate...the

¹⁷ Investigator's interview with D. Miller, publisher of Montana Christian Journal.

independent expenditure was intended to benefit.” 44.11.502(8)(b), ARM.¹⁸

Candidate Pinocci failed this requirement when he reported the entire amount spent on Issue 3:2 as an expense to his campaign and did not apportion the amount between his campaign and the campaigns of the other candidates whose campaigns were advocated by Issue 3:2.

Sufficiency Finding No. 1. The Commissioner determines that there are sufficient facts to show that Candidate Pinocci failed to report and disclose independent expenditures made on behalf of Candidates Gianforte and Juras. Further, there are sufficient facts to show that Candidate Pinocci failed to report and disclose coordinated expenditures that became contributions to the campaign of Candidate Kantorowicz.

There are, however, no independent expenditures in regard to Candidates Sheldon-Galloway and Buck because HD 19 did not include voter addresses for the separate house districts that Candidates Buck and Sheldon-Galloway were running in. Thus, Candidate Pinocci’s delivery of copies of Issue 3:2 to HD 19 voter addresses did not benefit their campaigns.¹⁹

5. Attribution

Candidate Pinocci purchased 2,000 copies of the 32-page Issue 3:2 and mailed 1,543 copies to the addresses of HD 19 voters (FOF No. 14). The Complaint asserts that Candidate Pinocci failed to properly attribute his role in

¹⁸ The Commissioner notes that Candidates Pinocci and Kantorowicz worked together (even sharing an attribution on mailings to HD 19 voter addresses) to the point that cooperation in the form of coordination existed between those two candidates. A coordinated contribution is not independent and is subject to contribution limits. *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, and *Bonogofsky v. Wagman*, COPP-2010-CFP-035.

¹⁹ In contrast, Candidates Juras and Gianforte were statewide candidates and therefore benefited from the delivery of copies of Issue 3:2 to SD 10 voters. HD 19 is encompassed within SD 10 voters so Candidate Kantorowicz also benefited from delivery of Issue 3:2 to HD 19 voters.

paying for delivery of Issue 3:2 to SD 10 voters.

Finding of Fact No. 16. Issue 3:2 was attributed at the top of the back cover (page 32), in the ¼ page blank space provided for use in mailing. The attribution language read “Paid for by Randy Pinocci for HD 19, 66 Sun River Road, Sun River, MT.” (Commissioner’s records.)

Under Montana law “all election communications ... 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.” §13-35-225(1), MCA. Stated another way, under Montana law “all election communications ... must clearly and conspicuously include the attribution” language set out in FOF No. 16. The key words in this Matter are “clearly and conspicuously.”

Commissioner Unsworth considered “clearly and conspicuously” in *Campbell v. Brown* (May 9, 2008), defining the phrase as follows:

1. The reader or observer should have no difficulty locating and reading the attribution language.
2. The attribution language should be of sufficient type size to be clearly readable by the recipient or reader of the communication.
3. The language should be contained in a printed area or segment set apart from the other contents of the communication.
4. The language should be printed with a reasonable degree of color contrast between the background and the printed statement.
5. In the case of yard signs and other campaign signs, the language should appear on whichever side or sides of the sign contain the campaign message.²⁰

The Commissioner applies the foregoing *Campbell* standards to the Issue 3:2 attribution used by Candidate Pinocci and determines that it was sufficient.

While it would have been more clear and conspicuous to place a sticker on the

²⁰ The COPP has since formally adopted the *Campbell* standards at 44.11.601(3), ARM.

front page of Issue 3:2, the Commissioner recognizes that direct mail political advertising is now commonplace in the mailboxes of Montanans. With that in mind, a plain stated attribution on the mail label page is sufficient as that is a page a Montanan would examine to find the attribution.

The Complaint also asserts that unattributed copies of Issue 3:2 were handed out at “local churches and other gatherings.” Candidate Pinocci did retain 457 copies of Issue 3:2 after the mailing to HD 19 voter addresses. (FOF Nos. 7, 8). There are no facts, however, showing that it was Pinocci’s extra copies that were handed out, as opposed to copies distributed by the Montana Christian Journal under its press exemption. The attribution complaint is dismissed on the basis of lack of sufficient facts.

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,

to show that Candidate Pinocci's 2016 HD 19 campaign 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, we next determine if there are circumstances or explanations that may affect prosecution of the violation and/or the amount of the fine.

The failures to fully and timely report and disclose and to properly attribute cannot generally be excused. Excusable neglect cannot be applied to oversight or ignorance of the law. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009. Likewise, the Commissioner does not normally accept that failures to file or report be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009.

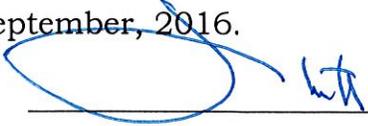
Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the sufficiency findings, civil/criminal prosecution and/or a civil fine is justified. §13-37-124, MCA. The Commissioner hereby issues a "sufficient evidence" Finding and Decision justifying civil prosecution of Candidate Pinocci. Because of the nature of the violations (the failure to report and disclose 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 setting that fine the Commissioner will consider matters affecting mitigation.

While it is expected that a fine amount can be negotiated and paid, 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 campaign practice law, including those identified in this Decision. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

Should this Matter not settle the Commissioner reserves his right, upon return of the Finding by the County Attorney, to instigate an enforcement action on behalf of the people of Montana.

DATED this 19th day of September, 2016.



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