

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

WBSC1 v. Wells No. COPP 2014-CFP-025	Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act
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Linda Haywood is a resident of Thompson Falls, Montana. Ms. Haywood is a leader in a civic group called Women for a Better Sanders County (WBSC1). Richard "Dick" Wells is a resident of Thompson Falls, Montana. On May 27, 2014 Ms. Haywood signed a complaint on behalf of WBSC1 against Mr. Wells alleging certain campaign practice violations.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this Decision are: 1) attribution of source of funding of election material; and, 2) requirement that political committees register and report with the COPP.

SUMMARY OF RELEVANT FACTS

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

Finding of Fact No. 1: For 2014 election purposes Sanders County, Montana is within the boundaries of Montana House District 13 (HD 13). (Secretary of State's Election Information Website (SOS website).

Finding of Fact No. 2: Four candidates were running for nomination as candidates to the 2014 Montana Legislature from HD 13 in the June 3, 2014 primary: Weylin Achatz (Democrat), Gerald Cuvillier (Democrat), Katy Walton (Republican) and Bob Brown (Republican). (SOS Website).

DISCUSSION

The WBSC1 complaint alleges that Mr. Wells' actions, as identified in the complaint, violated the attribution, registration and reporting requirements of Montana's campaign practice act. Those allegations are listed and discussed, below.

1. This Matter is A Campaign Practice Matter

The complaint in this Matter was filed on an Ethics Complaint form. The substance of the complaint, however, did not raise ethics issues concerning the conduct of a government official or employee. Instead, the complaint raised campaign practice issues – that is, issues related to the campaign actions of a private individual taken during an election. There are minimal procedural requirements for Complaints filed with the COPP. See 44.10.307(2) ARM. Likewise, the Commissioner is simply charged to investigate “the alleged violation.” See 44.10.307(3) ARM. Accordingly, it is the alleged violation, not the complaint form, which determines the nature of the investigation and the following Decision. The Commissioner, consistent with the nature of the alleged campaign

practice violation, posted this Matter as a campaign practice complaint and makes this Decision as a campaign practice Decision.

2. There are Two Identically Named Groups

There are two groups called “Women For Better Sanders County” involved in this Matter.

Finding of Fact No. 3: The Commissioner’s investigator spoke with the Complainants, “Women for a Better Sanders County.” The complainants told the investigator that they were a community organization, operating under the WBSC name, since 2012. This entity is hereafter labeled WBSC1. (Investigative notes).

Finding of Fact No. 4: On June 24, 2013, Richard “Dick” Wells filed an application with the Secretary of State’s Office to register the Assumed Business Name (ABN) of “Women for a Better Sanders County.” Mr. Wells listed the business description as “Publicity.” Mr. Wells listed “R. Wells” as the applicant name and listed an address of “PO Box 741, Thompson Falls, MT 59873.” Mr. Wells received a letter from the Secretary of State’s Office dated June 28, 2013 approving his ABN filing for the period of five years. This entity is hereafter labeled WBSC2. (SOS Office).

Finding of Fact No. 5: On August 16, 2013, Richard “Dick” Wells filed an Amended Registration for the Assumed Business Name (ABN) of “Women for a Better Sanders County.” Mr. Wells listed the new ABN as “Women for a Better Sanders County (WBSC).” Mr. Wells listed himself as “R. Wells” and provided an address of “PO Box 741, Thompson Falls, MT 59873.” Mr. Wells received a letter from the Secretary of State’s Office dated August 22, 2013 approving his amended assumed business name filing until June 24, 2018. (SOS Office).

Finding of Fact No. 6: On February 27, 2014, a group called “Women for a Better Sanders County” filed Articles of Incorporation for a Domestic Non-profit Corporation with the Secretary of State’s Office. The type of corporation was listed was “Public benefit without members.” The Registered Agent was listed as “Linda Haywood, Thompson Falls, MT” and the

Incorporator was listed as Carolyn Hidy, Trout Creek, MT. “Women for a Better Sanders County” received a Certificate of Filing from the Secretary of State’s Office dated March 11, 2014 approving their Articles of Incorporation, effective February 27, 2014. The Commissioner determines that WBSC1 designation also includes the corporation as the corporation was formed by the same group of women who were involved in the community organization described in FOF No. 3. (Montana Secretary of State’s Office).

The Commissioner determines that there were two entities legitimately entitled to use the name “Women for a Better Sanders County.” As set out above, the complainant entity (FOF Nos. 3 and 6) will be labeled WBSC1 because it first engaged in election related activity in Sanders County. The entity created by Mr. Wells is labeled WBSC 2.

3. Mr. Wells, through WBSC2, Must File With the COPP

In May of 2014 Mr. Wells/WBSC2 engaged in advertising related to the HD 13 primary election. The facts related to this advertising are as follows:

Finding of Fact No. 7: On May 14, 2014, a campaign advertisement was published in the “Clark Fork Valley Press.” The advertisement read, “Bob Brown, HD13 Candidate, is our only choice, Ad paid for by WOMEN FOR A BETTER SANDERS COUNTY (WBSC) 59873-0741.” The advertisement ran two more times before the primary, on May 21, 2014 and on May 28, 2014. (Investigator’s notes, Clark Fork Valley Press copy).

Finding of Fact No. 8: On May 15, 2014, a campaign advertisement was published in the “Sanders County Ledger.” The advertisement read, “Bob Brown, HD13 Candidate, is our only choice, Ad paid for by: WOMEN FOR A BETTER SANDERS COUNTY (WBSC), Dick Wells, treasurer, PO Box 741, Thompson Falls, MT 59873.” The advertisement ran two more times before the primary, on May 22, 2014 and on May 29, 2014. (Investigator’s notes, Sanders County Ledger copy).

Finding of Fact No. 9: There is no political committee called “Women for a Better Sanders County” (or any similar name) that has filed with the COPP. (Commissioner’s records.)

To any extent necessary, given the plain advocacy language of the advertisements, the Commissioner hereby determines that the advertisements constitute express advocacy.

There is no expenditure if the advertisement presents permissible non-advocacy information. *Roberts v. Griffin*, Decided November 19, 2009 and *Hansen v. Billings SD No. 2*, COPP-2013-CFP-030. There is an expenditure if the advertisement expressly advocates a vote “for” a particular candidate. An express advocacy analysis can be lengthy, depending on the wording examined (*See, Bonogofsky v. National Gun Owners Alliance*, COPP-2010-CFP-008). In this Matter a lengthy analysis is not necessary as “a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Federal Election Comm’n v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007) (“*WRTL*”). There is no other reasonable alternative, given the timing and language of the WBSC2 ads, other than the ads being an advertisement for vote “for” Bob Brown for HD13. The Commissioner determines that the WBSC2 ads are express advocacy and therefore the cost of the ads is an electioneering expense.

Section 13-37-201 MCA requires that WBSC2 file as a political committee “within 5 days after it makes an expenditure.” The

Commissioner has determined that WBSC2 made an expenditure as defined by Title 13. Montana law therefore requires that WBSC2 must file as a political committee. WBSC2, however, did not file as a political committee. (FOF No. 9) The Commissioner determines that sufficient facts exist to show that WBSC2 violated the Montana Campaign Practices Act by failing to file as a political committee.

The Commissioner now analyzes several issues related to this determination. First, Mr. Wells may argue that the Wells/WBSC 2 activity was that of an individual, not a group. Under Montana law filing with the COPP is required only of candidates and political committees (§13-37-201 MCA) and not of individuals. A political committee is: "...a combination of two or more individuals ...who makes a contribution or expenditure...to support or oppose a candidate..." §13-1-101(22) MCA.

In this Matter Mr. Wells acted as a group, using the words "our only choice" in the ad, not "my only choice." Further, Mr. Wells used a WBSC2 name that appropriated the group name of WBSC1, a League of Women Voters style civic group. Three weeks before the WBSC2 ads the WBSC1 group acted as a civic group as follows:

Finding of Fact No. 10: On April 30, 2014, the corporation "Women for a Better Sanders County" sponsored an all candidate forum for both Republican and Democrat candidates running for House District #13 (HD #13), Sanders County. Three of the four candidates attended the forum. Candidate Bob Brown did not attend. (Investigative notes).

The WBSC2 ads, coming closely after the WBSC1 candidate forum,

and using the word “our” invoked a group expenditure, not an individual expenditure. There is a public purpose and public need for disclosure of the sources of such a group expenditure and therefore WBSC2 is a political committee and it is required to file with the COPP.¹

Second, Mr. Wells may argue that his use of the WBSC2 name was a pseudonym used to preserve his anonymity. The COPP considered anonymity in the *Matter of Concerned Citizens of Lake County*, Decided November 10, 2011 (Commissioner Gallik). *Concerned Citizens* involved anonymous activity by a single individual acting under the pseudonym “Concerned Citizens of Lake County.” Because a single individual was involved, Commissioner Gallik determined that there were not “two or more” people and therefore there was no political committee. Further, Commissioner Gallik took into consideration the fact that the individual used the *Concerned Citizens* name to act in anonymity, a value that would be lost if a political committee filing were required.

This Matter is markedly different than *Concerned Citizens*. Mr. Wells twice filed public documents at the Montana Secretary of State’s Office (FOF Nos. 4 and 5), disclosing his name and address in regard to use of

¹ An earlier Decision involving this same issue was made in the *Matter of Welch v. Davis*, COPP-2014-CFP-027. The *Welch v. Davis* Decision set out footnote 3 on this issue as follows: “It is noted that Mr. Davis informed the Commissioner’s investigator that the money spent on the signs was entirely his own money (Investigator Sanddal notes). A political committee designation, however, is determined by looking to both “contribution or expenditure” and the expenditure was made in the name of Quiet Skies (FOF No. 6), not in the name of Mr. Davis. The contribution may have come from Mr. Davis, but the expenditure was that of Quiet Skies.” The same analysis applies in this Matter.

the name of WBSC2.² Having so acted there can be no claim of anonymity in this Matter. See also *Welch v. Davis*, COPP-2014-CFP-027.

4. WBSC2 Failed to Attribute

WBSC2/Wells spent funds on newspaper ads expressly advocating a vote for a candidate. These costs were campaign expenditures under Title 13: "...anything of value made for the purpose of influencing the results of an election." §13-1-101(11)(a) MCA. Accordingly, WBSC2/Wells was required to meet the attribution requirements of §13-35-225 MCA as attribution is required for "all communications advocating the success or defeat of a candidate..." Section 13-35-225(1) MCA required that WBSC2/Wells place on the Ads "the attribution 'paid for by' followed by the name and address of the person who made or financed the expenditure..."

The Commissioner determines that sufficient facts exist to show that the Clark Fork Valley Press ads (FOF 7) did not meet any part of the Section 13-35-225(1) requirements. The Sanders County Ledger ads (FOF 8) met attribution requirements although it is noted that it is a hollow attribution as the entity listed (WBSC2) had not filed as a political committee.³ The Commissioner further determines that Mr. Wells, as the person who created the scheme used in this Matter, is the responsible

² Mr. Wells also listed WBSC as an "assumed business name", thereby also creating a political committee by becoming a "person other than an individual" under §13-1-101(22) MCA.

³ The lack of filing by WBSC2 meant that there was no way the public could determine for certain who was behind the expenditure. Dick Wells listing of his name and address as treasurer offsets this failure to a degree.

person for the failure of WBSC2 to properly attribute.

Montana law requires attribution and this Matter is an example of why attribution is required. WBSC1 and WBSC2 share the same name and could easily be confused thereby misleading voters. If attribution is to have any purpose at all it must be applied vigorously in this matter so that voters understand who, or what, is funding the advertisement they are looking at.

5. WBSC2 Failed to Report

WBSC2/Wells engaged in election expenditures in paying for six election advertisements (FOF Nos. 7 and 8). The expenditure was made to promote the election of a particular legislative candidate. A political committee making such a candidate related expenditure of any amount is required to regularly report on the schedule set out at §13-37-226(3) MCA. The Commissioner determines that sufficient facts exist to show such a failure to report.

The Commissioner notes that Mr. Wells went to considerable lengths (See FOF Nos. 4 and 5) to establish a legal basis for his use of WBSC2. What Mr. Wells forgot was that the competing use of WBSC1 vs. WBSC2 in an election comes with attribution, reporting and disclosure obligations to WBSC2, the entity that engaged in election expenses. These requirements come because Montana law requires attribution, reporting and disclosure so that the voting public is better able to judge the electoral merit of the candidates, including by a fair look at the

identify of those supporting or opposing a particular candidate.

Mr. Wells may believe that his “right to be free” includes the right to act without restriction in election activities. Montanans have long recognized, however, that the actions of one individual in an election have to be measured in terms of how those actions affect others: “the people of Montana intend that there should be a level playing field in campaign spending that allows all individuals, regardless of wealth, to express their views to one another and their government...” §13-35-503(2)(d)MCA.

Enlightened civilization has long struggled with the extent to allow a reach of individual liberty that interferes with the good of society as a whole. Some limits on individual rights, such as speed limits in a school crossing zone, are rarely challenged. Limits on an individual’s campaign practice activities, however, have come under recent legal challenge.

In the United States enlightenment principles applicable to election activity were embodied into the constitution and are now interpreted by the US Supreme Court as a measure of 1st Amendment rights. In particular, the US Supreme Court has discussed, with approval, disclosure and reporting requirements in its Citizens United Decision.⁴ The transparency and open election principles inherent in disclosure and reporting requirements have also been cited with approval by Montana’s

⁴ *Citizens United v. Fed. Election Comm.*, 130 S. Ct. 876 (2010) and cases following.

courts.⁵

In general, then, 1st Amendment campaign speech rights of an individual do not trump the general public rights inherent in the requirements of campaign reporting and disclosure. Mr. Wells brought about the consequences of this Decision on himself by his deliberate individual campaign acts in violation of Montana campaign practice reporting and disclosure requirements. Mr. Wells, like each of us, must obey the law and he cannot legitimately now claim that enforcement of laws serving the public good is infringing on his rights as an individual.

FINDINGS OF CAMPAIGN PRACTICE VIOLATION

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

⁵ Judge Sherlock cited to “Montana’s tradition of free and open elections” in his November 15, 2013 Order holding American Tradition Partnership (formerly Western Tradition Partnership) accountable for campaign practice violations. *ATP v. Motl*, No. BDV-2010-1120, 1st Judicial District, Lewis and Clark County.

decision. In this Matter Montana's attribution and campaign finance report filing requirements are mandatory: "must .. include" (§13-35-225 MCA) and "shall file" (see §13-37-201 MCA). The filing date requirements are date certain. Therefore, any failure to meet a mandatory, date-certain filing date is a violation of §13-37-201 MCA. Likewise, the campaign finance report filing is mandatory: "...shall file a statement of organization..." §13-37-226 MCA.

This Commissioner, having been charged to investigate and decide, hereby determines that sufficient facts exist to show that WBSC2/Wells has, as a matter of law, committed a violation of Montana's campaign practice laws, including §§13-35-225, 37-201 and 37-226 MCA. Having determined that a campaign practice violation has occurred, 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.

Excusable neglect does not apply since Mr. Wells intended to act as he did in creating and using WBSC2. Ignorance of the law is not excuse as 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). See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

The principle of *de minimis* also does not apply to excuse the

violation in this Matter. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. The requirement that WBSC2 file as a political committee, fully attribute and report is designed to provide information to the public via the publicly available statement of organization and a proper attribution.

Because there is a finding of sufficient showing of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil adjudication and/or a civil fine is justified (see §13-37-124 MCA). This Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution under §13-37-124 MCA. This matter will now be submitted to (or “noticed to”)⁶ the Lewis and Clark County attorney for his review for appropriate civil action (see §13-37-124(1) MCA). Should the County Attorney waive the right to adjudicate (§13-37-124(2) MCA) or fail to initiate civil action within 30 days (§13-37-124(1) MCA) this Matter returns to this Commissioner for possible adjudication.

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 adjudication

⁶ Notification is to “...the county attorney in which the alleged violation occurred...” §13-37-124(1) MCA. The failure to attribute occurred in Sanders County and the failure to file and report occurred in Lewis and Clark County. This Commissioner chooses to Notice this matter to the county attorney in Lewis and Clark County as the failure to file and report created the dominate failure to report and disclose.

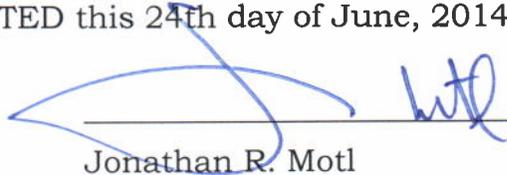
as the Commissioner has discretion [“may then initiate” see §13-37-124(1) MCA] in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In the event that a fine is not negotiated and the Matter resolved, the Commissioner retains 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 addition to whatever action (such as payment of a fine) is required, the Commissioner directs Mr. Wells to file WBSC2 as a political committee and further directs Mr. Wells to file the appropriate campaign finance reports. 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-012. Mitigation means “abatement or diminution of a penalty or punishment imposed by law.” *Black’s Law Dictionary, Revised 4th Edition*. The Commissioner will apply a degree of mitigation based on speed and thoroughness with which Mr. Wells files as a political committee and files the appropriate campaign finance reports.

CONCLUSION

Based on the preceding discussion as Commissioner I find and decide that there is sufficient evidence to show that Mr. Wells and/or WBSC2 violated Montana's campaign practices laws under the analysis set out above.

DATED this 24th day of June, 2014.



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