

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Beal v. Unknown (Frank Miller) No. COPP 2013-CFP-024 Hickes v. Unknown (Frank Miller) No. COPP 2014-CFP-005	Finding of Sufficient Facts to Show a Violation of Montana Campaign Practice Laws
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Lolo School District No. 7 in Lolo, Montana, placed consecutive school bond issues for approval by mail ballot with votes tabulated and released on October 1, 2013 and March 12, 2014. On September 16, 2013, Alex Beal of Lolo, Montana complained of unattributed signs and an advertisement opposing the October 1, 2013 bond issue. On February 5, 2014, Jennifer Hickes complained of unattributed signs and advertisements opposing the March 12, 2014 bond issue.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: applicability of Montana’s campaign practice act to school district bond elections; and, attribution.

SUMMARY OF RELEVANT FACTS

The foundational facts necessary for this Decision are as follows:

Finding of Fact 1: The Lolo School District #7 is classified as a second class (based on population) elementary school district. See § 20-6-201

MCA; Records Office of Public Instruction, State of Montana.

Finding of Fact 2: The Lolo School District No. 7 twice placed a school bond issue before voters resulting in October 1, 2013 and March 12, 2014 vote tabulations. (Missoula County Elections Records).

Finding of Fact 3: On October 1, 2013, the Missoula County elections office tabulated the voting on the Lolo school bond issue and found it failed by a vote of 867 to 824. (Missoula County Elections Records).

Finding of Fact 4: On March 12, 2014, the Missoula County elections office tabulated the voting on the Lolo school bond issue and found it failed by a vote of 948 to 919. (Missoula County Elections Records).

DISCUSSION

Lolo School District No. 7 serves a population of less than 6,500 people. On the basis of that population Lolo School District No. 7 is classified as a second class school district. FOF No. 1. The Campaign Practice Act has limited application to a second class school district election, including a bond issue election. §13-37-206 MCA. A second class school district is exempted from the campaign finance reporting provisions of the Campaign Practice Act. *Id.*

This means the only campaign practice requirement directly applying to the Lolo School Bond votes is the §13-35-225 requirement that “all communications advocating the success or defeat of a...ballot issue...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...”

There were such expenditures identified by the complaints in this Matter.

Those expenditures were:

Finding of Fact 5: The Beal Complaint identified 5 signs and an ad urging a no vote on the 2013 school bond issue. (Commissioner's records).

Finding of Fact 6: The Hickes Complaint identified signs and an ad urging a no vote on the 2014 school bond issue. (Commissioner's records).

The ads identified in the two complaints were printed in the publication "The Mailman," a weekly direct mail publication based in Stevensville, Montana, a neighboring town to Lolo, Montana. (Commissioner's records). The 2013 Beal Complaint ads were attributed as "Paid for by People Against Higher Taxes" while the signs had no attribution at all. (Commissioner's records). The 2014 Hickes complaint ads were initially attributed as "Paid for by Overtaxed Property Owners Against Higher Taxes" while the signs had no attribution at all. (Commissioner's records).

On February 5, 2014, after receipt of the Hickes complaint, the Commissioner's investigator contacted "The Mailman" and learned that the ads were placed by Frank Miller of Lolo, Montana. (Commissioner's records). The investigator then contacted Mr. Miller. Shortly after February 5, 2014, Mr. Miller prepared and added an attribution sticker to the signs reading "Paid for by Frank Miller, Box 730, Lolo, MT 59847." (Commissioner's records). An additional ad published in "The Mailman" after February 5, 2014 also had an attribution reading "Paid for by Frank Miller, Box 730, Lolo, MT 59847." (Commissioner's records). On February 7, 2014, Frank Miller filed a statement

of organization for a political committee using the names “People Against Higher Taxes” and “Overtaxed Property Owners Against Higher Taxes.” (Commissioner’s records).

The ads and signs identified in the two complaints advocated a No vote on two Lolo school bond issues. Section 13-35-225 MCA required that the Ads be properly attributed. The Commissioner determines that the Ads lacked the proper attribution and therefore violated the requirements of §13-35-225 MCA until Mr. Miller’s corrective actions taken February 7, 2014. Use of the names “People Against Higher Taxes” and “Overtaxed Property Owners Against Higher Taxes” as a partial attribution on some of the ads did not aid in meeting attribution because a political committee using those names was not formed until February 7, 2014.

There are no “coordination” issues and Mr. Miller is not a political committee under §13-1-101(22) MCA. As an individual Mr. Miller is exempt from the reporting requirements of §13-37-225 MCA. Further, Mr. Miller placed his name in the Ad thereby waiving anonymity and eliminating the need for a review of Ad as an anonymous expenditure. *See Olsen v. Vallance*, November 17, 2009.

Campaign Practice Act Violations

The Commissioner finds sufficient evidence to show that Mr. Miller’s school bond actions, assessed either as that of a political committee or as an individual, violate the attribution requirements of § 13-35-225 MCA. The Commissioner took into consideration the fact that Mr. Miller partially

attributed as a political committee using the names “People Against Higher Taxes” and “Overtaxed Property Owners Against Higher Taxes.” This partial attribution, however, did not assist Mr. Miller as he did not file a form creating the political committees until February 7, 2014, after the names were used in ads. The Commissioner also determines that this matter does not trigger an anonymity analysis. Mr. Miller did not intend or seek anonymity; in the end he placed his name in the Ad thereby waiving anonymity and eliminating the need for a review of Ad as an anonymous expenditure. *See Olsen v. Vallance*, November 17, 2009.

This finding is limited to attribution. As an individual Mr. Miller is exempt from the campaign finance reporting requirements of §13-37-225 MCA, leaving only attribution requirements. Measuring the actions in this Matter as those of a political committee, under the second class school district standard the same are also exempted from reporting requirements by §13-37-206 MCA. Mr. Miller’s actions, whether as an individual or a political committee, were governed solely by the §13-35-225 requirement that “all communications advocating the success of defeat of a...ballot issue...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...”

A school bond issue takes democracy into a community at a basic level. A bond vote asks property owners to assume increased taxes (about \$20 a month on a \$200,000 home in the case of the Lolo school bond votes) to provide better educational opportunity for the youth of the community. There are two sides

to this vote.

Mr. Miller spoke for the “No” side. Mr. Miller’s actions were not the hit and miss actions of the anonymous pamphleteer. Instead, Mr. Miller took his actions by organized and sustained use of paid advertisement, sophisticated argument, and signs. It is logical and fair, thereby promoting civic discourse, that Mr. Miller would also announce to the public the name and address of the person paying for the “No” statement. The bond vote was very close. Complete disclosure in the form of attribution in the election is essential to allowing both sides of the issue to accept the vote as a fair reflection of reasoned public opinion on the bond issue.

**ADJUDICATION INCLUDING CONSIDERATION OF DE MINIMIS AND
EXCUSABLE NEGLIGENCE PRINCIPLES**

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must investigate a complaint 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 attribution requirements are mandatory:

“must file” [See §13-35-225 MCA]. Therefore, any failure to meet a mandatory attribution requirement is a violation of §13-35-225 MCA.

This Commissioner, having been charged to investigate and decide, hereby determines that sufficient evidence exists to show that Mr. Miller has, as a matter of law, violated Montana’s campaign practice laws, specifically § 13-35-225, MCA. 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.

Mr. Miller’s actions are examined in regard to application of excusable neglect. Mr. Miller is a businessman. The prompt actions Mr. Miller and his staff took to correct and add attribution demonstrate that his failure to attribute was caused by a misunderstanding of the requirements of law.

Excusable neglect, however, cannot be applied to excuse actions based on a misunderstanding of law as 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). Further, the harm resulting from the violations (a substantial period of use of unattributed ads and signs) distinguish this Matter from *Womack v. Jenks*, COPP-2013-CFP-023, where excusable neglect was applied to excuse late filing caused by the post office return of a timely mailed campaign finance report. See also discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

Attribution is the sole requirement for participation in this particular school bond issue. The failure to attribute in this Matter stretched over a period of months, covering two school bond elections. While Mr. Miller corrected for part of the second school bond election, this still left the entire sign and ad use in the first election, as well as an ad and some sign use in the second election, that could not be cured by any later correction. That failure to attribute cannot be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. That failure to attribute creates uncorrectable harm such that the complaint in this Matter does not fall under the frivolous complaint standards of a corrected attribution, as set out in *Landsgaard v. Peterson* COPP-2014-CFP-008.

Because there is a finding of sufficient evidence to show a violation and a determination that *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 hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution under §13-37-124 MCA. Because the failure to report occurred in Missoula County and there are no reporting violations, this matter will now be submitted to [or “noticed to”] the Missoula County attorney for his review for appropriate civil action. See §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*.

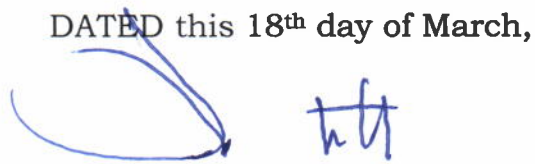
At the point this Matter is returned for negotiation of the fine or for litigation mitigation will be considered. One of the factors involved in determining the fine is the manner of action of the party involved in the campaign practice. Mr. Miller’s forthright cooperation and provision of information and prompt filing of the campaign finance report once he understood his error are factors that will be taken into consideration to mitigate the fine in this matter.

CONCLUSION

Based on the preceding discussion as Commissioner I find and decide that there is sufficient evidence to show that Mr. Miller violated Montana’s campaign practices laws, specifically §13-35-225, MCA, and that a civil penalty action under § 13-37-128, MCA is warranted. This matter is hereby submitted

to [or “noticed to”] the Missoula 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 work with Mr. Miller, in manner set out above, in determining the amount of civil penalty, should Mr. Miller choose to settle this Matter with a negotiated fine.

DATED this 18th day of March, 2014.



Jonathan R. Motl
Commissioner of Political Practices