

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Amerman v. McGrath No. COPP 2016-CFP-043	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION
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On October 28, 2016, Jeff Amerman of Butte, Montana filed a complaint against Wendy Allen McGrath of Butte, Montana for failing to properly report, disclose and attribute certain campaign contribution information.

**Discussion**

The Complaint alleges that Ms. McGrath, a 2016 Candidate for public office in Montana, failed to timely report, disclose and attribute certain expenses involved in her campaign for election to public office.

Finding of Fact No. 1: Silver Bow County elects a County Auditor in a non-partisan race. There were seven 2016 primary election candidates for this position: Hank Hockaday, Jeff Amerman, Mary Sorini, Michael Tutty, Mike Sheehy, Sheryl Ralph and Wendy Allen McGrath. (Montana Secretary of State (SOS) Website.)

Finding of Fact No. 2: Jeff Amerman and Wendy Allen McGrath were the top two primary election vote getters in the 2016 Silver Bow County Auditor race and advanced to the 2016 general election. (SOS Website.)

This Complaint was filed by Silver Bow County Auditor Candidate Amerman against Silver Bow County Auditor Candidate McGrath (FOF No. 2). The Complaint was filed on Friday, October 28, posted to the COPP website on Monday, October 31 and decided on October 31, 2016.

1. Failure to Attribute

The Complaint included a copy of a campaign flyer advocating a vote for Candidate McGrath. The copy of the campaign flyer accompanying the Complaint lacked the attribution language required by Montana's campaign practice law: "[A]ll election communications...must clearly and conspicuously include the attribution 'paid for by' followed by the name and address of the person who made or financed the expenditure for the communication." §13-35-225(1), MCA.

Montana law requires an accelerated review ("as soon as practicable") of a campaign practice complaint alleging an attribution violation. Accordingly, Candidate McGrath was immediately contacted by the Commissioner's office. Candidate McGrath responded by stating that she had: 1) reprinted the flyer with the proper attribution (a copy was provided to the COPP); and 2) stapled a campaign card with the proper attribution to any remaining flyers lacking attribution.

The law governing complaints of failure to properly attribute political signs provides precise directions to the Commissioner:

1. The Commissioner is to immediately assess the merits of the Complaint. §13-35-225(7)(a), MCA. The Commissioner found merit to the Complaint and hereby memorializes that finding.

2. The Commissioner shall notify the candidate of the merit finding, requiring the Candidate to bring the signs into compliance. §13-35-225(7)(a), MCA. The Commissioner, through oral communication by COPP Compliance Specialist Karen Musgrave, did this and hereby memorializes that Notice.

3. The Candidate is provided an unspecified period of time to bring the signs into attribution compliance (§13-35-225(7)(b), MCA). By this Decision the Commissioner declares satisfaction that Candidate McGrath has acted promptly and properly to correct the attribution deficiency.

Under Montana law Candidate McGrath is relieved of a campaign practice violation, provided she promptly carried out the attribution correction as promised. Candidate McGrath has met these duties and is therefore relieved of a campaign practice violation under §13-35-225(7)(b), MCA. This allegation of the Complaint is dismissed because the violation was satisfied by prompt remedial action of Candidate McGrath.

## 2. Failure to Timely Report and Disclose

The Complaint alleges that Candidate McGrath failed to timely report and disclose certain expenses.

Finding of Fact No. 3: Candidate McGrath filed a campaign finance report on October 4, 2016 (reporting through September 29) disclosing contributions and expenditures of her campaign. (COPP records.)

Finding of Fact No. 4: Candidate McGrath's October 4 campaign finance report did not disclose expenses or debt for a campaign billboard advertisement or a fundraiser. (COPP records.)

Finding of Fact No. 5: Copies of posts on Candidate McGrath's social media included with the Complaint show that Candidate McGrath's billboard was up no later than September 27, 2016 and show that the fundraiser took place on September 27, 2016. (COPP records.)

Finding of Fact No. 6: Candidate McGrath filed a campaign finance report on October 27, 2016 reporting an expense of \$1336.79 for the campaign billboard and \$484.50 for fundraiser expenses. (COPP records.)

Under Montana law a candidate for local government office must file a campaign finance report with the COPP on the 35<sup>th</sup> and 12<sup>th</sup> day before an election. §13-37-226(2), MCA.<sup>1</sup> Candidate McGrath's 35 and 12-day reports were due October 4 and October 27, 2016, respectively. Each report was required to report all campaign contributions and expenses up to 5 days of the report day, or September 29 and October 22, respectively. §13-37-228(2), MCA.

Sufficiency Finding No. 1: The Commissioner finds that there are sufficient facts to show that Candidate McGrath did not timely report campaign expenses including those for a fundraising event and billboard display.

Candidate McGrath explained that she reported and disclosed based on the date of payment of campaign bills. Reporting based on the date of bill payment would not accomplish timely disclosure of campaign activity and is subject to manipulation by a candidate. Candidate McGrath had billboards and fundraiser activity in place no later than September 27, 2016 (FOF No. 5). The expense of this campaign activity should have been reported and disclosed on the October 4 campaign finance report as that report disclosed campaign activity through September 29.

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<sup>1</sup> There is an exception for local government candidates who receive and spend less than \$500 in total. The exception does not apply to Candidate McGrath (FOF No. 6).

Montana's campaign practice laws require campaign activity reporting (not campaign debt payment reporting) because a candidate must report: "the amount and nature of debts and obligations owed" by the campaign at the end of the reporting period. §13-37-229(2)(a)(iv), MCA. Further, "[i]f the exact amount of a debt or obligation is not known, the estimated amount owed shall be reported." 44.11.506, ARM. Past Commissioners have applied these laws to require that campaigns "estimate their debts when they are incurred", not after an election when the bill is paid, *Akey v. Clark*, March 26, 1999 (Commissioner Vaughey) because "the public has a right to full disclosure of all debts and estimated debts incurred by a candidate during the appropriate reporting periods," *Ream v. Bankhead*, September 10, 1999 (Commissioner Vaughey). Campaign reporting of debt includes debt owed for services, advertisements and campaign expenses in general *Wilcox v. Raser*, May 26, 2010 (Commissioner Unsworth), *Williams v. Andersen*, COPP 2014-CFP-035 (Commissioner Motl) and even the expenses owed musicians *Hardin v. Ringling* 5, December 17, 2012 (Commissioner Murry). Within the past month this Commissioner found a campaign practice violation for failure to report the contracted debt owed for billboard space and newspaper advertising. *Krause v. Safe Montana*, COPP-2016-CFP-028; *Buyan v. Schulz*, COPP-2016-CFP-037.

Candidate McGrath is the second 2016 local government candidate to be in violation based on a "bill payment" misconception of Montana's reporting and disclosure law.<sup>2</sup> Candidate McGrath apologized to the people of Montana,

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<sup>2</sup> See *Buyan v. Schulz*, COPP-2016-CFP-037.

through the Commissioner, for her error. The campaign activity amount is now reported, albeit late, in Candidate McGrath's October 27, 2016 campaign finance report (FOF No. 6). The Commissioner notes that the filing date of Candidate McGrath's campaign finance report preceded the filing date of the Complaint. Candidate McGrath's forthright manner of dealing with this Complaint will be a factor in the mitigation of the fine assessed in this Matter.

The Complaint also asserts a failure to properly show aggregate contributions and an improper transactional use of loans (rather than a campaign bank account) by Candidate McGrath. Given the tight timing of the Complaint and Decision, the Commissioner dismisses these allegations on the basis of *de minimis* effect, noting that the Complaint could have been filed far earlier as to these issues.

#### **ENFORCEMENT OF SUFFICIENCY FINDINGS**

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. §13-37-111(2)(a), MCA. 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. 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 McGrath's 2016 campaign reporting 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* discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009. Likewise, the Commissioner does not normally accept that failures to file or report be excused as *de minimis*. *See* discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009.

Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the Sufficiency Finding, a civil fine is justified. §13-37-124, MCA. The Commissioner hereby issues a "sufficient evidence" Finding and Decision justifying a civil fine or civil prosecution of Candidate McGrath. Because of the nature of the violations (the failure to report and disclose occurred in Lewis and Clark County), this matter is 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 prosecute

within 30 days (§13-37-124(1), MCA) this Matter returns to this Commissioner for possible prosecution. *Id.*

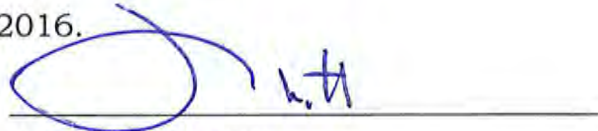
Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil prosecution as the Commissioner has 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 setting that fine the Commissioner will consider matters affecting mitigation, including the fact that the candidate named in the sufficiency finding was forthright in correcting disclosure of her campaign activity.

While it is expected that a mitigated fine amount will 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 §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*.

This Decision is simultaneously released to the press, public and the parties. Montanans are already voting, requiring a full release at the earliest possible date.



DATED this 31st day of October, 2016.



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