

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Essmann v. Billings Chamber of Commerce  No. COPP 2018-CFP-043	DECLARATION OF MERIT OF COMPLAINT  MEMORIALIZATION OF NOTIFICATION OF MERIT  RESOLUTION OF COMPLAINT BY PROMPT REMEDIAL ACTION  DISMISSAL OF COMPLAINT
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On September 17, 2018, Jeff Essmann of Billings filed a campaign practices complaint against the Billings Chamber of Commerce (BCOC). The complaint alleged that BCOC publicly distributed election or electioneering communications without properly registering as an incidental committee or disclosing their payment for these activities on financial reports filed with the Commissioner of Political Practices (COPP).

**SUBSTANTIVE ISSUES ADDRESSED**

Distribution of an election communications, proper timing and filing as a political committee, and attribution of election communications.

**FINDINGS OF FACT**

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: Montana's 2018 General Election will take place on November 6, 2018. (Montana Secretary of State website.)

Finding of Fact No. 2: The Billings Chamber of Commerce (BCOC) is a “non-profit, membership driven organization” whose Mission is “to develop a strong business climate and vibrant economy by serving the community in a leadership role”.<sup>1</sup> (Commissioner’s Records.)

Finding of Fact No. 3: On August 30, 2018, BCOC posted to its website a guide to the various referendums and ballot issues appearing on Montana’s 2018 General Election ballot.<sup>2</sup> The post was titled, “On Your Ballot: Referendums and Initiatives.” BCOC offered a brief synopsis of each issue/referendum, provided a link to the official language that will appear on Montana ballots, and listed its position on the issues:

LR 128 (the 6-Mill levy for the Montana University System) was supported by BCOC – “The Billings Chamber supports the Higher Education Levy”;

LR 129 (titled the Montana Ballot Interference Prevention Act) – no position given;

I-185 (tobacco tax) was supported by BCOC – “the Billings Chamber supports I-185”;

I-186 (involving hard rock mining clean up) was opposed by BCOC – “the Billings Chamber opposes I-186”.

Per an October 16, 2018 COPP review of BCOC’s website, the guide was publicly accessible and available to any interested individual, regardless of membership status with BCOC. This specific post/portion of the website also did not contain any “Paid for by” disclaimer. An October 19, 2018 COPP review of the BCOC website could not find any other posts or materials that specifically referenced, supported, or opposed candidates or ballot issues in Montana. (Commissioner’s Records.)

Finding of Fact No. 4: A copy of BCOC’s post described above (FOF No. 3) was sent by BCOC via email to Mr. Essmann on August 30, 2018. Mr. Essmann stated he is not a current member of BCOC and has not been “for at least 10 years.” (Commissioner’s Records.)

Finding of Fact No. 5: Healthy Montana is a registered Montana Ballot Issue committee supporting I-185. On September 4, 2018, Healthy Montana issued a press release stating that I-185 had

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<sup>1</sup> <https://www.billingschamber.com/about-the-chamber/>

<sup>2</sup> <https://www.billingschamber.com/on-your-ballot-referendums-and-initiatives/>

been officially endorsed by BCOC.<sup>3</sup> The press release was publicly posted on both Healthy Montana's website and its Facebook page, accompanied by a disclaimer statement identifying Healthy Montana as the paying party. An October 16, 2018 review by COPP determined this press release was not posted on BCOC's website. (Commissioner's Records.)

Finding of Fact No. 6: On September 24, 2018, BCOC responded to this complaint, stating the guide to the various referendums and ballot issues appearing on Montana's 2018 General Election ballot posted on its website would cost approximately \$9.00 to host on their website from August 30 until Election Day. BCOC also stated that the guide was produced by a BCOC employee; the employee was paid \$26.92 an hour and spent three hours researching and creating the materials. (Commissioner's Records.)

Finding of Fact No. 7: According to BCOC, the guide was sent via email to 3,535 recipients, including "former members (people who have not unsubscribed), elected officials (as a courtesy) and individuals that opt-in to our newsletter list through the website." BCOC uses a mass-email service (Boingomail) for such emails; in August 2018, that service cost BCOC \$119.00. BCOC records show that the email guide was one of 19 messages distributed using Boingomail in August, at an average cost of approximately \$6.27 per message. BCOC alternatively attempted to estimate the costs of this email by providing pricing information from Boingomail's website; that information showed that use of Boingomail would cost a one-time fee of \$6.00 "for a single design and spam test" and an additional \$.012 fee per recipient per message. A message using this fee structure sent to 3,535 recipients, BCOC calculated, would cost \$48.42. Additionally, BCOC estimated that it took one employee .25 hours to "create and schedule" the email, at a cost of \$7.22. (Commissioner's Records.)

Finding of Fact No. 8: BCOC also provided an invoice from Zee Creative in Billings for the "Website Hosting for billingschamber.com," "Managed WordPress Services," and "Dedicated IP for SSL" for the first quarter (3 months) of 2018. Cumulatively, BCOC was charged \$184.50 for these services, or \$61.50 per month. A website traffic analysis for the dates of August 30, 2018 (the date the "On Your Ballot" (FOF No. 3) post was added to the website) through September 18, 2018 (the day BCOC received notice of this Complaint) showed that 186 users

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<sup>3</sup> <https://www.healthymontana.org/2018/09/04/news-billings-chamber-commerce-endorses-185-healthy-montana-initiative/>

had accessed the post, approximately 4.2% of total web traffic on BCOC website during this time period. (Commissioner's Records.)

Finding of Fact No. 9: BCOC stated it was not responsible for producing or distributing the Healthy Montana press release (see FOF No. 5), and the material "clearly states the communication was paid for by Healthy Montana." (Commissioner's Records.)

Finding of Fact No. 10: BCOC provided additional information on October 24, 2018 regarding its membership and email lists. On August 30, 2018, BCOC had "1,260 active member businesses or organizations" and, "of the 3,535 recipients of the August 30, 2018 email there were 1,280 addresses [BCOC] could not identify as active members." BCOC also stated that any individual who opted-in to receive its newsletter would have received "access to all communications we sent out. The Billings Chamber of Commerce has since separated its communications lists to maintain a mailing list with only active members...and a separate list that includes former members, users who have opted-in, elected officials, and others who are not active members." (Commissioner's Records.)

Finding of Fact No. 11: On October 31, 2018, the Commissioner contacted the BCOC and provided notice to properly attribute the communications. The BCOC fulfilled the request on the same date. (Commissioner's Records.)

## **DISCUSSION**

The complaint alleged BCOC publicly distributed election and electioneering communications and did not register as a political committee or submit committee finance reports. The Commissioner examines the alleged communications and the requirements for filing as a political committee.

### *1. BCOC Voter "Guide"*

An "election communication" is defined as:

the following forms of communication to support or oppose a candidate or ballot issue:

- (i) a paid advertisement broadcast over radio, television, cable, or satellite;
- (ii) paid placement of content on the internet or other electronic communication network;

- (iii) a paid advertisement published in a newspaper or periodical or on a billboard;
  - (iv) a mailing; or
  - (v) printed materials.
- (b) The term does not mean:
- (i) an activity or communication for the purpose of encouraging individuals to register to vote or to vote, if that activity or communication does not mention or depict a clearly identified candidate or ballot issue;
  - (ii) a communication that does not support or oppose a candidate or ballot issue;
  - (iii) a bona fide news story, commentary, blog, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, internet website, or other periodical publication of general circulation;
  - (iv) a communication by any membership organization or corporation to its members, stockholders, or employees; or
  - (v) a communication that the commissioner determines by rule is not an election communication.

Mont. Code Ann. § 13-1-101(14).

BCOC distributed an email entitled “On Your Ballot: Referendums and Initiatives” and posted the same entitled content on its website on or about August 30, 2018. (FOF Nos. 3, 4, 7.)

The “On Your Ballot” website post clearly articulated BCOC’s support or opposition for three separate 2018 general election ballot issues/referenda up for election in Montana (FOF No. 3). BCOC pays to host the website and its paid-staff make periodic updates (FOF No. 6). The communication would qualify as an election communication under Mont. Code Ann. § 13-1-101(14)(a)(ii). Additionally, according to BCOC, the material was distributed via email to “former members (people who have not unsubscribed), elected

officials (as a courtesy) and individuals that opt-in to our newsletter list through the website.” (FOF No. 7.) The statutory exception for “a communication by any membership organization or corporation to its members, stockholders, or employees,” Mont. Code Ann. § 13-1-101(14)(b)(iv), would not apply here. BCOC’s communication went well-beyond the exclusive group contemplated by that statute; instead, the material was made available to any interested individual through its website and via an email list not culled for non-members or those who did not voluntarily subscribe (FOF No. 3, 7, 10). The Commissioner finds, therefore, the “On Your Ballot” communication (both on BCOC’s website and the mass email) is an election communication, and thus potentially reportable expenditure activity under Montana campaign finance law.

The Commissioner now turns to the question, would BCOC, by distributing an election communication, be required to register with COPP as a political committee. The relevant statute provides:

A political committee is not formed when a combination of two or more individuals or a person other than an individual makes an election communication, an electioneering communication, or an independent expenditure of \$250 or less.

Mont. Code Ann. § 13-1-101(31)(d).

In other words, if BCOC spent more than \$250.00 to create and disseminate this communication (or a combination of this and other election communications), it would be required to file and report with COPP.

Using cost estimates, BCOC computed that the creation and dissemination of the “On Your Ballot” communication cost between \$100.39

and \$145.40 (FOF Nos. 6, 7). In terms of assigning/estimating an overall cost for this material, the following components are considered:

- Research and design costs. Using BCOC's estimate of staff labor (3 hours by existing employee, at \$26.92/hour), the cost of this activity would total \$80.76 (FOF No. 6). Rounded up to the next \$10 amount, a value of \$90.00 can be assessed.
- Web hosting fees. BCOC provided a quarterly invoice from Zee Creative for web hosting and other associated website housing costs for BCOC's website, with the monthly cost of \$61.50. The web traffic analysis for the dates of August 30-September 18, 2018, showed that, during this period, 4.2% of web users accessed the "On Your Ballot" post in question (FOF No. 8), and it is reasonable to infer that this proportion of users remained relatively constant. For purposes of this discussion, COPP estimates 10% of all website users have viewed that specific post from the day it was posted until the present. Therefore the monthly cost (\$61.50) to host this specific post (10% of the traffic) on BCOC's website is \$6.15 (\$61.50 multiplied by 10%). This estimate runs generally in line with the market for blog/small website hosting costs.<sup>4</sup> Multiply the monthly cost by the approximately 2.25 months the post will be live before election day (late August, September, October, early November), and the total value is \$13.84 (\$6.15 multiplied by 2.25). Rounded up to the nearest \$5.00, a value of \$15.00 can be assessed for these fees.
- Email distribution costs. BCOC's estimate for staff time to create and schedule the mass email was \$7.22 (FOF No. 7). Using Boingomail's listed rates (\$6.00 one-time fee and \$.012/ per recipient, per message), email distribution of "On Your Ballot" to the 3,535 recipients would cost \$48.42 (FOF No. 7). Thus, staff time and distribution costs would total \$55.64. Rounded to the nearest \$10, a value of \$60.00 can be assessed for this activity.

The values assed above are calculated based on staff time estimates and actual invoices for charges paid to outside vendors provided by BCOC. The Commissioner finds BCOC's estimates and invoices are both applicable and

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<sup>4</sup> Online comparison tool located at: <https://www.top10bestwebsitehosting.com/wordpresshosting-comparison>.

reasonable. With research and design costs of \$90.00, website hosting costs of \$15.00, and email distribution costs of \$60.00, the “On your Ballot” communication cost BCOC a total of \$165.00. This value falls below the \$250.00 threshold triggering required registration with COPP, Mont. Code Ann. § 13-1-101(31), and BCOC would not, therefore, be required to register as a political committee at this time.

BCOC, however, needs be aware that any other election communication, electioneering communication, or independent expenditure (*i.e.*, content similar in nature to this post that mentions, endorses, or opposes candidates or ballot issues) created and publicly distributed by BCOC would count towards the \$250.00 registration-threshold. If BCOC engages in similar activity and the cumulative costs exceed \$250.00 this election cycle (\$165 discussed above, leaving \$85.00), it will be required to register with COPP as an incidental political committee at the time of such additional activity and file committee finance reports accordingly.

Finally, no attribution (“Paid for by”) statement was included on or within the “On Your Ballot” post or email (FOF No. 3, 4). All election communications are required to include this information. Mont. Code Ann. § 13-35-225(1). By not including any attribution, BCOC has failed to meet this requirement, and will need to update the post to provide a proper attribution statement and submit to COPP a statement of attribution for the mass email within 24 hours of this decision. Mont. Code Ann. § 13-35-225(7)(a)(ii).



The law governing complaints of failure to properly attribute election material provides precise directions to the Commissioner:

1. The Commissioner is to immediately assess the merits of the complaint. Mont. Code Ann. § 13-35-225(7)(a). The Commissioner has found merit in this Decision and hereby memorializes that finding.

2. The Commissioner shall notify the non-compliant party of the merit finding, requiring the election material be brought into compliance. Mont. Code Ann. § 13-35-225(7)(a). The Commissioner, by issuing this Decision, did this and hereby memorializes the Notice.

3. Because election day is 7 days or less from the date Notice was given, BCOC is provided 24 hours to bring the material into attribution compliance. Mont. Code Ann. § 13-35-225(7)(a)(ii). By this Decision the Commissioner declares his satisfaction that BCOC has acted promptly and properly to correct the attribution deficiency (FOF No. 11).

## 2. *Press Release*

While a press release touting BCOC's endorsement of I-185 may qualify as a reportable expenditure, BCOC did not pay for this activity. A COPP review determined that this material was produced and distributed by Healthy Montana, not BCOC (FOF No. 5). For this reason, BCOC would be under no


obligation to report or disclose costs associated with this activity, as it did not incur any. This allegation is hereby dismissed.

**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 there is a lack of sufficient facts to show any campaign practice act violation by BCOC.

The Commissioner hereby dismisses this complaint.

DATED this 31 day of October 2018.



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