

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

O'Hara v. Pinocci No. COPP 2015-CFP-007	Findings of Sufficient Facts to Show a Campaign Practice Violation
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Randy Pinocci is a resident of Sun River, Montana. Mr. Pinocci was a candidate for the Republican nomination for election to the 2014 Montana legislature, House District No. 18 (HD 18). Jesse O'Hara is a retired Republican legislator from Great Falls, Montana, now living in Florida. On June 8, 2015 Mr. O'Hara filed a complaint with the Office of the Commissioner of Political Practices (COPP) alleging that Candidate Pinocci engaged in campaign practice violations related to the reporting of expenses and contributions in his 2014 election reports.

DISCUSSION

Candidate Pinocci has had considerable past difficulty with the campaign finance reporting requirements set out by Montana law. Despite repeated opportunities, Candidate Pinocci failed to file an adequate campaign finance report of his 2012 election activity. In the end, the COPP directed Candidate Pinocci to simply close his 2012 campaign finance report, leaving Candidate Pinocci to resolve responsibility for uncorrected 2012 violations through

settlement or litigation with the COPP.¹

This new Complaint requires a review of Candidate Pinocci's 2014 campaign finance reports.² As set out further below, Candidate Pinocci's 2014 campaign finance reports are readable such that they are acceptable campaign finance reports, albeit reports with the issues and problems set out below.

Finding of Fact No. 1: Randy Pinocci and Roger Hagan were competing candidates in the 2014 primary election for Republican nominee for election as Representative to the Montana legislature from House District (HD) 19. (Secretary of State's (SOS) Website.)

Finding of Fact No. 2: Randy Pinocci prevailed in the 2014 primary election by a vote of 835 to 623 for Roger Hagan. Mr. Pinocci went on to win the general election and served as the Representative to the 2015 Montana legislature from HD 19. (SOS Website.)

Finding of Fact No. 3: As a candidate for the 2014 Legislature, Randy Pinocci (Candidate Pinocci) was required to file certain campaign finance reports, including a pre-election and post-election report. (COPP records.)

Finding of Fact No. 4: In 2014 the primary election was held June 3, 2014 and the general was held November 4, 2014. (SOS records.)

The Commissioner now addresses the issues raised by the O'Hara complaint.

1. Filing

Montana law required that Candidate Pinocci file a Statement of Candidate (Form C-1) with the COPP within 5 days of accepting a contribution or making an expenditure. §13-37-201 MCA.

Finding of Fact No. 5: Candidate Pinocci filed his Statement of Candidacy (Form C-1) on March 14, 2014. The form designated Randy Pinocci as treasurer. On December 28, 2015 Candidate

¹ See Initial and Final Decisions in O'Hara v. Pinocci, COPP-2014-CFP-027.

² Candidate Pinocci already has a Decision issued in response to an earlier complaint over his 2014 campaign activity: *Hagan v. Pinocci*, COPP 2014-CFP-026

Pinocci filed an amended Statement of Candidacy appointing Richard Swensen as deputy treasurer. (COPP records.)

The Commissioner determines that the March 14, 2014 Statement of Candidacy was timely filed.³

A filing issue remains, however. A review of Candidate Pinocci's campaign finance reports shows that an accountant engaged by Candidate Pinnoci (Richard Swensen) was signing Candidate Pinocci's campaign finance reports as deputy treasurer before being authorized to do so by the amended statement of Candidacy filed with the COPP (FOF No. 5). Section 13-37-231 MCA requires that the campaign finance report "must be verified as true and correct by the oath or affirmation of the individual signing the report." The statute goes on to state that "the individual filing the report must be the candidate." Richard Swensen was neither the candidate or a designated treasurer acting for the candidate at the time he signed several of Candidate Pinocci's campaign finance reports. Accordingly, the following is determined.

Sufficiency Finding No. 1: The Commissioner determines that sufficient facts exist to show that Candidate Pinocci failed to meet Montana campaign practice standards when he filed campaign finance reports signed by someone other than a candidate or the candidate's appointed treasurer.

There is sound reason for the requirement that a candidate (or his treasurer) sign a campaign finance report. By application of a statutorily authorized signature the campaign finance report is deemed by statute to be certified as

³ The earliest date of contribution or expenditure set out in Candidate Pinocci's campaign finance reports was March 10, 2014 thereby making the March 14 filing timely.

true and correct, thereby producing a self-authenticated document that can be relied on by the press and public when commenting on or publishing the names of those providing funding to a candidate. Likewise, the signature provides the Commissioner a self-authenticated report that can be used in a subsequent complaint or enforcement action.

Montana's filing requirements for campaign finance reports are mandatory: "shall file" (see §13-37-226 MCA). In turn, the filing deadlines are date certain with legislative candidates required to file their campaign finance report "on the 12th day preceding the date on which an election is held..." and on 20th day after the election §13-37-226(3) MCA. Any failure to meet a mandatory, date-certain filing date is a violation of §13-37-226 MCA. Candidate Pinocci timely filed his pre-primary and post-primary campaign finance reports.⁴ Candidate Pinocci timely filed his pre-general and post-general campaign finance reports.⁵

2. Reporting and Disclosing

Candidate Pinocci's campaign treasurer is required to "keep detailed accounts of all contributions received and expenditures made" (§13-37-208(1)(a) MCA). Candidate Pinocci then "shall file periodic reports of contributions and expenditures" (§13-37-225(1) MCA), according to the schedules set out above. This system, if followed, provides transparency and fairness to the public, voters and the opposing candidate.

As determined in prior Decisions by the COPP, Candidate Pinocci did not

⁴ The reports were filed May 22 and June 23, 2014 respectively (Commissioner's records).

⁵ The reports were filed October 22, and November 21, 2014 respectively (Commissioner's records).

meet reporting and disclosure standards in regard to his 2012 campaign finance reports.⁶ Eventually the COPP declared that Candidate Pinocci filed and did not correct deficient 2012 campaign finance reports. The reports were deemed deficient because they did not intelligibly disclose contributions or expenditures.⁷ Candidate Pinocci was directed to “immediately” file a closing report on his 2012 campaign finance reporting.⁸

Candidate Pinocci’s 2014 campaign finance reports do not suffer the overall deficiency of his 2012 campaign finance reports. The 2014 reports, while amended multiple times, can be read. The Commissioner accepts the reports as campaign finance reports and uses them to determine compliance with reporting and disclosure standards.

Sufficiency Finding No. 2: Candidate Pinocci’s campaign finance reports fail to meet campaign finance disclosure and reporting standards by failing to report: a contributor’s name, costs of printing and mailing, costs of a video and detail as to in-kind contributions made by Candidate Pinocci.
(COPP records.)

The Commissioner notes that COPP staff worked with Candidate Pinocci to assist in filing his 2014 campaign finance reports and in reviewing attribution on documents. However, an anonymous \$100 contribution⁹, deficient contributor information and deficient in-kind contribution descriptions remain on Candidate Pinocci’s reports, despite multiple requests by COPP staff for the

⁶ *O’Hara v. Pinocci*, COPP 2014-CFP-0027, Initial and Final Decisions.

⁷ *O’Hara v. Pinocci*, COPP 2014-CFP-027, Final Decision.

⁸ *O’Hara v. Pinocci*, COPP 2014-CFP-027, Final Decision. Candidate Pinocci inexplicably chose not to file the closing report.

⁹ Section 13-37-217 MCA requires that a contribution be listed in the name of the contributor.

missing information.

Candidate Pinocci's reports are also deficient in disclosure of campaign expenses. A reader of the Candidate Pinocci campaign finance reports sees a campaign that has the candidate traveling (likely going door to door), eating meals, spending money making and placing yard signs and printing some unspecified campaign documents. It is the campaign documents that raise the greatest concerns. In particular, COPP's records contain copies of high quality post cards, palm cards, and rack cards designed for use by the Pinocci campaign. In contrast, the expense reports itemize literally no mailing costs and three printing costs that do not cover the breadth of printing coincidentally shown by documents provided to the COPP. Further, the COPP has already issued a Decision in regard to Candidate Pinocci's 2014 campaign determining that "value existed" in regard to a campaign video produced by Candidate Pinocci.¹⁰ There is no video value disclosed on the campaign finance reports.

ENFORCEMENT OF SUFFICIENCY FINDINGS

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

¹⁰ *Hagan v. Pinocci*, COPP 2014-CFP-026 (June 18, 2014). Despite the clear direction set out by that Decision Candidate Pinocci did not report any expenses for the video.

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. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence, as set out in this Decision, to show that Candidate Pinocci’s campaign has, as a matter of law, violated Montana’s campaign practice laws, including those set out in this Decision. Having determined that sufficient evidence of a campaign practice violation exists, 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.

The failure to report expenses and use of an unauthorized signature was due to lack of diligence. Excusable neglect cannot be applied to lack of diligence. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

Likewise the harm to the public caused by a failure to report and disclose is substantial and obvious so as not to be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. This is particularly true here where Candidate Pinocci filed, and sought press coverage for, a narrowly drawn pre-election campaign practice complaint against his 2014 primary election opponent. *Pinocci v. Hagan*, COPP-2014-CFP-021.

Because there is a finding of violation and a determination that *de minimis*

and excusable neglect theories are not applicable, civil/criminal prosecution and/or a civil fine is justified (See §13-37-124 MCA). The Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution under §13-37-124 MCA. Because of nature of violations (the failure to report and disclose occurred in Lewis and Clark County) this Matter, upon issuance of the final Decision, will be referred to the County Attorney of Lewis and Clark County for his consideration as to prosecution. §13-37-124(1) MCA. Should the County Attorney waive the right to prosecute (§13-37-124(2) MCA) or fail to timely prosecute (§13-37-124(1) MCA) this Matter returns to this Commissioner for possible prosecution. *Id.*

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 or criminal prosecution 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 law, including those of §13-37-226 MCA. (See 13-37-128 MCA). Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.