

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Berkram v. DesRosier No. COPP 2016-CFP-021	Finding of Sufficient Facts to Show a Campaign Practice Violation
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On June 15, 2016, Carolyn Berkram filed a formal campaign complaint against Michael DesRosier, a 2016 candidate for County Commissioner for Glacier County.¹ The Complaint alleges that Candidate DesRosier failed to properly attribute election materials.

Foundational Findings of Fact

The following findings of facts are necessary before proceeding to discussion of this Matter:

Finding of Fact No. 1. Michael DesRosier and Jamie Evans were primary election candidates for Democratic Party nomination to the general election for District No. 3 County Commissioner for Glacier County. (Montana Secretary of State Website.)

Finding of Fact No. 2. The primary election vote was held on

¹ Carolyn Berkram is the County Attorney for Glacier County.

June 7, 2016 and Michael DesRosier defeated Jamie Evans by a vote of 1,192 to 1,189. (Montana Secretary of State Website.)

Finding of Fact No. 3. On June 29, 2016, a recount took place and DesRosier again defeated Evans by a vote of 1,196 to 1,188. (Glacier Reporter, June 29, 2016.)

Discussion

Under Montana law “all 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. The Complaint was accompanied by photos or copies of a Candidate DesRosier campaign sign, campaign letter, and palm card, all lacking some or all of the attribution language as required by law. (Commissioner’s records).

Montana law requires an accelerated review (“as soon as practicable”) of a campaign practice complaint alleging an attribution violation.² An informal attribution complaint against Candidate DesRosier came before the election (May 28, 2016) and concerned unattributed campaign signs. Candidate DesRosier was immediately contacted by the Commissioner’s office and asked to add attributions to any unattributed campaign signs.

The formal Complaint was filed on June 15, 2016, after the June 7, 2016 date of the election. Candidate DesRosier’s response to the formal Complaint asserted that he responded to the Commissioner’s earlier contact by correcting the attribution on his campaign signs prior to the date of voting. Candidate

² The accelerated review is designed to allow a candidate an opportunity to correct the attribution violation prior to the date of the election. *Lund v. Osmundsen*, COPP-2016-CFP-017.

DesRosier's response admitted that his campaign failed to include a full and proper attribution on palm cards and a campaign letter used by his campaign. Candidate DesRosier's response apologized for this error and made no claim of pre-election correction as to the palm cards and campaign letter.

The Commissioner declares his satisfaction that Candidate DesRosier acted promptly and properly to correct the attribution deficiency as to his campaign signs. There was no such correction made as to the campaign palm cards or letters. Accordingly, the following sufficiency finding is made:

Sufficiency Finding No. 1: The Commissioner determines that sufficient facts exist to show that Candidate DesRosier failed to properly attribute campaign materials (a letter and palm card), as required by Montana law.

Full and complete attribution of campaign materials has been and continues to be a requirement specifically defined by the Montana legislature: "all 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. Candidate DesRosier did not meet these attribution requirements.

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 DesRosier’s 2016 campaign activities 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 attribute cannot generally be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law. 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 attribute are 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 findings, civil/criminal prosecution and/or a civil fine is justified. §13-37-124, MCA. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying civil prosecution of the Candidate DesRosier. Because of the nature

of the violations (the failure to attribute occurred in Glacier County), this matter is referred to the County Attorney of Glacier County for her 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 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 setting that fine the Commissioner will consider matters affecting mitigation.

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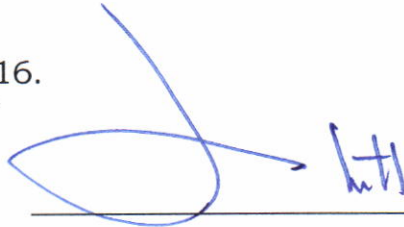
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While it is expected that a fine amount will be negotiated and paid, in the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally 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*.

DATED this 12th day of July, 2016.



Jonathan R. Motl
Commissioner of Political Practices
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