

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Perea v. Montana Democratic Party No. COPP 2014-CFP-055	Decision and Findings of Sufficient Facts to Show a Campaign Practice Violation
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On October 31, 2014, Mark Perea, a resident of Helena, Montana filed a complaint against the Montana Democratic Party (MDP) alleging a campaign practice violation. Mr. Perea's complaint alleges that two flyers attacking the candidacy of Jedediah Hinkle (*see* attachments to Complaint) were received by Senate District (SD) 32 voters on or after October 30, 2014. Mr. Perea's complaint states Mr. Hinkle received inadequate notice of the flyers and cites to the provisions of Montana's "Clean Campaign Act", requiring certain notice for any campaign related Flyers delivered in the 10 days prior to an election.

FOUNDATIONAL FACTS

The facts necessary for determination in this matter are as follows:

Finding of Fact No. 1: Jedediah Hinkle (R) and Franke Wilmer (D) were the 2014 candidates for election to the Montana legislature representing Senate District 32, Gallatin County. (Secretary of State (SOS) website).

Finding of Fact No. 2: Mr. Hinkle defeated Ms. Wilmer with 3,840 votes to her 3,030 votes. (SOS website).

DISCUSSION

To date the COPP has engaged in minimal discussion of the overall reporting and disclosure requirements for entities making independent expenditures in Montana elections.¹ Instead, independent expenditure discussion has focused on whether or not a particular third party election expense advocated for or against a candidate (“express advocacy”) such that it became a reportable election expense.²

Independent expenditures are third party election expenditures that are not coordinated with the candidate.³ Independent expenditures in Montana elections increased following the 2010 *Citizens United* decision by the US Supreme Court. Independent expenditures are generally carried out in the form of an election communication (in Candidate Hinkle’s case, a flyer) issued by a third party (MDP, in Candidate Hinkle’s case) attacking a candidate (Hinkle).

The 2014 Montana election cycle involved significant independent expenditure activity by multiple entities in multiple elections. The entities making the independent expenditures, as shown by this Decision, did so within

¹ The COPP has discussed narrow issues regarding independent expenditures in Montana elections as early as 2003. See *Haines v. Bianco*, (March 2003, Commissioner Vaughey).

² See *Bonogofsky v. NGOA*, COPP-2010-CFP-008.

³ Independent expenditures are those “not made with, at the request of suggestion of, or the prior consent of a candidate...” 44.10.323(3) ARM

a reporting and disclosure culture that lacked the adherence to transparency that is seen in reporting and disclosure by the campaigns of the candidates themselves. There have been five complaints filed over 2014 independent expenditure activity, including the complaint in this matter.⁴

As explained in this Decision, entities involved in independent expenditures will need to adapt such that they fully and timely report and disclose independent expenditures, with those independent expenditures listed on a candidate-by-candidate basis. This disclosure, timely made according to candidate, is what Montana law requires and it is what the press, public and the opposing candidate need if there is to be transparency in election expenditures.

1. Notice Laws Were Violated

Montana law requires that any entity producing an attack flyer provide notice to the affected candidate of printed material “intended for public distribution in the 10 days prior to an election...” (§13-35-402(1) MCA). The printed material must be provided to the candidate if “...disseminated by direct mail, on the date of the postmark...” (§13-35-402(3)(b) MCA).

The following findings of fact apply:

Finding of Fact No. 3: The two MDP flyers attacked Candidate Hinkle on medical privacy and corporate giveaways. Each MDP attack flyer was mailed once. (Commissioner’s records).

⁴ The four additional complaints concerning 2014 independent expenditure activity are: *Shellnutt v. Planned Parenthood*, COPP-2014-CFP-058; *Buttrey v. MDP*, COPP-2014-CFP-050; *Gibson v. MDP*, COPP-2014-CFP-053 and, *Kary v. MDP*, COPP-2014-CFP-059.

Finding of Fact No. 4: The MDP medical privacy flyer was “dropped” or mailed on October 29, 2014. The MDP corporate giveaway attack flyer was “dropped” or mailed on October 28, 2014. (Commissioner’s records).

Finding of Fact No. 5: There was no postmark date on either of the MDP attack flyers. (Commissioner’s records).

The Commissioner notes that the 2014 Montana general election took place on November 4, 2014. Montana law requires that notice be given for any attack flyer “intended for public distribution in the 10 days prior” to the November 4 election. (§13-35-402(1) MCA).

The 10 days prior to the November 4 election was the period of October 25 through November 3, 2014. There were no postmarks on the two MDP attack flyers (FOF No. 5). The Commissioner therefore determines that the date mailed or “dropped”, as reported by the mail house, is the equivalent of the postmark date.⁵ The Commissioner has determined that this mail date is the date that will be used to measure the date of “intended for public distribution” under §13-35-402(1) MCA. *Buttrey v. MDP COPP-2014-CFP-050*.

With the above in mind, the Commissioner determines that the two MDP attack flyers were mailed October 28 and October 29, the 7th and 6th day respectively before the election. Because these days fell within the 10 days prior to the election MDP was required to provide copies of the attack flyers to candidate Hinkle at a date certain. The dates certain were October 28 and October 29 as “copies of the [attack flyer] material...must be provided” to

⁵ The Commissioner’s investigator confirmed the mailing dates with the mail house handling the Flyer.

Candidate Hinkle at the “date of the postmark.” §13-35-402(3) MCA.

The MDP provided notice of both MDP attack flyers to Hinkle late in the evening of October 29, 2014. This notice was timely as to October 29 MDP attack flyer but was one day late, and therefore in violation of the notice provisions of §13-35-402, as to the October 28, 2014 attack flyer.⁶

Sufficiency Finding No. 1: The Commissioner determines that sufficient facts exist to show that the MDP violated Montana law by failing timely notice a certain flyer attacking candidate Hinkle. (Commissioner’s records).

2. The MDP Has Failed to Adequately Report and Disclose

Once a complaint is filed the Commissioner “...shall investigate any other alleged violation ...” (§13-37-111(2)(a) MCA). The Perea complaint, once filed, triggered a review of adequacy of the independent expenditure information reported and disclosed by the MDP.

Under Montana law independent expenditures “must be reported in accordance with the procedure for reporting other expenditures”. *Hanes v. Bianco*, ARM 44.10.323(3) and ARM 44.10.531(4). Section 13-37-225 MCA requires that the MDP file “periodic reports of ... expenditures made ...on behalf of a candidate....” (Emphasis added). The reports must include “debts and obligations owed” by the MDP. §13-37-230(1)(g) MCA. Independent expenditure reporting requires “reporting of the name of the candidate...the independent expenditure was intended to benefit....” ARM 44.10.531(4).

The Commissioner determines that the MDP campaign finance reports did

⁶ The response by the MDP explained that October 28 attack flyer was set for mailing on October 24 (a date 11 days before the election) and was sent later by mistake. Had it been sent on October 24 as planned notice would not have been required.

not meet these requirements. The MDP reports disclosed approximately \$204,000 in 2014 independent election expenditures, but did so by lump sum reporting, rather than by designation of expenditures made in a particular candidate election, such as that of Candidate Hinkle.

Specifically, MDP disclosed independent expenditures in three pre-election campaign finance reports.⁷ In part, the MDP pre-election campaign finance reports list the independent expenditures as being for “printing-mail/IE in SD11, 13, 14, 22, 24, 32, 42, and 49”. (MDP C-6 and C-7E report forms). These lump sum independent expenditure reports cover 8 senate districts and report no particular expenditure as to Candidate Hinkle (or any candidate), as required by §13-37-225 MCA. Further, listing by senate district (rather than by candidate name) does not meet specific requirements of Montana’s independent expenditure law: “shall report the name of the candidate”. ARM 44.10.531(4).

Sufficiency Finding No. 2: The Commissioner determines that sufficient facts exist to show that the MDP violated Montana law by failing to report and disclose the independent expenditures in the Hinkle election in the manner required by law. (Commissioner’s records).

The Commissioner notes that the MDP and its counsel have been fully cooperative in responding to and addressing the issues raised by this complaint. In responding to the complaint the MDP notes that others, including the Montana Republican Party, also engaged in 2014 reporting and

⁷ The MDP filed an October 23, 2014 pre-election report (on form C-6) and later (on October 24 and October 28) filed two 24 hour reports (on forms C-7E).

disclosure methods similar to that used by the MDP. The MDP's observation may be correct, but it does not excuse errant conduct. Instead, given the increasing use of independent expenditures, it assigns urgency to this Decision that holds all entities making independent expenditures to the full reporting and disclosure standards set by Montana law. The Commissioner will, however, consider the definitional nature of this Decision, along with a prompt corrective independent expenditure report filing by the MDP, as factors to apply to mitigation of the fine involved in this matter.⁸

3. Failure to Timely Report

Montana law required that MDP, as a political party committee, file its campaign finance report "on the 12th day preceding the date of an election..." §13-37-226(5)(a) MCA. In 2014 that 12th day preceding the general election was October 23, 2014, reporting through October 18. The MDP timely filed its pre-general campaign finance report on that date.

Montana law also required that, following October 18 and to the date of the election, the MDP file a special report (for C-7E) within 24 hours of making an expenditure of \$500 or greater. §13-37-226(5)(a) MCA. MDP made two such expenditures in regard to Candidate Hinkle, sending out attack flyers on October 28 and October 29, 2014. MDP filed two form C-7Es on October 24 and October 28, 2014 disclosing only October 24 and October 28, 2014 independent expenditures in lump sum, including presumably the October 28,

⁸ The Commissioner notes the COPP on-line political committee campaign finance report form (at Schedule B) sets out a separate form for reporting of independent expenditures. That form prompts the listing of the amount, purpose, date and candidate for any independent expenditure, thereby bringing reporting and disclosure into compliance with law.

2014 MDP Hinkle Attack Flyer.⁹ There was no disclosure of the October 29, 2014 MDP Hinkle attack flyer:

Sufficiency Finding No. 3: The Commissioner determines that sufficient facts exist to show that the MDP violated Montana law by failing to timely file a C-7E report of certain campaign expenditures.

4. Other Entities Making Independent Expenditures

The Commissioner has designated Mary Baker to reach out to all political committees or other entities that engaged in independent expenditure activity during the 2014 election cycle. Those political committees will be asked to self- assess (and correct if necessary) the sufficiency of their 2014 campaign finance reporting as measured by this Decision.

ENFORCEMENT OF SUFFICIENCY FINDINGS

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must act on, an alleged campaign practice violation 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

⁹ The form C-7E inadequately disclosed the details of the Hinkle independent expenditure. *See* this Decision, pages 5-6. The Commissioner takes administrative notice that each mailing of the two MDP attack flyers (Exs. A and B, Complaint) would have cost more than \$500 thereby triggering a C-7E report.

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 MDP has, as a matter of law, violated Montana's campaign practice laws, including, but not limited to §13-37-226 MCA and all associated ARMs. 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 properly and timely file was due to oversight. Excusable neglect cannot be applied to oversight. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

Likewise independent expenditures are emerging as an important component of spending in candidate races such that issues dealing with independent expenditures cannot be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil/criminal prosecution and/or a civil fine is justified (See §13-37-124 MCA). The Commissioner hereby, through this decision, issues a "sufficient evidence" Finding and Decision justifying civil prosecution under §13-37-124 MCA. Because of the nature of violations (the failure to timely report occurred in Lewis and Clark County) this matter is referred to the County Attorney of Lewis

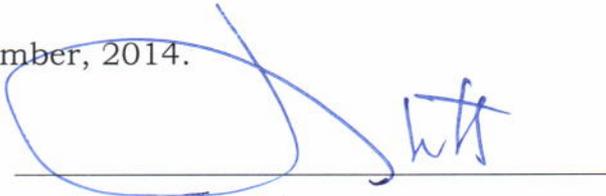
and Clark County for his consideration as to prosecution. §13-37-124(1) MCA. Should the County Attorney waive the right to prosecute (§13-37-124(2) MCA) or fail to prosecute within 30 days (§13-37-124(1) MCA) this Matter returns to this Commissioner for possible prosecution. *Id.*

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 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 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*.

At the point this Matter is returned to the COPP for negotiation of the fine or for litigation, mitigation principles will be considered. *See* discussion of mitigation principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. The Commissioner notes that MDP showed complete cooperation and willingness to explain the oversight in a manner that accepted responsibility. That cooperation, along with the first time nature of this Decision, will be

recognized as a factor supporting mitigation.

DATED this 25th day of November, 2014.



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