

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Matter of Baker v. KEY – Kids Education Yes  No. COPP 2011-CFP-32	Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana’s Campaign Practices Act
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Kids Education Yes (KEY) draws its identity and existence through registration, with the Commissioner, as a political action committee or PAC. KEY has been registered as a PAC since 1996. Great Falls resident Joelle Stremcha served as treasurer of KEY from early 2008 until April 29, 2013, when she was replaced as treasurer by Amanda Boutilier.

On December 15, 2011, Great Falls resident Cyndi Baker filed a complaint against KEY alleging violations based on the late filing of campaign finance reports and the receipt of corporate contributions. This Finding and Decision resolves both complaints.

**SUBSTANTIVE ISSUES ADDRESSED**

The substantive areas of campaign finance law addressed by this decision are: 1) Timely reporting of contributions to and expenditures by a PAC; 2) Application of Montana’s ban on corporate contributions to non-candidate elections; and, 3) *De minimis* and/or excusable neglect theories as applied to late filing.

## FINDING OF FACTS

The facts necessary for this Decision are as follows:

1. KEY is a political action committee or PAC (Commissioner's Records).
2. KEY's PAC registration forms state it exists to "promote passage of the mill levy for Great Falls Public Schools." (Commissioner's Records).
3. KEY has been registered as a PAC since 1996, taking in and spending about \$32,500 in mill levy elections. (Commissioner's Records).
4. A mill levy vote for a \$998,000 appropriation to the Great Falls Public Schools was held on May 3, 2011. Both the elementary and high school proposed mill levies failed in the May 3, 2011 vote. (Secretary of State Website, Commissioner's Records).
5. KEY was involved in the 2011 mill levy vote, advocating for passage of the mill levy. (Commissioner's Records).
6. KEY's involvement in the 2011 mill levy vote was reported as follows:
  - a. On April 29, 2011, KEY filed a pre-election report for 6-24-2010 through 4-19-2011. The report shows cash forward of \$1358.69, receipts of \$3793.25 and expenditures of \$5027.93. The report includes pre-election contributions and expenditures going back to 2010.
    - i. On May 24, 2011, the Commissioner's office audited the KEY report and, as a result of the audit, noted that the report lacked occupation/employer information as to three contributors and lacked the vendor mailing address and purpose of certain

expenditures.

ii. On April 4 and July 5, 2013, KEY filed amended reports for this time period adding the missing vendor and expense information. The occupation/employer information was not added.

b. On April 4, 2013, Key filed a report for the period of 4-20-11 through 12-31-2011. The report shows receipts of \$2120 and expenditures of \$2172.

7. The Commissioner has confirmed that copies of the pre-election and post-election reports for the 2011 elections were first filed in Cascade County in April of 2013.

8. The Commissioner finds as fact that KEY:

a. Failed to timely make disclosures required on its pre-election report;

b. Failed to timely file its pre-election reports (at either state or county sites); and,

c. Failed to timely file its post-election reports.

9. A review of KEY's records shows that no expenses involved school board or other candidates. Instead, all expenses involved school levy issues.

### **DISCUSSION**

KEY was registered as a political action committee in Montana during the applicable 2011 election [**See** FF Nos. 1-5, **See** 44.10.327(2)(b) ARM]. KEY accepted contributions and made expenditures in the 2011 Great Falls mill levy election [see FF No. 5]. This Commissioner finds that KEY is an

independent committee as defined by §13-37-226(5) MCA and 44.10.327(1)(b), (2)(b) ARM. Accordingly, this Commissioner determines that this Matter concerns the application of Montana's Campaign Practices law to the actions of an independent political committee.

I. Campaign Practices Law Violations

Montana's campaign Practices law has provisions applying to the election expenditure activity of an independent committee. KEY admits that it engaged in election activity, making election expenditures. Accordingly, as an independent committee the KEY is required to file a report:

- a) ...on the 12<sup>th</sup> day preceding the date of an election in which it participates by making an expenditure
- b) ...not more than 20 days after an election in which it participates by making an expenditure

**See** §13-37-226(5) MCA. Montana's campaign related laws require full and timely disclosure of campaign contributions and expenditures. A political committee is required to timely file a certification [§13-37-201 MCA], timely keep and maintain accounts of contributions and expenditures [§13-37-208 MCA] and timely file reports to the Commissioner's office of such contributions and expenditures [§13-37-226 MCA]. The reports, once filed, are available for review by the public, thereby providing transparency and shared access to this information.

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### A. Pre-Election Report

This Commissioner has determined that KEY had pre-election contributions and expenditures. [FF No. 6(a)]. The school levy election took place on May 3, 2011. FF No. 4. KEY's pre-election PAC report was due 12 days pre-election or no later than April 21, 2011, reporting through April 16, 2011. [Commissioner's Website Information, 2011]. KEY's pre-election PAC report was late filed by 8 days on April 29, 2011. [FF Nos. 6(a) and 8(b)].

Public access to the information in the reports is enhanced by the requirement of in-district filing. Montana law requires that political committee reports required by §13-37-226 MCA also be filed with the appropriate County election administrator, in this case in Cascade County. **See**, §13-37-225(1) MCA. KEY did not file at the County level the reports due for the 2011 mill levy April of 2013. FF No. 8. These reports were therefore late filed by two years.

The Commissioner hereby finds that the late filings of pre-election reports are violations of campaign practices law.

### B. Post-Election Report

KEY's post-election report was due "not more than 20 days after the date of the election" [§13-37-226(5) MCA], or by May 23, 2012. KEY filed this report on April 4, 2013. The report was, therefore, filed 22 months late. Again, KEY did not timely file the post-election report with Cascade County. FF No. 8, **See**, §13-37-225(1) MCA.

The Commissioner hereby finds that KEY's late filings of post-election reports are violations of campaign practices law.

C. Other Issues

The complaint also alleges that KEY failed to properly disclose information concerning its contributors, accepted an illegal corporate contribution from a contributor and improperly reported a contribution to both spouses, rather than dividing the contribution. Each issue is discussed, below.

First, the required occupation/employer information was not provided as to some contributors [FF No 6(a), **See** §13-37-229(2) MCA], nor was the full expenditure information timely provided as to some expenditures [FF No 6(a), **See** §13-37-230 MCA]. These failures are violations of law and the Commissioner so finds these violations.

Second, Montana's law requires that contributions be disclosed according to "each person." §13-37-229 MCA. This "each person" disclosure serves the contribution limits elements of Montana's campaign practices law limiting the amount of money that a single person can give to a candidate. There are, however, no such contribution limits applicable to KEY and therefore the reporting of a contribution jointly to married couple, as applied to KEY's situation, violates the intent of no law. The Commissioner hereby declines, under a *de minimis* theory (see below) to find this violation.

Third, the complainant alleges that KEY took an illegal contribution from a corporation. However, the prohibition on corporate contributions applies only to "...a candidate or a political committee that supports or opposes a candidate

or a political party.” §13-35-227 MCA. KEY is solely involved in a non-candidate, mill levy election. KEY **can** legally accept and use corporate contributions and no violation can be found for any such actions.

## II. Enforcement

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, 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” 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. 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. Likewise, the disclosure requirements for independent committee election expenditures are mandatory: “...shall report...” 44.10.531(4) ARM.

This Commissioner, having been charged to investigate and decide, hereby determines that KEY has, as a matter of law, violated Montana’s campaign practice laws, including §§13-37-225, 226, MCA. Having determined that a

campaign practice violation has occurred, 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.

A Commissioner is given discretion ["may", **See** §13-37-124(1) MCA] in regard to prosecution of a violation. KEY has offered the Commissioner's investigator an explanation for the late filing based on the volunteer nature of the group, leading to failure to designate an individual to be responsible for filing the reports. KEY's explanation implicates several past decisions by this Office involving the legal concepts of *de minimis* or excusable neglect .

The concept of a *de minimis* exception to civil enforcement of a violation of Montana's campaign practice law is set out and defined by the 9<sup>th</sup> circuit court of appeals in *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth* 556 F. 3d 1021, 1028-29 (9<sup>th</sup> Cir. 2009). In *Canyon Ferry* the 9<sup>th</sup> circuit prohibited civil enforcement of Montana's campaign finance disclosure requirements, as applied to limited ballot issue activity (limited photocopying, limited staff use and limited use of church property) carried out in support of a ballot initiative. The Court found that these ballot issue services, while technically having some value, could not be subjected to civil enforcement as a violation Montana's campaign practices law because the "conduct neither causes an economic detriment to the Church nor carries an ascertainable market value." *Id.* at 1030. The Commissioner has further applied *de minimis* to an expenditure by an incidental committee. *Raffiani v. Montana Shrugged* COPP- 2010- CFP 17.



Both *Canyon Ferry* and *Raffiani* involved incidental committee activity. To a degree this Office has applied the incidental committee *de minimis* standards to candidate election expenditures. **See** *In the Matter of the Fitzpatrick Complaint*, COPP- CFP-2011- 014. The Commissioner hereby applies the *de minimis* concept to except KEY's independent committee failure to separate funds between persons listed as a couple on the disclosure form.

The Commissioner does not apply *de minimis* to KEY's late filing failures nor to its remaining disclosure failures. The Commissioner has refused to apply *de minimis* to a late filing of 71 days [**See** *Matters of Vincent* Nos. CPP-2013-CFP-006 and 009] and does not do so in this Matter as it involves late filing of hundreds of days.

The Commissioner now considers excusable neglect. This Office has, based on certain facts, declined prosecution based on late filing by a period of 11 days [**See** *In the Matter of the Washburn Complaint. COPP-CFP-2013-002*] and by a period of 17 days [**See** *In the Matter of the Complaint Against CMRG*, decided February 21, 2002]. These determinations were, in part, based on an excusable neglect theory stemming from the Commissioner's determination of genuine confusion among multiple parties over who was to file what and when. However, as discussed in detail in *Matters of Vincent* Nos. CPP-2013-CFP-006 and 009 intent and motive are not considered in an excusable neglect consideration.

Specifically it is noted that a showing of excusable neglect generally requires 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). Neglect that is "due to forgetfulness and the press of other, more important business is not sufficient to establish excusable neglect." *Foster Apiaries, Inc. v. Hubbard Apiaries, Inc.*, 193 Mont. 156, 161, 630 P.2d 1213, 1216 (1981). A party's busy schedule or inattentiveness to the matter does not constitute excusable neglect. *Matthews v. Don K. Chevrolet*, 2005 MT 164, ¶¶13-15, 327 Mont. 456, ¶¶13-15, 115 P.3d 201, ¶¶ 13-15.

With the above analysis in mind, the late filing violations in this Matter are not appropriate for application of an excusable neglect theory. While KEY was a volunteer effort with an apparent dilution of leadership to the point where no one was really responsible to file, that does not excuse the failures. **See** above.

Because there is a finding of violation and a determination that, as to late reporting, *de minimis* and excusable neglect theories are not applicable, civil prosecution and/or a civil fine is justified [**See** §13-37-124 MCA]. This Commissioner has, through this decision, issued a "sufficient evidence" Finding and Decision justifying civil prosecution under §13-37-124 MCA. Because reporting was required in both Lewis and Clark and Cascade counties, both counties are venue for an allegation of a campaign practice violation. **See** §13-37-124 MCA. By the choice of the Commissioner this matter will now be submitted to [or "noticed to"] the Lewis and Clark County attorney for his review for appropriate civil action. §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 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 Chapter 37, including those of §13-37-226. [**See** 13-37-128 MCA]. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

In regard to any such a fine the Commissioner has discretion to determine if mitigation is appropriate to reduce a fine based on the explanation of why a violation occurred or circumstances of payment. **See** *In the Matter of the Complaint of MacLaren*, COPP-2011-CFP-12 . Mitigation means "abatement or diminution of a penalty or punishment imposed by law." *Black's Law Dictionary, Revised 4<sup>th</sup> Addition*. The Commissioner will consider the facts of this matter to determine whether mitigation will be applied to the amount of fine negotiated in this Matter, should KEY choose to settle this Matter with a negotiated fine.

## CONCLUSION

Based on the preceding Discussion as Commissioner I find and decide that there is sufficient evidence to show that KEY violated Montana's campaign practices laws, including §§13-37-225, 226, 229, 230 MCA, and that a civil penalty action under § 13-37-128, MCA is warranted. Because this matter involves a reporting violation that occurred in both Lewis and Clark and Cascade Counties the Commissioner hereby chooses that this Matter be submitted to [or "noticed to"] the Lewis and Clark County Attorney for his review for appropriate civil action under section 13-37-124(1) MCA. Upon return to the Commissioner of this Matter by the County Attorney, this Commissioner will assess the amount of civil penalty, should KEY choose to settle this Matter with a negotiated fine.

DATED this 15<sup>th</sup> day of July, 2013.



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