

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Welch v Davis No. COPP 2013-CFP-027	Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act
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Scott Davis is a resident of Kalispell, Montana. Mr. Davis was active in opposition to Referendum No. 103, a ballot issue placed before the Kalispell electors in the 2013 local government elections.

On November 1, 2013, Sandy Welch, also a resident of Whitefish, filed a complaint alleging Mr. Davis violated Montana finance and practice laws by:

1. Failing to register as a ballot committee;
2. Failing to meet minimum requirements for yard sign disclaimers;
3. Failing to certify a treasurer; and,
4. Failing to pay for yard signs in accordance with the law.

The Commissioner now considers and addresses the campaign practice issues raised by Ms. Welch's complaint.

**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 individuals/political committees register with Commissioner.

## SUMMARY OF RELEVANT FACTS

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

Finding of Fact No. 1: A general election in the city of Kalispell, Montana was held on November 5, 2013. (Flathead County Election Department website).

Finding of Fact No. 2: There were three public office positions and one ballot issue (Referendum No. 103) on the ballot. The purpose of Referendum No. 103 was to repeal Resolution 5572, passed in 2012 by the Kalispell City Council concerning the expansion of the city airport. (Sample ballot from November 5, 2013, Kalispell city election).

Finding of Fact No. 3: Referendum No. 103 passed on November 5, 2013 with 1,886 votes for the repeal and 1,535 against the repeal. (Flathead County Election Department website).

Finding of Fact No. 4: In August and September of 2013 Kalispell residents filed statements of organization for two ballot issue committees concerning Referendum No. 103: 1) "Save Your Airport" (campaigning for a vote "against" the repeal)<sup>1</sup> and, 2) "Repeal the city Airport Expansion" (campaigning for a vote "for" the repeal), originally called "Sign the Petition" (for the repeal). (Commissioner's Records).

Finding of Fact No. 5: There were and are no other ballot committees or incidental committees that filed statements of organization with the Commissioner's Office concerning Referendum No. 103. In particular, no committee known as Quiet Skies of Kalispell filed a statement of organization. (Commissioner's Records).

Finding of Fact No. 6: Prior to the November 5, 2013 election Mr. Davis created, paid for the printing of, and displayed for public view eleven large campaign signs. All signs purchased by Mr. Davis read: "QUIET SKIES of Kalispell "FOR" Repeal of Resolution No. 5572, Paid for by Quiet Skies Members of Kalispell (406) 752-1523." (Photographs provided by complainant, KCFW TV interview with Mr. Davis posted online October 29, 2013, Investigator Sanddal notes).

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<sup>1</sup> Sandy Welch, complainant, is listed as treasurer of the Save Your Airport ballot committee.

## DISCUSSION

Mr. Davis printed and displayed campaign signs in the midst of a contested ballot issue matter in Kalispell, Montana (FF No. 6). The signs advocated “For” a repeal vote. Ms. Welch’s complaint alleges that Mr. Davis’s actions violated the attribution (§13-35-225 MCA) and registration (44.10.411 ARM) sections of Montana’s campaign practice law.

### 1. Quiet Skies Is a Political Committee

Quiet Skies/Mr. Davis engaged in \$229 of election expenditures in producing 11 campaign signs (FOF No. 6, Investigator’s notes). Under Montana law Quiet Skies became a political committee because it was “...a combination of two or more individuals ...who makes a contribution or expenditure...to support...a ballot issue...” §13-1-101(22) MCA.

As early as 2009 an informal group known as Quiet Skies of Kalispell existed and took public stances on airport related issues. Since 2009 at least three Quiet Skies leaders (Scott Davis, Carl Feig and Steve Eckels) were involved. Quiet Skies activity included at least one public organizational meeting. Quiet Skies was also publicly active in at least one Kalispell city planning meeting, one city council meeting and its spokespeople, including Mr. Davis, were quoted in several newspaper articles.<sup>2</sup> (Investigator Sanddal notes.) Based on these facts the Commissioner determines that Quiet Skies was a combination of two or more individuals and became a political committee

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<sup>2</sup> Mr. Davis held himself out on several occasions as a “spokesman for Quiet Skies.”

when it made expenditures in regard to Referendum No. 103.<sup>3</sup>

The Commissioner considered the *Matter of Concerned Citizens of Lake County* decided November 10, 2011 (Commissioner Gallik) when making the above determination. *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* as more than one person is involved and the individuals involved did not seek anonymity in their actions.

The Commissioner further determines that Quiet Skies was an incidental political committee. Quiet Skies existed as an informal group and appeared publicly through spokespeople for over three years before Referendum No. 103 appeared on the ballot. Quiet Skies, unlike the two ballot issue committees involved in this Matter (see FOF No. 4), was not formed solely to advocate for votes on Referendum No. 103. Instead, Quiet Skies became incidentally involved by making an expenditure advocating a “for” vote on Referendum No.

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<sup>3</sup> 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.

103. This makes Quiet Skies an incidental committee. See 44.10.327 (2)(c) ARM.

2. Quiet Skies Must Register But Need Not Report

Quiet Skies/Mr. Davis engaged in \$229 of election expenditures in producing 11 campaign signs (Investigator Sanddal notes). The expenditure was made in regard to a local ballot issue. An incidental political committee making an expenditure of any amount is required to file a statement of organization with the Commissioner's Office [44.10.411 (3)(a) ARM].

The Commissioner determines that Quiet Skies was required to, but did not, file a statement of organization with the Commissioner's office. Quiet Skies expenditures were less than \$500, with those expenditures being made on a local ballot issue. Accordingly, Quiet Skies was not required to file any further campaign finance reports other than the statement of organization. See §13-37-226(4) MCA and 44.10.411 (3)(a) ARM .

3. Quiet Skies Must Attribute under §13-35-225(1) MCA.

Quiet Skies/Mr. Davis spent \$229 on posters expressly advocating a vote for a ballot issue. 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, Quiet Skies 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 ...ballot issue." Section 13-35-225(1) MCA required that Quiet Skies place on the Ads "the attribution 'paid for by' followed by the name and address of the person

who made or financed the expenditure...”

This Commissioner determines that the \$229 in expenditures made by Quiet Skies in this Matter were election related independent expenditures that were not properly attributed, as required by law. The Commissioner further determines that Mr. Davis, as the person who created the signs, is the responsible person for the failure of Quiet Skies to properly attribute.

Montana law requires attribution and this Matter is an example of why attribution is required. The election concerning the scope of future airport operations engendered strong responses on both sides of the issue. The other entities and people advocating for or against the ballot issue filed, reported, and disclosed their activity (FOF No. 4). It is logical and fair, thereby promoting civic discourse, that Quiet Skies would also disclose to the public and candidates the name and address of the entity paying for a particular statement of position.

It is noted that Quiet Skies did place its name and “paid for by” on the signs. That partial attribution, however, was hollow given Quiet Skies’ failure to file as a political committee. Without a statement of organization on file, thereby providing the public with a name and address, Quiet Skies had no legal identity or address.

#### **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, a decision 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* §13-37-201 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 requirements for incidental committee filing is mandatory: “...shall file a statement of organization...” 44.10.411 ARM.

This Commissioner, having been charged to investigate and decide, hereby determines that Quiet Skies/Mr. Davis has, as a matter of law, committed a violation of Montana’s campaign practice laws, including §§13-35-225 and ARM 44.10.411. There are no reporting violations because the expenditure is less than \$500. *See* above. The Quiet Skies violations (attributed to Mr. Davis) are failing to register as a political committee and failing to attribute campaign signs. 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. Davis intended to publicly

display the signs that lead to the violation. While Mr. Davis may call the failure to register, attribute, and report an "oversight", 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). See discussion of excusable neglect principles in *Matters of Vincent* Nos. CPP-2013-CFP-006 and 009.

The principle of *de minimis* also does not apply to excuse the violation in this Matter. The Commissioner recognizes that *de minimis* application is separately measured when dealing with an incidental committee. *Canyon Ferry Road Baptist Church v Unsworth* 556 F3d 1021 (9<sup>th</sup> Cir. 2009). The Commissioner further recognizes that a *de minimis* application must be made when required by the facts of the Matter. *Id.*

The Commissioner has not defined a *de minimis* violation by reference to a specific dollar amount. Rather, the Commissioner has applied the principle based on specific facts in individual cases. For example, in *Royston v. Crosby*, COPP-2012-CFP-0041, \$273 was spent on a newspaper advertisement regarding a local candidate. *De minimis* was applied because the \$273 expenditure was made in a public manner (26 people contributing \$10 each and placing their name on the ad purchase with the funds) such that the names of the persons making the expenditure were fully disclosed. The failure

to create a political committee and the accompanying failure to properly attribute in *Royston v. Crosby* was thus limited to that of a technical failure. The public was fully informed as to the nature and funding of the campaign expense. Requiring a further act from the Crosby group would have satisfied the letter of the law without serving any purpose of Montana's campaign practice laws. *De minimis* was applied to excuse such a technical violation in a manner that preserves law without unnecessarily interfering with election speech.

This Matter, while also involving an expenditure of less than \$500, is markedly different than *Royston v. Crosby*. The *Royston v. Crosby* matter involved 26 people whose names were disclosed and known to the public. Formation of these 26 people into a political committee, while required by law, provided no new information to the public when the names of the 26 people were fully disclosed. This Matter, in contrast, involves an artificial entity, Quiet Skies, whose identity (address and people) are not revealed by the name of the artificial entity. The requirement that Quiet Skies file as a political committee and fully attribute is designed to provide this identity information to the public via the publicly available statement of organization and a proper attribution.

Judge Sherlock noted "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, 1<sup>st</sup> Judicial District, Lewis and Clark County. Political Committee registration and attribution in circumstances such as this

Matter serves that tradition. *De minimis* cannot apply in this Matter.

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”)<sup>4</sup> 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 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

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<sup>4</sup> Notification is to “...the county attorney in which the alleged violation occurred...” §13-37-124(1) MCA. The failure to attribute occurred in Flathead County and the failure to file occurred in Lewis and Clark County. This Commissioner chooses to Notice this matter to the county attorney in Lewis and Clark County.

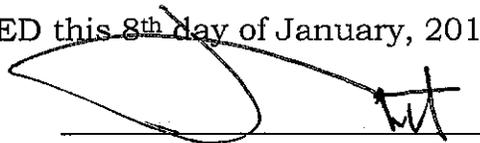
13-37-128 MCA]. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

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 4<sup>th</sup> Addition*. The Commissioner will consider the facts to determine whether mitigation will be applied to the amount of fine negotiated in this Matter, should Mr. Davis choose to settle this Matter with a negotiated fine. With mitigation in mind, Mr. Davis is advised to file Quiet Skies as a political committee at his earliest opportunity.

### CONCLUSION

Based on the preceding discussion as Commissioner I find and decide that there is sufficient evidence to show that Mr. Davis and Quiet Skies violated Montana’s campaign practices laws, including §§ 13-35-225 and ARM 44.10.531.

DATED this 8<sup>th</sup> day of January, 2014.



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