

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

<i>Womack v. Jenks</i> No. COPP-2013-CFP-0023	Finding of Sufficient Evidence to Show a Campaign Practice Violation Dismissal of Further Action by Determination of Lack of Justification to Prosecute
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Kathleen Jenks and Leta Womack are Missoula residents and 2013 candidates for municipal court judge for the City of Missoula. The primary election date was September 10, 2013. On September 12, 2013, Ms. Womack filed a complaint against Ms. Jenks alleging violations of Montana's campaign practices law.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: filing dates, removal of name of candidate from the ballot, and excusable neglect.

FINDING OF FACTS

The facts necessary for this Decision are as follows:

Finding of Fact No. 1:

A candidate for local office in Montana, including Ms. Jenks, is required to file certain reports of contributions and expenditures.

Finding of Fact No. 2:

The first (pre-primary) reporting deadline for 2013 candidates for local office was August 29, 2013. (See Commissioner's Campaign Finance Report Calendar).

- a. The 2013 local government primary election date in Montana was set for September 10, 2013.
- b. The City of Missoula did not hold a primary election thereby passing Ms. Jenks and Ms. Womack (along with another candidate) through to the general election ballot.
- c. Regardless of whether a primary election took place, §13-37-226 (3)(a) MCA required a report of contributions 12 days prior to the election date, or August 29, 2013, in regard to Ms. Jenks.

Finding of Fact No. 3:

Ms. Jenks was required to file an August 29, 2013 report (hereafter Report) with the Missoula County Election Administrator

- a. The office of the Missoula County Election Administrator confirmed that Ms. Jenks filed the Report with that office on August 26th, 2013, three days before the filing deadline of August 29.
(Commissioner Investigator's notes).
- i) The Report was 5 pages in length and reflected a "cash in bank - ending balance this period" of \$9,076.55.
(Commissioner Investigator's notes).

- ii) The Report filed with the Commissioner on August 30, 2013 was also five pages in length with an ending balance of \$9,076.55. (Commissioner's records).

Finding of Fact No. 4:

Ms. Jenks was required to file an August 29, 2013 report (hereafter Report) with the Commissioner.

- a. Ms. Jenks filed the Report with the Commissioner's office via email on August 30, 2013. The circumstances of the August 30, 2013 Report filing with the Commissioner are as follows:

- i) The Report was sent under an email from Ms. Jenks' campaign treasurer, Jack Jenks, received August 30, 2013, at 4:44 PM. (Commissioner's records).
- ii) The Report was date stamped by the Commissioner on September 3, 2013, the date it was processed by a staff member at the Commissioner's office. The staff member added a handwritten note that the Report was emailed "8/30/13." (*Id.*)
- iii) Jack Jenks advised the Commissioner's investigator that he attempted to mail the Report to the Commissioner on August 26, the same day he filed the Report with the Missoula County Election Administrator. The mailing was returned for deficient postage and Jenks received it back in his mailbox on August 30. The investigator requested, and Mr. Jenks provided, a copy of the envelope showing the August 26 postmark and stamp showing the envelope was returned for more postage. (Commissioner's records).
- iv) Jack Jenks emailed the Report to the Commissioner on August 30. He mailed the original Report to the Commissioner on August 31.

INTRODUCTION TO DECISION

Ms. Jenks was and is a candidate for municipal court judge for the City of Missoula, Montana. The complaint filed in this Matter alleges that Ms.

Jenks violated Montana's campaign practice laws by failing to report campaign contributions and expenses in a timely manner. The complaint further seeks the removal of Ms. Jenks' candidacy and name from the ballot as a penalty for failing to timely report.

FAILURE TO TIMELY REPORT

As a candidate Ms. Jenks was required to file a report of contributions and expenditures (Report) on or by August 29, 2013. (§13-37-226(3) MCA). Ms. Jenks was required to file the Report with the Commissioner and the Missoula County election administrator. (§13-37-225 MCA).

Ms. Jenks timely filed the Report with the Missoula county election administrator. (Finding of Fact No. 3). Ms. Jenks was one day late in filing the Report with the Commissioner. (Finding of Fact No. 4).

FINDING OF CAMPAIGN PRACTICE VIOLATION

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. 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 to justify a civil...prosecution" of a violation the Commissioner must ("shall notify", see §13-37-124 MCA) initiate consideration for prosecution.

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.

This Commissioner, having been charged to investigate and decide, hereby determines that sufficient evidence exists to show that Ms. Jenks has, as a matter of law, committed a violation of Montana's campaign practice law, specifically §13-35-226 MCA. The Commissioner, however, further determines that the violation does not justify further action beyond the issuance of this Decision.

Prosecution, and therefore referral to the County Attorney, is not justified in this Matter as the principle of excusable neglect applies in regard to this Decision. Jack Jenks, the campaign treasurer, provided proof of a clerical oversight (insufficient postage) and further proof of prompt correction once the oversight was discovered (Finding of Fact No. 4). This proof meets the standard of excusable neglect as it is sufficient to show 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). Prior Commissioners have applied the excusable neglect principle to excuse prosecution of late filing by a period of 11 days (see *In the Matter of the Washburn Complaint*, COPP-CFP-2013-0002) and by a period of 17 days (see *In the Matter of the Complaint Against CMRG*, decided February 21, 2002). This Commissioner has, however, explained and narrowed the use of the excusable

neglect principle. See the Discussion in *Matters of Vincent*, Nos. COPP-2013-CFP-0006 and 0009.

The principle of *de minimis* could also be applied in this Matter. The concept of a *de minimis* exception to civil enforcement of a violation of Montana's campaign practice law is set out and defined in *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F. 3d 1021, 1028-29 (9th Cir. 2009). While *de minimis* may also apply under the facts of this Matter, it is not necessary to make this ruling as the excusable neglect principle applies. The Commissioner declines to apply an across the board *de minimis* exception to prosecution based on late filing.

Lastly, the Commissioner notes that complaint seeks candidate disqualification from the ballot under §13-37-126(1) MCA. This Section reads: "The name of a candidate may not appear on the official ballot for an election if the candidate or a treasurer for a candidate fails to file any statement or report as required by §2-2-106 or this chapter". (Emphasis added.)

Commissioner Argenbright considered this statute *In the Matter of the Complaint against Stanley M. Fisher* (decided August 21, 1998, pp. 5-6) and determined that the disqualification language of the statute applies only to the complete failure to file, rather than to untimely filing. Ms. Jenks filed the Report in this matter and therefore §13-37-126(1) MCA does not apply.

With the above considerations in mind this Commissioner finds that no further action is required beyond the issuance of this Decision. Because there is a finding of violation and a determination that excusable neglect is

applicable, civil prosecution and/or a civil fine is not justified (see §13-37-124 MCA).

CONCLUSION

Based on the preceding discussion as Commissioner I find and decide that there is sufficient evidence to show that Ms. Jenks violated Montana's campaign practices laws, by filing a report one day late. This violation, however, does not justify any further action, upon application of the excusable neglect principle, such that prosecution is not justified and will not be pursued. The issuance of this Decision ends this Matter.

DATED this 24th day of October, 2013.



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