

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Royston v. Livingston Fire Fighters No. COPP 2013-CFP-031	Summary of Facts and Findings of Sufficient Evidence to Show a Violation of Montana’s Campaign Practices Act
---	---

The City of Livingston has a fire and rescue department, the employees of which are organized into a union and a political committee. On December 2, 2013, Wilsall resident Sheila Royston filed a complaint against the firefighter organizations alleging violations of Montana’s campaign practices law.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: 1) Reporting requirements; 2) Political Committee conduct; 3) Filing of Reports with a County election administrator; and, 4) *de minimis*.

FINDING OF FACTS

The facts necessary for this Decision are as follows:

Finding of Fact No. 1. The City of Livingston (located in Park County, Montana) maintains a fire and medical (rescue) department. The people working in this department are called “firefighters,” although they have EMT and other rescue skills. The department employs 15 firefighters on a full-time basis. (City of Livingston Website)

Finding of Fact No. 2. The 15 firefighters are organized as local 630 of the International Association of Fire Fighters (IAFF-630). (Investigator's notes, Commissioner's records)

Finding of Fact No. 3. On July 19, 2011, some of the Livingston firefighters filed a statement of organization as the "Livingston Firefighters Political Action Committee," thereby becoming a political committee under Montana law. (Commissioner's records)

Finding of Fact No. 4. The Livingston Firefighters PAC contributed to candidates for the Livingston City commission and the Park County Commission. (Commissioner's records)

DISCUSSION

Firefighter employees of the City of Livingston are organized as an employee bargaining unit (FOF No. 2). Some of the firefighter employees further organized as a political unit or PAC. (FOF No. 3). These actions are lawful and proper.

The complaint in this Matter alleges that some of the organized firefighter actions, whether as a PAC or union, violated certain Montana's campaign practice laws. Each of the complaint allegations are discussed below.

1. Improper Use of Public Facility

Under Montana law, a political committee is "...a combination of two or more individuals ...who makes a contribution or expenditure...to support...a candidate..." §13-1-101(22) MCA. A political committee is required to timely file a certification [§13-37-201 MCA], timely keep and maintain accounts of

contributions and expenditures [§13-37-208 MCA] and timely file reports to the Commissioner's office of such contributions and expenditures [§13-37-226 MCA]. The reports, once filed, are available for review by the public, thereby providing transparency and shared access to this information.

The Livingston Firefighters PAC filed the certification and finance reports as listed above. The complaint focuses on the PAC's October 24, 2013 campaign finance report and the listing of "414 East Callender Street, Livingston, MT" as the address for the 12 firefighters listed as contributing to the PAC. The 414 Callender Street address is the address for a City of Livingston facility, housing City functions including the firefighters.

The complaint asserts that the PAC's listing of the 414 Callender Street address as the address for 12 firefighters violates §13-35-226(4) MCA: "[a] public employee may not solicit support for or opposition to...any person to public office...while on the job or at the place of employment." This issue has been addressed by prior Decisions of this office. *Mackin v. Mazurek*, (June 2000, Commissioner Vaughey) determined that an inadvertent entry of a public employee's work address into a campaign data base was not evidence of an attempt to solicit for a campaign at the place of work. Further, the Matter determined that an incidental activity, such as receipt of unsolicited campaign literature at work, was not a violation of Montana's campaign practice act. The matter of *Fasbender v. Toole*, (February 21, 2012, Judge Honzel, Deputy Commissioner) determined that incidental use of public space (using a public

office as a backdrop for a campaign photo) did not violate the campaign practice act.

There are some differences between *Mackin v. Mazurek*, *Fasbender v. Toole* and this Matter. What the three cases have in common, however, is an incident of limited use by a public employee (a limited mailing, a limited use of a public office and a limited use of a public address, now corrected). In this matter the address use is limited because the Livingston Firefighter's PAC had previously been reporting contributions listing the contributor's home address. The Commissioner's investigator determined that the 414 East Callender Street address was used when a contributor (who was also a firefighter) expressed concern about listing their home address. The firefighter who was managing the PAC sought to address this concern by using work addresses for all contributors. Because the contributors were all firefighters employed by the City of Livingston, all of the addresses were listed for 414 East Callender Street, the place of their employment. The Firefighters PAC has resumed using the home address of any firefighter contributor to the PAC. (Investigator's notes).

This Commissioner does not find it necessary to determine whether the limited listing of a public employment address on a PAC report funded by public employees was or was not a violation. Instead, the Commissioner assumes *arguendo* that it was a violation and determines that any such violation, under the facts of this Matter, is excused or dismissed as *de minimis*.

Royston v. Crosby, COPP-2012-CFP-041; *Canyon Ferry Road Baptist Church v. Unsworth*, 556 F3d 1021 (9th Cir. 2009).

2. Improper Contributions

The complaint alleges that there were improper union-to-PAC (that is, IAFF 630 to Firefighters PAC) money transfers thereby creating an unlawful contribution. The complaint also alleges an unlawful contribution by the Firefighters PAC. The findings of fact necessary for a determination of these unlawful contribution allegations are as follows:

Finding of Fact No. 5. Candidate Clint Tinsley ran for Park County Commissioner District 3 in the Park County General Election on November 6, 2012. Candidate Tinsley won his seat with 2,765 votes. (Montana Secretary of State's Office, SOS website)

Finding of Fact No. 6. Candidates Reddington, Pesa, and Hoglund ran for Livingston city commissioner in the Park County Municipal Election on November 5, 2013. Three commission seats were available. Candidates Reddington and Hoglund won a seat in the election; Candidate Reddington with 784 votes and Candidate Hoglund with 886 votes. Candidate Pesa did not win a seat with 770 votes. James Bennett won the third seat in that election. (Park County Elections Department)

Finding of Fact No. 7. On October 24, 2013, the firefighters PAC filed a C-6 form with COPP for the reporting period November 30, 2012 to October 24, 2013. On that report the PAC reported contributions to:

1. Park County Commission candidate Clint Tinsley in the amount of \$97 (dated December 17, 2012, after the November 6, 2012 election)
 2. City Commission Candidate John Reddington in the amount of \$160 (dated October 4, 2013, prior to the November 5, 2013 election)
 3. City Commission candidate Mark Pesa in the amount of \$160 (dated October 4, 2013, prior to the November 5, 2013 election).
 4. City Commission candidate Dorel Hoglund in the amount of \$160 (dated September 6, 2013, prior to the November 5, 2013 election).
- (Commissioner's records)

The claim of union involvement stems from the Pesa and Reddington campaign finance reports disclosure a \$160 contribution from IAFF 630. Based on these disclosures the complaint asserts that IAFF 630 is illegally "channeling" union money through the PAC.

The Commissioner's investigator examined these allegations. The investigator determined that the Pesa and Reddington campaign finance reports erred in listing the source of funds as being from IAFF 630 rather than the PAC. (Investigator's notes.) The Firefighters PAC properly issued \$160 PAC checks to the Pesa and Reddington campaigns. *Id.* The Firefighters PAC correctly reported the \$160 contribution to the campaigns on its campaign finance reports. (FOF No. 5).

The \$160 amount is the lawful amount of contribution allowed to the Firefighters PAC. See §13-37-216 MCA with amounts adjusted for inflation by 44.10.338 ARM. The contribution was timely and correctly reported by the Firefighters PAC. The error in reporting was a ministerial error by the Pesa and Reddington campaigns that inadvertently reported the contribution to the wrong entity. This candidate campaign reporting error, however, does not

change the tenor of a lawful contribution, correctly reported by the PAC contributor. This portion of the complaint is dismissed as lacking sufficient facts in support.

The complaint further alleges a violation because the Firefighters PAC reported a \$97 in-kind contribution to candidate Tinsley (*see* FOF No. 5) that it was not reported by the candidate. The Commissioner's investigator found that a \$97 PAC contribution was, in fact, made.¹ Under the analysis set out above, this complaint is also dismissed for lack of factual support.

The dismissals, above, also dismiss the claim of co-mingling on the basis of lack of facts. The separate segregated fund for the Firefighters PAC is formed by registration and implemented by the separate deposits and expenditures reflected in the PAC campaign finance reports. The Firefighters' PAC funds were, in fact, kept separate from and not co-mingled with union funds. The report by the candidates to the contrary was in error and did not alter the separation between the PAC and the union. There is no factual basis for any claim of co-mingling of union funds with PAC funds and this portion of the complaint is dismissed as lacking factual support.

3. Lack of Filing of Campaign Finance Reports with Park County

The complaint notes that the Firefighters PAC failed to file a copy of its campaign finance reports with the Park County election administrator. The complaint points to §13-37-225(3) MCA as requiring

¹. The Tinsley campaign informed the investigator that it missed the contribution and amended its report to include the contribution.

that a copy of the campaign finance report be filed at the county level.²

The Commissioner's investigator confirmed that the Firefighters' PAC failed to file a copy of its campaign finance reports with the Park County election administrator.

The requirement that a political committee file a copy of its campaign finance report at a local level³, while technically correct, is nuanced when it comes to determining a campaign finance violation based upon such a failure to file. The Firefighters PAC is required (as all PACs are) to file its campaign finance reports with the office of the COPP. §13-37-225(1) MCA. The Firefighters PAC timely and properly filed its reports with the COPP.

There is a dual reason for a PAC filing with the COPP. First, the Commissioner's public trust enforcement duties require that the COPP inspect all campaign finance reports (§13-37-121 MCA) for readily determinable compliance with the campaign practice act. Second, the COPP is the government agency responsible for making the campaign finance reports available to the public. All campaign finance reports, including those of the Firefighters' PAC, are scanned and archived under the name of the candidate or political committee submitting the report.

² The requirement to file is set out in §13-37-225(1) MCA. Subsection 3 sets out exceptions.

³ A political committee is required to file a copy of its campaign finance reports with the election administrator of the county where "the political committee has its headquarters." §13-37-225(1) MCA.

The archived documents are made available (24 hours a day, 7 days a week) on the Commissioner's website for public review and copying.⁴

The dual campaign finance report filing with the county serves a lesser purpose. The county has no inspection or oversight function in regard to campaign finance reports. Further, the county does not provide electronic access to its copy of the report, nor would it make sense to do so, given that public access to the document is already accomplished through the COPP. In reality, the only function filing a campaign finance report with the county accomplishes is making a hard copy review of the document possible at the local level.

The above observations notwithstanding, the campaign finance filing requirement at the county level had its origin in the 1975 comprehensive campaign finance legislation establishing the Commissioner's office. En 23-4778 by Sec. 3, Ch. 480 L. 1975. In 1975, a Montana citizen would have needed to view a campaign finance report in hard copy form and, of course, it then made sense to require a hard copy be available at the local county election administrator's office. Today a citizen anywhere in Montana (24 hours a day, 7 days a week) can easily access, view, and print a copy of any campaign finance report, including the Livingston Firefighters PAC, off the COPP website access. It makes less sense today to require local filing of a copy of a campaign finance report.

⁴ Ms. Royston, the complainant in this Matter, used the documents from this archive when she prepared and filed the complaint in this Matter.

The above facts of public access to campaign reports through the COPP were presented to the 2011 Montana legislature. The legislature responded by removing filing requirements at the local level for statewide district level candidates, including all legislative candidates. [§13-37-225(3) MCA]. Political committees, however, were not included in this reform so the Livingston Firefighters PAC, with its headquarters in Livingston was, and still is, required to file a copy of its campaign finance report at the office of the election administrator of Park County.

The Commissioner does not readily see the policy reasons for continuing to require PAC report filing at the county level. The legislature, however, recently considered this issue and must have had a reason for leaving the local filing requirement for PACs, while removing the similar requirement for legislators and others. Accordingly, the Commissioner must enforce §13-37-225(1) MCA and finds sufficient facts to show that that the Firefighter PAC acted in violation of Montana law by failing to file a copy of its campaign finance reports with the elections officer in Park County, Montana.

ENFORCEMENT

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must act on a complaint 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 must follow substantive law applicable to a particular campaign practice decision. In this matter Montana’s campaign finance report filing requirements are mandatory: “shall file” [*See* §13-37-226 MCA]. The filing date requirements are date certain. Therefore, any failure to meet a mandatory, date-certain filing date is a violation of §13-37-226 MCA, as incorporated into §13-37-225(1) MCA.

This Commissioner, having been charged to investigate and decide, hereby determines that sufficient facts exist to show that the Firefighters PAC has, as a matter of law, violated Montana’s campaign practice laws, including §13-37-225 MCA. 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.

A Commissioner is given discretion [“may”, *See* §13-37-124(1) MCA] in regard to prosecution of a violation. The Commissioner may refuse to enforce, or excuse, enforcement under *de minimis* or excusable neglect principles.

The concept of a *de minimis* exception to civil enforcement of a violation of Montana’s campaign practice law is set out and defined by the 9th circuit court of appeals in *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*,

556 F. 3d 1021, 1028-29 (9th Cir. 2009). The Commissioner has further applied *de minimis* to an expenditure by an incidental committee. *Raffiani v. Montana Shrugged*, COPP-2010-CFP-017. The Commissioner, however, does not generally apply *de minimis* to late filing failures. Given the legislature's recent consideration of this issue, the Commissioner declines to apply *de minimis* to this violation.

The Commissioner now considers excusable neglect. It is noted that a showing of excusable neglect generally requires justification for error beyond mere carelessness or ignorance of the law. *Empire Lath & Plaster, Inc. v. American Casualty Co.*, 256 Mont. 413, 417, 847 P.2d 276, 278 (1993). Neglect that is "due to forgetfulness and the press of other, more important business is not sufficient to establish excusable neglect." *Foster Apiaries, Inc. v. Hubbard Apiaries, Inc.*, 193 Mont. 156, 161, 630 P.2d 1213, 1216 (1981). The filing failure of the Firefighters PAC was caused by a lack of understanding and there is no justification that can trigger excusable neglect.

Because there is a finding of violation and a determination that, as to this failure to file, *de minimis* and excusable neglect theories are not applicable, civil prosecution and/or a civil fine is justified (See §13-37-124 MCA). This Commissioner has, through this decision, issued a "sufficient evidence" Finding and Decision justifying civil prosecution under §13-37-124 MCA. Because the filing was required in Park County, the violation occurred there and it is the county of venue for an allegation of a campaign practice violation. See §13-37-124 MCA. The Commissioner will submit to [or "notice to"] the

Park County attorney for his review for appropriate civil action. §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 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 Chapter 37, including those of §13-37-226. [See 13-37-128 MCA]. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

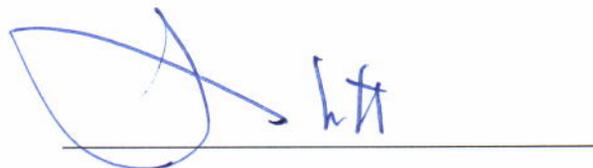
In regard to any such a fine the Commissioner has discretion to determine if mitigation is appropriate to reduce a fine based on the explanation of why a violation occurred or circumstances of payment. *See In the Matter of the Complaint of MacLaren, COPP-2011-CFP-12.* Mitigation means “abatement or diminution of a penalty or punishment imposed by law.” *Black’s Law Dictionary, Revised 4th Addition.* In that regard, the Firefighters’ PAC acted promptly to file at the local level once the infraction was called to their

attention. Further, any harm to the public was mitigated by the filing of and the availability of identical information from the Commissioner's Office. Still further, the Firefighter's PAC cooperated fully throughout the investigation of this Matter. The Commissioner will consider these factors and actions as mitigating measures in determining the amount of fine negotiated in this Matter, should the Firefighters PAC choose to settle this Matter with a negotiated fine.

CONCLUSION

Based on the preceding Discussion as Commissioner I find and decide that there is sufficient evidence to show that the Livingston Firefighters' PAC violated Montana's campaign practices laws, including §§13-37-225 and that a civil penalty action under § 13-37-128, MCA is warranted. Because this matter involves a reporting violation that occurred in Park County the Commissioner submits the Matter to [or "notices to"] the Park County Attorney for his review for appropriate civil action under section 13-37-124(1) MCA. Upon return to the Commissioner of this Matter by the County Attorney, this Commissioner will assess the amount of civil penalty, should the Firefighters' PAC choose to settle this Matter with a negotiated fine.

DATED this 25th day of March, 2014.



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