

**BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA**

Bishop v. Miller No. COPP 2012-CFP-056	Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act
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On April 19, 2012, Kelly Bishop filed a complaint with the Commissioner of Political Practices (COPP) alleging that a 2012 Candidate for Governor, Kendall (Ken) Miller, had failed to properly maintain campaign records or properly report his campaign contributions or expenditures.¹ Ms. Bishop's complaint has been addressed by initial (June 1, 2012) and amended (June 20, 2012) Decisions issued by Commissioner Murry. On March 13, 2014 this Commissioner issued a Notice of Reopening of the Complaint with intent to reissue a new Decision. This is that new Decision, replacing those earlier Decisions of June 1 and June 20, 2012.

¹ Ms. Bishop had unique knowledge of Candidate Miller's campaign activity as she was a former Candidate Miller campaign "insider", having served as chief fundraiser for the 2012 Miller for Governor campaign.

INTRODUCTION

Campaign finance rules are simple in concept. A candidate is supposed to designate a single repository (campaign bank account) in which all campaign contributions are to be deposited and from which all campaign expenses are to be paid. A single person (the campaign treasurer) is appointed to handle the campaign transactions which are then disclosed to the public through reports filed with the COPP.

The transparency sought in this approach can be frustrated, sometimes intentionally, when 3rd party entities engage in unreported and undisclosed candidate campaign activity.² The transparency can also be frustrated when a candidate engages in campaign transactions (expenditures or contributions) that avoid the designated repository or the control of a treasurer.³ This Matter falls into the latter type of conduct – candidate campaign practice activity that falls outside of normal procedure and discipline leading to mishandling of campaign finance reports and frustration of transparency, the purpose of the campaign finance rules.

I. Campaign Treasurer

Ms. Bishop's complaint raised fundamental questions about how the Miller for Governor campaign was handling and reporting campaign contributions and expenditures. The Commissioner will first examine the "handling" portion

² *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Clark v. Bannan*, COPP 2010-CFP-023; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; *Bonogofsky v. Wittich*, COPP-2010-CFP-031; *Madin v. Sales*, COPP-2010-CFP-029; *Bonogofsky v. Prouse*, COPP-2010-CFP-033, and *Bonogofsky v. Wagman*, COPP-2010-CFP-035.

³ *Connell v. Boulanger*, COPP-2014-CFP-036.

of this allegation.

Campaign contributions and expenditures are to be “handled” by one person, the campaign treasurer. Each candidate for public office in Montana, including Candidate Miller, is required to “appoint one campaign treasurer” (§13-37-201, MCA).⁴ In turn, “[n]o contribution received or expenditure made by a candidate or political committee shall be deposited or expended except by the appointed campaign treasurer of duly authorized deputy treasurer through the designated … repository.” 44.10.501 ARM.

Finding of Fact No. 1: In 2012 Ken Miller was a candidate for Republican Party nomination for election as Governor of the State of Montana. Ken Miller did not win the 2012 Republican primary election, losing to Candidate Rick Hill. (Secretary of State (SOS) Website)

Finding of Fact No. 2: Ken Miller filed the required candidate declaration forms with the Montana Secretary of State’s office. (SOS Website).

Finding of Fact No. 3: On July 30, 2010 Ken Miller filed the required statement of candidacy form (Form C-1) with the COPP. The C-1 form listed Patsy Guenthner as Treasurer and Vickie Miller as deputy treasurer.⁵ The C-1 form was signed by Ken Miller. (COPP records).

Finding of Fact No. 4: The campaign repository for candidate Miller’s campaign account was listed on the C-1 form as Altana Federal Credit Union in Laurel, Montana (COPP records).

The Bishop complaint was filed on April 19, 2012 by a Miller campaign insider

⁴ Campaigns are allowed to, and often do, appoint a deputy treasurer who actually handles the accounting of a campaign. Candidate Miller did appoint a deputy treasurer, Vickie Miller, but she also was bypassed by the Candidate.

⁵ Vickie Miller is not Peggy Miller, the wife of Candidate Miller.

(see FN 1) late in the 2012 primary election campaign cycle.⁶ On April 23, 2012 COPP staffers Mary Baker and Julie Steab⁷ traveled to Laurel, Montana where they delivered a copy of the Bishop complaint to Candidate Miller and interviewed Miller campaign staffers Stacy Lillis and Marissa Stockton.⁸ Stockton and Lillis said that they were not involved in campaign finance reporting and directed Baker and Steab to talk to Candidate Miller, his wife (Peggy Miller) and the campaign treasurer, Ms. Guenther. Baker and Steab interviewed each of those three people, leading to the Findings of Fact set out below:

Finding of Fact No. 5: On April 23, 2012 COPP Candidate Miller and his wife, Peggy, told COPP staffers Baker and Steab that Candidate Miller and his wife alone issued checks from the campaign account (Investigation notes).

Finding of Fact No. 6: On April 23, 2012 Candidate Miller's campaign treasurer, Patsy Guenthner, told COPP staffers Baker and Steab that:

- a. As a Altana bank officer she had access to the campaign accounts and had to use that access to view account checks because:
 - i) Candidate Miller's wife, Peggy, kept the checkbook, invoices, and receipts and "has trouble letting go" of any information, including "invoices and receipts".
 - ii) She had never had access to the checkbook or even the check register.
- b. If she had not have worked at the bank I "would have had no access" to campaign financial information.
(Investigation notes).

Finding of Fact No. 7: On April 27, 2012 an amended C-1 form was filed substituting Peggy Lee Miller as deputy

⁶ On April 23, 2012 news stories appeared based on the complaint. In early May of 2012 Candidate Miller requested that the Commissioner make a prompt determination of the Complaint.

⁷ COPP program supervisor and investigator, respectively.

⁸ Deputy campaign manager and field director, respectively.

treasurer for Vickie Miller. The C-1 form was signed by Ken Miller. (COPP records).⁹

Finding of Fact No. 8: By April 27, 2012 Candidate Miller had filed 6 quarterly and 2 monthly campaign finance reports spanning about two years (mid 2010 to April of 2012) and disclosing hundreds of campaign expenditures totaling over \$130,000. (COPP records).

Mr. Miller was a 2012 primary election candidate for the Republican party nomination for Governor of Montana (FOF No. 1). Candidate Miller was subject to Montana's Campaign Practice Act while conducting that campaign.

Accordingly, the following determination is made:

Sufficiency Finding No. 1: The Commissioner finds that sufficient facts exist to show that Candidate Miller acted in violation of Montana's campaign practice law by causing contributions to be deposited and expenditures to be made by someone other than the designated campaign treasurer.

There can be no doubt about how the Miller campaign chose to operate as sufficiency finding No. 1 is based on facts supplied by Candidate Miller, his wife and his campaign treasurer. While Candidate Miller appears to value and rely on the private loyalty of his family and friends, that privacy must give way to the requirements of public trust (including campaign finance reporting) that Candidate Miller voluntarily assumed when he ran for public office. The requirement should not be taken lightly as the "campaign treasurer" public trust obligation has already been applied to another 2012 candidate for Governor of Montana. On October 12, 2012 the COPP issued a Decision (*Little v. Bullock*, October 15, 2010, Deputy Commissioner Dufrechou) finding that

⁹ The change in deputy treasurer could not condone or excuse the campaign's failure to conduct campaign finance through the treasurer or deputy treasurer prior to April 27, 2012. Decision re: Bishop v. Miller

Candidate Bullock (now Governor Bullock) had, in violation of the campaign practice act, issued \$15,472.15 in checks signed by someone other than the campaign treasurer.¹⁰

II. Separation of Campaign Accounts

Under Montana law any candidate, including Candidate Miller, is subject to a limit on the amount of contributions that may be received from a political committee or individual. §13-37-216(1)(a) MCA. That limit applies per election, with a contested primary and a general election counted as separate elections. §13-37-216(6) MCA.

Candidate Miller was involved in a contested primary election for Governor (FOF No. 1). Accordingly, in 2012 Candidate Miller could accept up to \$630 per election (\$1,260 for two elections) from one individual during his primary election with \$630 of that amount to be held in trust in a separate account for use in the general election: “[g]eneral election contributions received prior to the primary election must be maintained in a separate account and shall not be used until after the primary election.” 44.10.330(2)(c) ARM.

Finding of Fact No. 9: During the primary election Candidate Miller accepted over \$24,000 in general election contributions. (COPP records).

Finding of Fact No. 10: Candidate Miller deposited the general election funds into the same depository account used for his primary election funds. Candidate Miller did not place the general election funds into a separate account as shown by the issuance of refunds of general election contributions from the same bank account used

¹⁰ The Bullock campaign paid a fine of \$3,000 to settle this violation.
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for primary election contributions and expenditures.
(COPP records).

Based on Findings of Fact Nos. 9 and 10 the Commissioner determines the following:

Sufficiency Finding No. 2: There are sufficient facts to show that Candidate Miller acted in violation of Montana's campaign practice law by depositing primary and general election funds into the same bank account, thereby failing to establish the "separate" general election account required by law.

Candidate Miller did not prevail in the Republican primary election and was therefore required by Montana law to return all general election contributions: "[a primary election loser]...must return the [general] election contributions to the donors." 44.10.330(3) ARM. The recent electoral focus in Montana on contested primary elections has led to several recent complaints on this issue.¹¹

III. Reporting and Disclosure

The money that supports (campaign contributions) and is spent by (campaign expenses) a candidate's campaign is subject to complete transparency, made useful to voters and the opposing candidate by an accompanying requirement of timely reporting. Candidate Miller was, as are all other candidates for public office in Montana, subject to campaign finance reporting and disclosure requirements.

¹¹ *Kenat v. VanDyk*, COPP-2014-CFP-004; *Wemple v. Connell*, COPP-2014-CFP-041, and *Connell v. Boulanger*, COPP-2014-CFP-036.

A. CONTRIBUTIONS

Candidate Miller designated Altana Bank in Laurel, Montana as the campaign depository for his campaign account. Montana law requires that “all contributions received” (§13-37-205 MCA) must be deposited by Candidate Miller (through his treasurer) into his Altana campaign account. Montana law further requires that Candidate Miller file a campaign report disclosing all expenditures and contributions made within the reporting period. §13-37-225 MCA. These contributions “shall be reported for the reporting period during which it [the contribution] is received.” 44.10.511(4) ARM. Finally, “anonymous contributions are illegal in Montana.” 2012 Accounting and Reporting manual for Candidates, p. 14, citing §13-37-271 MCA.

This Complaint alleged that Candidate Miller did not timely deposit certain contributions into the campaign account, accepted anonymous contributions and further alleged that other contributions were not timely reported and disclosed.¹² The Commissioner makes the following Findings of Fact related to this allegation.

Finding of Fact No. 11: Candidate Miller did not timely report or disclose certain in-kind contributions he made to his own campaign, including amounts paid for campaign signs. (Investigation notes).

¹² The COPP’s earlier Decisions (now replaced by this Decision) in this Matter also found sufficient facts for a campaign practice based on certain over-the-limit contributions. The COPP since determined *Landsgaard v. Peterson*, COPP-2014-CFP-008, and *Kenat v. Van Dyk*, COPP-2013-CFP-004, where, for the reasons set out those Decisions, a candidate was provided discretion (barring contrary directions from a donor) to designate division of a contribution amount issued in one check between spouses and between primary and general elections. Accordingly, this Decision will not find sufficient facts as to contribution amounts that are within limits when so divided.

Finding of Fact No. 12: Candidate Miller did not timely report certain contributions (reporting the same at least one reporting period too late) including but not limited to: \$1,000 from Russell Lowe; \$1,000 from Nancy Allen; \$1,000 from Harry Spooner; and \$250 from Jeff and Lucy Melugin. (COPP records).

Finding of Fact No. 13: Candidate Miller accepted and reported at least 5 anonymous contributions in excess of \$500. (COPP records).

Based on FOF Nos. 11-13 the Commissioner determines:

Sufficiency Finding No. 3: There are sufficient facts to show that Candidate Miller acted in violation of Montana's campaign practice law by late reporting contributions, failing to disclose contributions and reporting anonymous contributions.

Candidate Miller objects to such a sufficiency finding as "technical" but the facts in support of the sufficiency finding are far more substantial than those that resulted in a sufficiency finding against another 2012 candidate for Governor. In *Hart v. Bullock*, Deputy Commissioner Dufrechou found a campaign practice violation for failure to deposit a single (\$600) campaign contribution within 5 days of the date of receipt.¹³ Candidate Miller cannot fairly claim that the Complaint and this Decision are singling him out for review and penalty. Miller had one complaint, this one, filed against him. In contrast, the 2012 Democratic candidate for Governor, Steve Bullock, had 8 complaints (6 were dismissed) filed against him.¹⁴

¹³ The Bullock campaign paid a fine of \$250 for this violation.

¹⁴ *Nelson v. Bullock*, December 22, 2011 (Commissioner Gallik); *Montana Republican Party v. Bullock*, May 5, 2012 (Deputy Comm. Dufrechou); *Olson v. Bullock*, October 17, 2012 (Deputy Comm. Dufrechou); *Swope v. Bullock*, October 24, 2012 (Deputy Comm. Dufrechou); *Little v. Bullock*, October 25, 2012 (Deputy Comm. Dufrechou); *Hart v. Bullock*, November 23, 2012.

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B. EXPENDITURES

Under Montana law, each candidate for public office, including Candidate Miller, must pay expenses by “disbursing” funds from his or her designated campaign depository (§13-37-205 MCA). Further, Candidate Miller’s campaign treasurer “shall keep detailed accounts of all … expenditures made …” (§13-37-208(1)(a) MCA). Candidate Miller then “shall file periodic reports of ...expenditures made by...” the campaign. ((§13-37-225(1) MCA). All expenditures made must be reported and disclosed for the time period covered by a campaign finance report. (§13-37-230 MCA)

Finding of Fact No. 14: Candidate Miller failed to timely report (late reported by at least one reporting period) expenditures, including but not limited to \$898.80 in hotel costs covering 21 nights at the Super 8 hotel in Missoula¹⁵ and expenditures related to wages paid by the campaign to Marissa Stockton. (COPP records).

Based on FOF No. 14 the Commissioner makes the following sufficiency findings:

Sufficiency Finding 4: Sufficient facts exist to show that Candidate Miller failed to properly report and disclose campaign expenditures as required by Montana law.

Candidate Miller cannot excuse the failure to timely disclose expenses by claiming disclosure based on the date of payment of a debt. The expense that

(Deputy Comm. Dufrechou); *Reid v. Bullock*, COPP-2012-LOB-001 (Commissioner Motl); and *Pennington v. Bullock*, COPP-2013-CFP-0012 (Commissioner Motl).

¹⁵ Through a check dated 5-16-12 the Miller campaign paid Super 8 the sum of \$898 for 21 nights of lodging over the time period of April 2011 through April of 2012. In the event that this Matter does not settle any enforcement action is *de novo* (begins again) for both parties. With that in mind, if enforcement is necessary the COPP does not waive the judicial pursuit of this infraction as an illegal acceptance of corporate contributions, as discussed in the earlier Decisions in this Matter.

underlays any debt must be disclosed at the date the expense obligation is incurred, not the date it is paid. Past Commissioners have rigorously applied laws requiring 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). This reporting of debt covers services, advertisements campaign expenses in general (*Wilcox v. Raser*, May 26, 2010 (Commissioner Unsworth) and even the expenses owed musicians (*Hardin v. Ringling* 5, December 17, 2012 (Commissioner Murry)). This Commissioner has similarly Decided. *Williams v. Andersen*, COPP-2014-CFP-035.

Montana’s requirements of reporting, disclosure and record keeping are designed to insure transparency and fairness to the public, voters and the opposing candidate. Stated another way by Ravalli County Senator Fred Thomas:

We [legislators] are to follow the [campaign practice] law to the N'th degree, report every dime to our campaign, report every expense that we incur in the time and manner that it's supposed to happen. I don't have any problem with that, that's our job as candidates. We are a citizen legislature and that we owe it to our citizens, our voters in our district and the state voters as well.¹⁶

¹⁶ April 24, 2015 Senate floor debate on the confirmation of Commissioner Motl.
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The Commissioner determines that sufficient facts exist to show that Candidate Miller failed in his reporting and disclosure obligations as described in this Decision.

ENFORCEMENT OF SUFFICIENCY FINDINGS

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must act on, an alleged campaign practice violation 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. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence (see Sufficiency Findings, as set out in this Decision) to show that Candidate Miller’s campaign has violated Montana’s campaign practice laws, including, but not limited to the several campaign practice laws set out above. 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.

As explained in this Decision, Candidate Miller improperly used the
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campaign bank account, failed to report contributions, failed to report expenses, and failed to properly segregate general election contributions. 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 and 009.

Likewise, the Commissioner does not accept that failures to file or report can normally be excused as *de minimis*. *See* discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. In particular, the Commissioner has limited discretion to apply *de minimis* to untimely reporting. Reporting is only valid when it is timely accomplished and any delay, much less a failure to file, demonstrates harm.

Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil/criminal prosecution and/or a civil fine is justified (*See* §13-37-124 MCA) as well as any other action the Commissioner is directed to take. In this Matter that “other action” includes potential denial of listing of Candidate Miller as a candidate on any ballot until a proper campaign closing report is filed with the COPP (§13-37-126 MCA).

The Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution of Candidate Miller for late filing, failing to report, improper accounting, improper use of campaign funds and general improper campaign practices implicating the full reach of chapters 35 and 37 of Title 13 MCA. Because of nature of violations (the

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failure to timely and adequately 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 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 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 29th day of September, 2015.



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