

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Boyd v. Kary No. COPP 2018-CFP-047	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN FINANCE VIOLATION
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On October 15, 2018, Andy Boyd of Bozeman filed a campaign practices complaint against Doug Kary of Billings. The complaint alleged that candidate Kary failed to report the acquisition of yard signs used by the campaign on financial reports filed with the COPP.

**SUBSTANTIVE ISSUES ADDRESSED**

Proper reporting of used signs from previous campaign as an in-kind contribution.

**FINDINGS OF FACT**

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: Douglas (Doug) Kary filed a C-1 Statement of Candidate as a candidate for Senate District 22 in Yellowstone County with the COPP on November 2, 2017. (Commissioner's Records.)

Finding of Fact No. 2: Candidate Kary timely filed his initial C-5 campaign financial report on May 2, 2018, dated January 1 through May 1, 2018. While this report included in-kind candidate contributions for "3.5" x 8.5" printed notepads (approx 5,000)" valued at \$400.00 and "(4) 12" x 18" Vehicle magnetic signs" valued at \$92.00, it did not include the acquisition of yard signs by the campaign as either a contribution to or an expenditure of the campaign. (Commissioner's Records.)

Finding of Fact No. 3: Candidate Kary filed an amended version of his May 2 initial campaign financial report on October 6, 2018. This report did not include the acquisition of yard signs by the campaign as either a contribution to or an expenditure of the campaign. (Commissioner's Records.)

Finding of Fact No. 4: Candidate Kary timely filed a periodic C-5 campaign financial report on May 29, 2018, dated May 2 through May 28. This report did not include the acquisition of yard signs by the campaign as either a contribution to or an expenditure of the campaign. (Commissioner's Records.)

Finding of Fact No. 5: Candidate Kary timely filed a periodic C-5 campaign financial report on June 21, 2018, dated May 29 through June 21. This report did not include the acquisition of yard signs by the campaign as either a contribution to or an expenditure of the campaign. (Commissioner's Records.)

Finding of Fact No. 6: Candidate Kary timely filed a periodic C-5 campaign financial report on October 6, 2018, dated June 22 through October 6. This report did not include the acquisition of yard signs by the campaign as either a contribution to or an expenditure of the campaign. (Commissioner's Records.)

Finding of Fact No. 7: Candidate Kary, when contacted by the Commissioner to discuss the complaint on October 15, 2018, responded he started using campaign signage from previous campaigns approximately 3 to 4 weeks ago for the General election, and the failure to place on his campaign finance report was an oversight. Kary indicated he would be amending the report to reflect the in-kind contribution of the signage. (Commissioner's Records.)

Finding of Fact No. 8: Candidate Kary filed an amended version of his October 6 financial report on October 15, 2018. This report included two in-kind candidate contributions of yard signs to the campaign: "24" x 48" yard signs (qty. 20)" valued at \$180.00, and "18" x 24" (qty. 80) yard signs" valued at \$150.00. (Commissioner's Records.)

## **DISCUSSION**

The complaint alleges candidate Kary failed to report used campaign signs from previous campaigns and multiple signs contained outdated

information regarding the office candidate Kary is seeking. The Commissioner examines each of these allegations.

1. *Failure to report campaign signs*

To support the allegation that candidate Kary failed to report campaign signs which appeared in or about September 2018, the complaint included photos of older campaign signs promoting Kary. Candidate Kary did not report receiving or purchasing campaign signs on his May 6, May 25, June 25, or October 6, 2018 campaign finance reports (FOF Nos. 2-6). However, when reached by telephone to discuss the complaint, candidate Kary stated he re-used a number of older campaign signs purchased during his previous campaigns for legislature, the failure to report was an oversight (FOF No. 7), and subsequently amended his campaign finance report to properly indicate the in-kind contribution (FOF No. 8).

Mont. Code Ann. § 13-1-101(9)(a)(i), defines a contribution as “the receipt by a candidate or a political committee of an advance, gift, loan, conveyance, deposit, payment, or distribution of money *or anything of value* to support or oppose a candidate or a ballot issue.” Used or recycled campaign signs qualify as “something of value to support or oppose a candidate” and are reportable as in-kind contributions. 44.11.402(1), ARM, further dictates that all in-kind contributions received by a candidate or committee must be reported “on the date the consideration is received[.]” (*See also* 44.11.403(1), ARM, directing that in-kind contributions are reported on the same schedule and require at least the same information as other contributions.) Therefore, Candidate Kary

was be required to report the contribution during the reporting period the signs were first utilized in the 2018 campaign cycle.

Sufficiency Finding No. 1: Candidate Kary failed to properly report an in-kind contribution of used campaign signs from previous campaigns to his 2018 campaign.

The Commissioner finds candidate Kary failed to timely report campaign contribution activity, a Montana campaign finance violation.

*2. Campaign signs contain misleading information*

The complaint alleges candidate Kary's utilized older campaign signs that referred to a state district he was not currently seeking. The recycling of older campaign signs from a candidate's previous elections is common in Montana elections. Occasionally, candidates may use signage that refer to the candidate and another district and/or office. While it may be confusing to some voters, there is no Montana campaign finance and practice law that addresses the practice. The allegation is hereby dismissed.

**DECISION**

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner "shall investigate" any alleged violation of campaign practices law. Mont. Code Ann. § 13-37-111(2)(a). The mandate to investigate is followed by a mandate to take action; where there is "sufficient evidence" of a violation the Commissioner must ("shall notify," *see id.*, at § 13-37-124) 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 to show that candidate Kary violated Montana's campaign practice laws, including, but not limited to the laws set out in the 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 fully and timely report and disclose cannot generally be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law as it relates to failures to file and report. See *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009 (discussing excusable neglect principles). Likewise, the Commissioner does not normally accept that failures to file or report be excused as *de minimis*. *Id.* (discussing *de minimis* principles).

Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the above Sufficiency Findings, a civil fine is justified. Mont. Code Ann. § 13-37-124. The Commissioner hereby issues a "sufficient evidence" Finding and Decision justifying a civil fine or civil prosecution of candidate Kary. Because of the nature of the violation, this matter is referred to the County Attorney of Lewis and Clark County for his consideration as to prosecution. *Id.*, at (1). Should

the County Attorney waive the right to prosecute (*id.*, at (2)) or fail to prosecute within 30 days (*id.*, at (1)) this Matter returns to this Commissioner for possible prosecution.

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 the Matter is waived back, this Finding and Decision does not necessarily lead to civil prosecution as the Commissioner has discretion (“may then initiate” *see id.*) in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In setting that fine the Commissioner will consider matters affecting mitigation, including the cooperation in correcting the issue when the matter was raised in the Complaint.

While it is expected that a fine amount can be negotiated and paid, 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 campaign practice law including those of Mont. Code Ann. § 13-37-225. *See id.*, at § 13-37-128.

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Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

DATED this 11 day of October 2018.



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