

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Strizich v. Loney No. COPP 2014-CFP-034	<u>Dismissal of Complaint By Application of <i>De Minimis</i> Principle</u>
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On August 21, 2014, Black Eagle, Montana, resident Willaim Strizich filed a complaint with the COPP against Cleve Loney, also a resident of Black Eagle, alleging Mr. Loney violated Montana campaign finance and practice laws during his 2014 general election campaign for election as representative to the Montana legislature from House District 21 (HD21).

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this decision is that of attribution of campaign materials, with enforcement measured by application of *de minimis* principle.

FINDING OF FACTS

The foundational facts necessary for this Decision is as follows:

Finding of Fact No. 1: On June 3, 2014 Democrat Tom Jacobson and Republican Cleve Loney advanced through the primary election vote for HD 21 and will appear on the general election ballot for HD 21 in November of 2014. (Montana Secretary of State's Office).

DISCUSSION

The complaint alleges that Candidate Loney distributed campaign literature in the 2014 HD 21 election that lacked the appropriate party designation. Under Montana law all election materials prepared by Candidate Loney "...must state the candidate's party affiliation or include the party symbol." §13-35-225(2) MCA. The Commissioner makes the following Findings related to this Complaint:

Finding of Fact No. 2: Candidate Loney won 2010 election to the Montana legislature, HD 25. Candidate Loney lost the 2012 election to the Montana legislature, HD 25. (Montana Secretary of State's Office)

Finding of Fact No. 3: Candidate Loney admitted that a brochure he had printed for use in his 2014 campaign did not set out the required party designation. (Investigator's notes).

Finding of Fact No. 4: Candidate Loney stated that 3,500 brochures were printed and the investigator confirmed that number with the printer. (Investigator's notes).

Finding of Fact No. 5: Candidate Loney stated that the brochure mock-up he took to the printer had a party designation (in the form of an elephant symbol) but that the printer removed the Party image from the mock-up. The investigator confirmed the change by examining the mock-up. (Investigator's notes).

Finding of Fact No. 6: Candidate Loney stated that he had distributed 2,000 of the brochures without the party designation and stated that he had hand stamped or would hand stamp "Republican" on all remaining brochures. (Investigator's notes).

Candidate Loney failed to comply with Montana's attribution law by failing to list party affiliation on election materials. (FOF No. 3). Complainant Strizich points out that Candidate Loney is a veteran campaigner (FOF No. 2) such that his failure is likely intentional rather than accidental. The Commissioner,

however, accepts that the error was unintentional (FOF No. 5) with Candidate Loney's principal failure being his inaction in correcting the oversight until after the Strizich complaint was filed. The Commissioner further notes that Candidate Loney, through the investigator, apologizes to the people of Montana for his error.

Having decided that this a matter of oversight, not intention, the issue the Commissioner next addresses is whether Candidate Loney's oversight can be excused as *de minimis*. *De minimis* is an established concept of law meaning that "the law does not care for, or take notice of, very small or trifling matters." Black's Law Dictionary 4th Edition.

The COPP began to regularly apply a *de minimis* exception to civil enforcement of a technical or minor violation of Montana's campaign practice, when directed to do so law by the 9th circuit court of appeals in that Matter of *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth* 556 F. 3d 1021, 1028-29 (9th Cir. 2009). The *de minimis* actions in *Canyon Ferry* were the limited use of staff and copying expenditures by a party involved in a ballot issue campaign.

While not always identifying it as *de minimis*, Commissioners have long used the concept to dismiss prosecution of technical violations: no prosecution for lack of address, *Shannon v. Andrews*, COPP-2012-CFP-035 (Commissioner Murry); no prosecution for failure to list party affiliation or funding source on a candidate website display, *Fitzpatrick v. Zook*, COPP-2011-CFP-014 (Commissioner Gallik); and no prosecution when full name of committee

treasurer omitted, *Ellis v. Yes on CI-97*, April 15, 2008 (Commissioner Unsworth). This Commissioner has applied *de minimis* to excuse technical violations for: omitting a 'paid for by' attribution, *Ulvestad v. Brown*, COPP-2013-CFR-025; accepting a contribution of \$40 over the allowed amount, *Rodda v. Bennett*, COPP-2014-CFR-013; failing to register/attribute as a political committee, *Royston v. Crosby*, COPP-2012-CFP-041; failure to fully attribute on a candidate letter, *Ponte v. Buttrey*, COPP-2014-CFP-007; and failure to properly apportion total allowed amount of contribution between husband and wife, *Kenat v. Van Dyk*, No. COPP-2014-CFP-004.

Further, this Commissioner, in a January 31, 2014 advisory opinion to Emilie Boyles, generally placed the *de minimis* principle in Montana campaign practice law as follows:

Second, there is a *de minimis* exception to Montana's definition of campaign contribution. This means that costs, fees or charges associated with a minor amount of campaign speech need not be reported. The *de minimis* principle holds that robust election speech is favored such that minimal election speech actions cannot be burdened with any requirements. This principle would apply to except small cost amounts (such as one time electronic campaigning costs) from disclosure or reporting requirements.

COPP-2014-AO-003-Boyles. The constitutional considerations inherent in the "robust election speech issue" raised in the advisory opinion are discussed in *Landsgaard v. Peterson*, COPP-2014-CFP-008.

Turning now to the Candidate Loney's activity, the Commissioner notes that a substantial number of (2,000) brochures were distributed without the

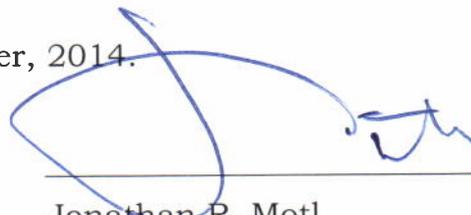
required Party attribution. On the other hand, all other required information, including the campaign address and treasurer, was properly attributed.

With the above considerations in mind, the Commissioner finds that the technical violation in this Matter is comparable to the failure to attribute letters that was dismissed as *de minimis* in *Ponte v. Buttrey*. As was the case in *Ponte v. Buttrey*, the candidate's actions in properly attributing other campaign material helped isolate the violation and lessen harm to the public. For the reasons set out in this discussion, Candidate Loney's failure to fully attributed is dismissed under the *de minimis* principle.

DECISION

This Commissioner, having duly considered the matters raised in the Complaint, and having completed his review and investigation, hereby holds and determines, under the above stated reasoning, that the above described violation of attribution standards is dismissed as *de minimis*. The Commissioner hereby dismisses this complaint.

DATED this 8th day of September, 2014.



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