

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

O'Hara v. Cascade County Republican Central Committee No. COPP 2016-CFP-004 No. COPP 2016-CFP-013	Finding of Sufficient Facts to Show a Campaign Practice Violation
--	--

On March 28, 2016 and May 16, 2016 Jesse O'Hara a resident of Lakeland, Florida,¹ filed a complaint against the Cascade County Republican Central Committee (hereinafter "Central Committee") alleging that certain actions of the Central Committee violated campaign practice law.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign practice law addressed by this Decision is the role and function of a political party political committee as well as timeliness of reporting and disclosure.

¹ Mr. O'Hara is a former Great Falls resident and former Montana Republican legislator who retired to and resides in Florida.

INTRODUCTION

The Complaints present the issue of the role of political party organizations in the election of Montana public officials. Political party organizations are covered by two Chapters of Title 13, the portion of Montana's statutory law defining and dealing with issues related to elections held in the State of Montana.

Chapter 38 of Title 13 of the Montana Code is entitled "Political Parties." It defines the powers, structure and levels of political party committees. A political party organization is any entity that was on the ballot during either of the "two most recent statewide general elections." (§13-1-101(32), MCA.). Under Montana law a political party "makes its own rules" (§13-38-101, MCA) and is organized at a state and county central committee level. (§13-38-203, MCA).

Chapter 37 of Title 13 of the Montana Code defines allowable campaign practices. Under Chapter 37, and its supporting regulations, a "political party committee" means a political committee formed by a political party organization and includes all county central committees. (§13-1-101(31), MCA.) In turn, 44.11.202(2)(b), ARM classifies any such political party committee as a type of political committee.

FINDING OF FACT

The foundational fact necessary for this Decision is as follows:

Finding of Fact No. 1: The Cascade County Republican Committee filed an appropriate (Form C2) Statement of Organization with the COPP on June 4, 2015, thereby becoming a political committee.

DISCUSSION

The Complaints allege that the Central Committee violated Montana's campaign practice laws in several particular ways. The individual allegations are identified and discussed separately, below.

1. Failure to Function as a Political Party Committee

The Complaints imply that the Central Committee failed its essential role as a political party committee when it engaged in activity favoring some 2016 Cascade County Republican candidates for public office and opposing other such candidates.

Finding of Fact No. 2: On its 2015 year end C-6 Finance Report, the Central Committee reported on the Schedule B, section 2 certain expenditures including: Air Host Gateway to the Falls- Lincoln/Reagan Dinner Meals, 2/25/2015, \$4595.20; Mitchell Supply, Raffle item for Lincoln/Reagan Dinner, 3/31/2015, \$400.00; 4th of July Foundation Parade Registration, 6/8/2015, \$40.00; and Montana State Fair, Booth Rental, 6/15/2015, \$688.00, 7/29/2015, \$300.00. (Commissioner's records)

The Complaints point out that the Central Committee booth rental at the Montana State Fair (involving costs of \$988, see FOF No. 2) produced exposure and advertising space for only certain Cascade County Republican candidates.² Candidate Wendy McKamey³ provided photographs to the Commissioner

² Central Committee's current chairperson, George Paul, has taken both sides on this issue. In a June 1, 2016 interview with COPP staffers Mr. Paul asserted no candidates were allowed to put up signs at the booth. However, in an April 13, 2016 letter to the COPP Mr. Paul stated that campaign signs were present for some candidates and that Republican Candidate Wendy McKamey was not allowed to place her signs at the booth.

³ Ms. McKamey was a 2016 Republican primary election candidate for House District 19, a district located entirely within Cascade County (SOS Website). Her opponent in the Republican primary election, Randy Pinocci, was allowed to place campaign signs at the booth.

showing campaign signs for selected Republican primary candidates at the Central Committee Booth. The Commissioner's investigator reviewed the Central Committee website and found advertisements displayed favorably for about one-half of the candidates running as Republicans for elected office in 2016.⁴

The Commissioner determines that the Cascade County Central Committee engaged in selective actions as to 2016 Republican candidates for elected office in Cascade County. Specifically, the Commissioner determines that the Central Committee supported some 2016 Republican candidates and opposed other such Republican candidates.

This selective action by the Central Committee would seem to present problems within the Republican party itself (see introduction) but it does not give rise to a campaign practice violation. In essence, the Complaints ask that the Commissioner reclassify the Central Committee as an independent committee, thereby taking away any benefit the Central Committee receives as a political party committee. The Commissioner has authority to take this action under the COPP's general authority to classify political committees (44.11.204 ARM) but declines to do so in regard to a political party committee.

The Commissioner has determined that there are "nuances of political party association rights" that enter into any restrictions of political party association actions, such as use of campaign staff who are paid by the political party, *Adams v. Montana Democratic Party*, COPP 2015-CFP-006

⁴ Investigator's records.

(Commissioner Motl). Likewise, the selection of some Republican Party primary election candidates over other competing Republican candidates falls under the association interest of a political party. The complainant's remedy for unfair Central Committee endorsement lies within the political party structure, not the COPP.

2. False Signing

The Complaints allege that the Central Committee has violated several Montana laws requiring veracity of a certain signed statement filed as part of a campaign. The signed statement at issue is the most recent Statement of Organization filed with the COPP.

Finding of Fact No. 3: The Central Committee filed a C2 Statement of Organization on June 4, 2015, with the Purpose of Committee listed as: "Support election of Republican candidates from Cascade County for county and state offices." The Statement further lists the Name(s) of 2016 Candidate(s) as "All Republican Candidates for Offices in Cascade County." On April 28, 2016 the Central Committee filed an amended C2 with the same content as the C2 from June 2015. (Emphasis added, COPP Records.)

Under Montana law the person responsible for filing a Statement of Organization with the COPP can be deemed to engage in a deceptive election practice if he or she "knowingly causes a false statement" to be filed. §13-35-207, MCA.⁵

⁵ The Complaint cited to §13-37-231(1), MCA as the controlling statute but that statute is limited to imposition of oath and affirmation status as to any signature on a campaign finance report. The words "report" and "statement" have precise meaning under Title 13 and therefore §13-37-231(1), MCA is limited to a report and does not apply to a statement. §1-2-101, MCA.

In this Matter the Commissioner has determined that the Central Committee did not support all 2016 Republican primary election candidates for elected Office “involving” Cascade County. This determination would, at first glance, make the April 28, 2016 amended C-2 a false statement because it states the Central Committee would support “all [2016] Republican candidates for offices in Cascade County.” However, Central Committee Chairman, George Paul, asserts a nuanced meaning to “Republican,” claiming that “we [the Central Committee] do support all Republican candidates that act as such.”⁶ Emphasis added.

The Commissioner determines that the language of the Amended C-2 Statement is not a false statement, given the Central Committee’s assertion of its right to determine whether or not a candidate is or is not a “true” Republican. As set out in this Decision, above, referencing *Adams*, the Commissioner has determined that there are “nuances of political party association rights” that enter into any restrictions of the associational actions of political party organizations. Accordingly, the choice of the Central Committee to determine whether some candidates are “act[ing] as” a Republican is within that associational right. The Complainant’s remedy lies within the political party structure, not the COPP.

⁶ Mr. Paul made this assertion in his letter of April 13, 2016 responding to the Complaint. The Commissioner notes that this assertion was made prior to the Central Committee’s April 28, 2016 filing of amended C-2 (Statement of Organization) with the COPP.

3. Late Filing

The Complaints allege that the Central Committee failed to timely file its 2016 campaign finance reports. The Commissioner determines the following:

Finding of Fact No. 4: The Central Committee filed its first 2016 campaign finance report on May 2, 2016 covering the period of January 1, 2016 through March 4, 2016. (COPP Records.)

Finding of Fact No. 5: The Central Committee filed its second 2016 campaign finance report on May 25, 2016 covering the period of March 5, 2016 through April 28, 2016. (COPP Records.)

Finding of Fact No. 6: The Central Committee filed its third 2016 campaign finance report on May 31, 2016 covering the period of April 29, 2016 through May 21, 2016 . (COPP Records.)

Finding of Fact No. 7: All three campaign finance reports listed in FOF Nos. 4-6 were filed by hard copy without electronic filing. (COPP Records.)

Finding of Fact No. 8: The Central Committee made expenditures on 2016 Montana legislative elections. The Central Committee website, for example, advocates and offers resources (yard signs) for seven 2016 candidates for election to the Montana legislature. (COPP Records.)

The Central Committee's actions have confused its reporting obligations. The Central Committee filed three campaign finance reports (FOF Nos. 4-6), all untimely, showing an assumed responsibility to file under the general requirement that a political committee "shall file a report on the 90th, 35th and 12th days preceding the date of an election." §13-37-226(4) MCA.

However, the three Central Committee campaign finance reports disclosed no contributions or expenditures to candidates. Without

contributions or expenditures to candidates reports are not required as under Montana law a pre-election reporting obligation is triggered “by making an expenditure.” *Id.*⁷ The Commissioner, however, has determined that the Central Committee did make expenditures in the 2016 campaigns of certain candidates for election to the Montana legislature (FOF No. 8). Accordingly, under Montana law the Central Committee was required to report under the district candidate schedule, making reports due on the “35th and 12th day preceding” the date of election. §13-37-226(2) MCA. These reporting dates were May 3, 2016 and May 26, 2016 respectively.⁸ Applying these statutory reporting date requirements to the date of filing of the Central Committee’s reports the Commissioner makes the following determination.

Sufficiency Finding No. 1: The Commissioner determines that sufficient facts exist to show that the Central Committee late filed its May 3 report by 22 days; and its May 26 report by 5 days.

As discussed in the Introduction, a political party committee is one of the four types of Montana political committees. 44.11.202(2), ARM. A political party committee is afforded deference when its associational interests are involved.⁹

While those associational interests allow for increased deference to the

⁷ Montana law sets a practical approach to political committee reporting obligations. Political committees file for reporting periods that involve expenditures and/or file an annual report “at the close of each calendar year.” §13-37-226(4) MCA.

⁸ The COPP prepared and sent a Report Calendar with those dates to all 2016 political committees, including the Central Committee.

⁹ A political committee is provided deference when its campaign (speech) activity involves the association rights and interests that accompany an association of Montanans formed into a political party committee. See this Decision, above.

substance or content of political party activity, that deference does not extend to the requirements for reporting and disclosure. For reporting and disclosure purposes a political party committee is treated the same as any other Montana political committee and is subject to the same reporting requirements. §13-37-226(2), MCA. The Central Committee, held to those standards, has failed to timely report, as set out in Sufficiency Finding No. 1.

4. Failure to Report and Disclose

The Complaints assert that the Central Committee reported and disclosed certain expenses as serving the political party interests when those expenses instead served the interests of candidates such that they should have been reported and disclosed as to each candidate. The Commissioner's investigator examined the campaign finance reports filed by the Central Committee providing facts that allow the Commissioner to determine the following.

Finding of Fact No. 9: The Central Committee filed three campaign finance reports (February 1, March 9, and May 26). (COPP Records.)

Finding of Fact No. 10: An examination of all three reports showed that no expenditures were disclosed to any 2016 Republican candidate for election to public office. (COPP Records.)

Finding of Fact No. 11: The Central Committee made expenditures that benefited certain 2016 Republican candidates when it: provided some candidates tickets to the Lincoln/Regan Dinner; provided some candidates space for Candidate signs at the State Fair booth; advocated for some candidates on its website and advertised in a newspaper in favor of some candidates. (COPP Records.)

The Commissioner has determined (this Decision, above) that the Central

Committee acted in favor of some, but not all, of the Republican candidates running for elective office in 2016 Republican primaries in Cascade County. The Commissioner has further determined that the Central Committee did not report or disclose the value of resources provided to selected 2016 Republican candidates (FOF No. 11).

Sufficiency Finding No. 2: The Commissioner determines that sufficient facts exist to show that the Central Committee failed to report and disclose contributions provided individually to 2016 Republican candidates.

The Central Committee seems of two minds on this issue. In July and August of 2015 COPP staff members (Karen Musgrave and Mary Baker) contacted the treasurer of the Central Committee to inform her of the need to report as contributions the value of services or materials provided to selected 2016 Republican primary election candidates. Julie Wolf and Judy Tankink, Central Committee treasurers, stated that they understood this requirement and assured COPP staff that they would report accordingly.¹⁰ On June 1, 2016 Chairman Paul changed course and claimed that there was no support of individual candidates.¹¹ Regardless of the Central Committee's position, the Sufficiency Finding determines that it is required to report and disclose and has failed to do so.

5. Failure to Timely Electronically File a Campaign Finance Report

Once a complaint is filed, the Commissioner "shall investigate any other alleged violation" of Montana's Campaign Practice Act. §13-37-111(2)(a),

¹⁰ COPP internal records and notes.

¹¹ See FN 2.

MCA. The Central Committee is a 2016 political committee (FOF No. 1) and the Commissioner therefore looks to whether or not it filed its report electronically.

Finding of Fact No. 12: The Central Committee has not electronically filed any 2016 campaign finance report. (Commissioner's records.)

A 2016 political committee is required to file campaign finance reports electronically using the COPP's Campaign Electronic Reporting System (CERS). 44.11.302, ARM. This means the Central Committee was required to file an electronic version of its campaign finance report starting May 3, 2016.¹²

The Central Committee, by failing to timely file electronically, failed to meet the requirements of 44.11.302 ARM. That alone, however, does not lead to a campaign practice violation as the COPP, through Mary Baker, can waive the requirement of electronic filing. 44.11.302(2), ARM.¹³ The Central Committee did not request or receive such a waiver. Accordingly, the Commissioner finds a campaign practice violation.

Sufficiency Finding No. 3: The Commissioner determines that sufficient facts exist to show that the Central Committee failed to timely electronically file 2016 campaign finance reports, as required by Montana's campaign practice laws.

The COPP staff have successfully worked with hundreds of 2016 candidates and political committees, assisting electronic filers with access to and use of

¹² The COPP rules requiring electronic filing by political committees became effective in January of 2016. The COPP first began to require electronic filing with the campaign finance report due 35 days before the primary election or May 3, 2016.

¹³ Ms. Baker exercised authority to waive electronic filing for the May 3 deadline for five candidates. There was no waiver of electronic filing provided the Central Committee.

the electronic CERS platform through which campaign finance reports are electronically filed. The Montana legislature has declared the importance of transparency through electronic filing whereby campaign finance information and data is easily and promptly made available to the public. There is no legitimate reason for the Central Committee to fail to file electronically when so many other candidates and committees have cooperated and complied with Montana law.

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 the Central Committee’s 2016 campaign activities 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. 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 the Central Committee. 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.*

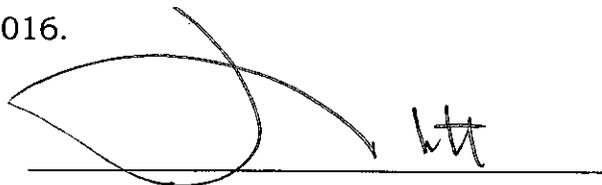
Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that this Matter is waived back, the Finding and Decision in this

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 will 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 of §13-37-226, MCA. (see §13-37-128, MCA.) 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 15th day of June, 2016.

A handwritten signature in black ink, appearing to read 'JRM', is written over a horizontal line.

Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana
P. O. Box 202401
1205 8th Avenue
Helena, MT 59620