

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Smith v. Republican State Leadership Committee-Judicial Fairness Initiative Montana PAC No. COPP 2016-CFP-040	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION
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On October 27, 2016, Al Smith of Helena, Montana filed a complaint against Republican State Leadership Committee – Judicial Fairness Initiative Montana PAC (hereafter, “MTPAC”), a 2016 Montana independent political committee, for failing to timely and properly report and disclose certain campaign expense and contribution information.

Discussion

The Complaint alleges that MTPAC failed to timely report and disclose expenses and contributions involved in a 2016 candidate election. The Complaint was filed on Thursday, October 27, posted to the COPP website on Friday, October 28 and decided on Tuesday, November 1, 2016.

Finding of Fact No. 1: On October 6, 2014 MTPAC filed a Statement of Organization (Form C-2), registering as a Montana independent political committee. (COPP records.)

Finding of Fact No. 2: MTPAC listed its purpose as “support” Candidate VanDyke and “oppose” Candidate Wheat in the 2014 election of Montana Supreme Court Justice. (COPP records.)

Finding of Fact No. 3: Kristen Juras and Dirk Sandefur are 2016 candidates on the ballot for election to the Montana Supreme Court, Justice No. 3 position. (Montana Secretary of State (SOS) records.)

Finding of Fact No. 4: On February 19, 2016 MTPAC updated its C-2 form for the 2016 Montana elections but did not list either Candidate Juras or Candidate Sandefur (FOF No. 3) as candidates that it would support or oppose. (COPP records.)

Finding of Fact No. 5: MTPAC has filed a series of 2016 Montana campaign finance reports showing little cash on hand, no contributions and no expenditures other than bank charges of \$14 a month. (COPP records.)

Finding of Fact No. 6: On September 19, 2016 StopSetEmFreeSandefur.com Committee filed a Statement of Organization (Form C-2) as a Montana independent political committee. The statement of purpose lists “Oppose Dirk Sandefur – Supreme Court” and “Support Kristen Juras – Supreme Court.” (COPP records.)

Finding of Fact No. 7: StopSetEmFreeSandefur.com Committee reported cash and in-kind contributions of \$268,000 from MTPAC. (COPP records.)

Finding of Fact No. 8: StopSetEmFreeSandefur.com Committee campaign finance reports show it spent \$268,000 to fund direct mail and TV ads opposing the 2016 election of Candidate Sandefur to the Montana Supreme Court. (COPP records.)

Under Montana law a political committee involved in a statewide candidate campaign must file campaign finance reports with the COPP “on the first day of each month from March through November during a year in which an election is held.” §13-37-226(1)(b), MCA. The reports must disclose contributions and expenses “to 5 days before the date of filing of [such] a report.” §13-37-228(2),

MCA.

1. Failure to Report and Disclose

The Complaint alleges that MTPAC failed to report and disclose \$268,000 in 2016 campaign in-kind and cash expenditures¹ it made to StopSetEmFreeSandefur.com Committee. The Commissioner summarizes the findings as to this allegation: 1) The amount of \$268,000 was reported by StopSetEmFreeSandefur.com Committee as spent against the 2016 election of Candidate Sandefur to the Montana Supreme Court (FOF No. 8); 2) StopSetEmFreeSandefur.com Committee reported that it received the \$268,000 as cash and in-kind contributions from MTPAC² (FOF No. 7); and, 3) MTPAC has not reported any of the \$268,000 StopSetEmFreeSandefur.com Committee reported as receiving as a contribution from MTPAC (FOF No. 5).

Based on the above-listed findings it seems clear that there is a blatant campaign practice failure-to-report violation by a Montana political committee, MTPAC; more so because MTPAC is a Montana independent political committee. An independent committee must report and disclose both contributions received (§13-37-229(1), MCA) and expenditures made (§13-37-229(2), MCA). Any MTPAC failure to report would mean that the Montana public has been deprived of knowing the source of funds (contributions to MTPAC) and the confirming amount of cash and in-kind expenditures that MTPAC has made.

¹ As reported by StopSetEmFreeSandefur.com Committee, a cash or in-kind expenditure by MTPAC becomes an in-kind or cash contribution to StopSetEmFreeSandefur.com Committee.

² All but \$65 of the contributions reported as received by StopSetEmFreeSandefur.com Committee came from MTPAC.

The campaign practice violation, though, is not that simple. The Commissioner's investigator was able to determine, through a series of phone conversations with a Washington, DC attorney representing MTPAC, that the \$268,000 came from what was represented to be an entirely separate entity, called the Republican State Leadership Committee-Judicial Fairness Initiative.³ The attorney further claimed that the contribution was fully disclosed to Montanans by the Republican State Leadership Committee-Judicial Fairness Initiative's separate filing with the Internal Revenue Service.⁴

At the outset, the Commissioner determines that the IRS filing does not provide transparency to Montanans. First, the IRS filing stands alone as there are no campaign finance reports filed at the COPP or Federal Election Commission (FEC) by the Republican State Leadership Committee-Judicial Fairness Initiative that disclose the \$268,000 contributed to StopSetEmFreeSandefur.com Committee. Likewise a copy of the IRS filing was not lodged with the Montana COPP. Montana's rules on nonresident committees claiming substitute report disclosure (in lieu of Montana campaign reporting and disclosure) require that a copy of the substitute report be lodged with the COPP (44.11.305, ARM).

Second, the content and timing of the IRS filing does not meet requirements of Montana law as the filing does not disclose the contribution

³ The attorney was Trevor Stanley of BakerHostetler of Washington, DC. The Commissioner and the Commissioner's investigator talked to Mr. Stanley three times on October 28 and 31, 2016.

⁴ The filing was made through a "Form 8872." Form 8872 denotes a quarterly report of a 527 political organization's contributions and expenditures to the IRS. The forms may be viewed by going to the IRS website and entering in the employee identification number for the entity filing the form you wish to see.

and expense information in either the detail or timing required by Montana law. Given that discrepancy, the Republican State Leadership Committee-Judicial Fairness Initiative “shall file reports on Montana forms for the periods in which the committee makes expenditures and contributions in elections in Montana.” 44.11.305(2)(b), ARM.

More importantly, the act of making the \$268,000 expenditure, by itself, triggered political committee reporting requirements of Montana law. Under Montana law a campaign expenditure is a “payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value made by a candidate or political committee to support or oppose a candidate.” §13-1-101(17)(a), MCA. In turn, a political committee is formed “when a person other than an individual ...makes an expenditure to support or oppose a candidate.” §13-1-101(30)(a), MCA. The \$268,000 expenditure to StopSetEmFreeSandefur.com Committee was an expenditure to a Montana political committee that had the sole-purpose of “supporting” or “opposing” two named candidates for 2016 election to the Montana Supreme Court (FOF No. 6). This meant that the Republican State Leadership Committee-Judicial Fairness Initiative became a Montana political committee the instant it provided its first in-kind expenditure to StopSetEmFreeSandefur.com Committee.

It is hard to fathom the logic of this attempt to avoid Montana reporting and disclosure laws. On the surface it seems clear that counsel involved in this effort viewed the Republican State Leadership Committee-Judicial Fairness

Initiative as a “527” entity that is not regulated by any campaign practice laws, including Montana’s Campaign Practice Act.⁵ But, this position is foolhardy when measured by Republican State Leadership Committee-Judicial Fairness Initiative’s 2016 Montana campaign activity because: 1. The campaign activity concerned a state-level candidate, not a federal-level candidate, eliminating any possible conflict between federal and state regulation; and, 2. The campaign activity involved expenditures to a sole purpose Montana political committee whose stated purpose was “opposition” to Candidate Sandefur, eliminating any possible issue advocacy argument.

Further, Montana law requires reporting and disclosure of contributions and expenditures regardless of an organization’s tax status, § 13-37-233, MCA. The Republican State Leadership Committee-Judicial Fairness Initiative is simply not exempt from Montana’s campaign finance reporting and disclosure laws.⁶

As discussed, above, the Republican State Leadership Committee-Judicial Fairness Initiative may well organize as a 527 entity; but the 527 organizational status by itself does not exempt the entity from becoming a Montana political committee, subject to Montana’s reporting and disclosure laws. Instead, a Montana political committee is formed by a “person other than an individual”

⁵ The phrase “527” refers to the particular Internal Revenue Code section number which provides tax exempt status for election-related organizations: 26 U.S.C. § 527.

⁶ A 527 Organization is required to report its contributions and expenditures to the IRS in order for its income to be tax exempt: “Until the organization files its disclosures with the IRS, its income (including contributions) is subject to taxation.” IRS Fact Sheet, Release No: FS-2002-13. Instead of prioritizing federal taxation reporting, the federal code specifically provides an exemption to those 527 organizations that comply with federal and state campaign finance reporting and disclosure laws.

(§13-1-101(30)(a), MCA) with “person” including a “corporation, association, firm, partnership, cooperative, committee, including a political committee, club, union or other organization.” §13-1-101(28), MCA. The Republican State Leadership Committee-Judicial Fairness Initiative is such a “person” under Montana law and it became an independent political committee when it made an expenditure to a political committee in opposition to Candidate Sandefur. A Montana independent political committee must report and disclose the source of its funds (contributions received) and expenditures made. §13-37-229(1) and (2), MCA.

The Complaint was filed against MTPAC, a Montana political committee. The Commissioner, however, is authorized to investigate and enforce any “other alleged violation” of Montana campaign practice law, including the failure to file a statement of organization. §13-37-111(2)(a), MCA. Accordingly, the Commissioner includes the Republican State Leadership Committee-Judicial Fairness Initiative in the reach of this Decision.

Sufficiency Finding No. 1: The Commissioner finds that there are sufficient facts to show that Republican State Leadership Committee-Judicial Fairness Initiative did not report and disclose \$268,000 in contributions it received and expenditures it made concerning campaign opposition to Candidate Sandefur, a 2016 candidate for election to Montana’s Supreme Court.

On a practical level the Commissioner notes that the Republican State Leadership Committee-Judicial Fairness Initiative has access to an already formed Montana independent political committee, MTPAC. The directives set out in this Decision may be carried out through MTPAC. Reporting and

disclosure is required so that the public, press and opposing candidates understand the contribution and expenditure of funds used in support of or opposition to a particular campaign. Disclosures in Montana's Supreme Court elections have become of particular interest, given the large amounts of money spent for or against candidates in those elections during the 2014 and 2016 election cycles.

2. Failure to Disclose on a C-2

The MTPAC 2014 political committee statement (Form C-2) listed the 2014 Supreme Court candidates it was supporting or opposing (FOF No. 2.) The MTPAC filed a 2016 Form C-2 but it did not list the names of 2016 candidates it was supporting or opposing (FOF No. 4). The Republican State Leadership Committee-Judicial Fairness Initiative did not file a C-2 at all, much less list 2016 Supreme Court candidates it was supporting or opposing.

Yet, under Montana law a political committee must file a C-2 statement which shall list "the name ... of each candidate on whom the committee makes a reportable election expenditure." 44.11.201 ARM; See *O'Hara v. Madison County Republican Central Committee*, COPP-2016-CFP-011.

Sufficiency Finding No. 2: The Commissioner determines that there are sufficient facts to show that the Republican State Leadership Committee-Judicial Fairness Initiative failed to file a 2016 C-2 statement, as required by Montana law.

The Commissioner notes that the candidate disclosure information provided by a C-2 statement has become increasingly important, given the post-*Citizens United* campaign finance world that allows use of corporate funds as

independent expenditures for or against a candidate for public office.⁷ A political committee is required to include “the name, office sought and party affiliation of each candidate on whom the committee makes a reportable election expenditure.” 44.11.201(1)(f) ARM. A political committee must file an amendment to its C-2 statement within five business days of any change brought about by an election activity. 44.11.303 ARM.⁸

3. Special Directives

The Commissioner has authority to investigate and enforce any “other alleged violation” of Montana campaign practice law, including the failure to file a statement of organization. §13-37-111(2)(a), MCA. Under that authority the Commissioner directs as follows:

a. Republican State Leadership Committee-Judicial Fairness Initiative

The Republican State Leadership Committee-Judicial Fairness Initiative is directed to register as a Montana Independent Political Committee and file campaign reports current to the date of registration. The Republican State Leadership Committee-Judicial Fairness Initiative may cooperate with MTPAC, including registration. This registration and report filing must be accomplished no later than 3:00 O’Clock PM, November 2, 2016.

b. RSLCJFIMTPAC

This MTPAC political committee is allowed to cooperate to accomplish directive a, above.

⁷ *Citizens United v. Fed. Election Comm.*, 130 S. Ct. 876 (2010).

⁸ It is possible, even likely, that an expenditure for or against a particular candidate by a political committee will fall between campaign finance reporting periods such that the first indication of the activity will actually occur when an amended C-2 is filed.

c. StopSetEmFreeSandefur.com Committee

StopSetEmFreeSandefur.com Committee is directed to file an amended campaign finance report disclosing the source of contributions it receives. StopSetEmFreeSandefur.com Committee is directed to cooperate in directives a and b, above, so that it can accurately report using the correct name of any involved political committee. This amended campaign finance report must be filed no later than 3:00 O’Clock PM, November 2, 2016.

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 2016 campaign activities of the Republican State Leadership Committee-Judicial Fairness Initiative 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 as it relates to failures to file and report. 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 those certain 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 Republican State Leadership Committee-Judicial Fairness Initiative. 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.*

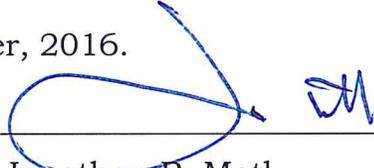
Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration.

Assuming that this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil 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.

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 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*.

This Decision is simultaneously released to the press, public and the parties. Montanans are already voting, requiring a full release at the earliest possible date.

DATED this 2nd day of November, 2016.



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