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COMMISSIONER OF
POLITICAL PRACTICES

Buell v. Montanans for Trap Free Public Lands, a ballot committee	Amended Summary of Facts and Finding of Sufficient Evidence to Show Violation of Montana's Campaign Practices Act (Other Allegations Dismissed)
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Montanans for Trap Free Public Lands ("Ballot Committee") is a ballot issue committee organized in August 2009 to support Initiative 160, a proposed law that would have, with certain exceptions, prohibited the trapping of wild mammals and birds on Montana public lands. The Statement of Organization (Form C-2) filed by the ballot committee on August 20, 2009, stated the purpose of the committee was: "To gather signatures state-wide to place the Montana Trap-Free Public Lands initiative on the 2010 ballot." According to the official statements on the website of the Montana Secretary of State, not enough signatures were gathered to qualify I-160 for the 2010 election.

Montanans for Effective Wildlife Management was a ballot issue committee organized to oppose I-160. On July 8, 2010, Jim Buell, the treasurer for Montanans for Effective Wildlife Management, filed a complaint against the Ballot Committee. The complaint alleged numerous violations as detailed below.

In September of 2010, an answer and amended answer were filed by the Ballot Committee's attorney, Jonathan Motl, which included an amended campaign report ("Amended Report") as well as an exhibit regarding the identity and payment of signature gatherers. During May 2013, Jonathan Motl was appointed Commissioner of Political Practices. An investigator outside the staff of the Commissioner's office was appointed to investigate the factual allegations raised by this complaint. The undersigned was appointed, pursuant to § 13-37-111, MCA, as Deputy Commissioner of Political Practices for purposes of resolving this complaint and the related complaint, Buell v. Footloose Montana for Trap Free Public Lands.

For the reasons explained below, the Deputy Commissioner finds the Ballot Committee in violation of statutory reporting requirements with respect to the failure to report in-kind contributions relating to wine and use of Ten Spoons winery as a venue for an event on September 10, 2009. Although the initial decision issued by the Deputy Commissioner on November 13, 2013 found a violation relating to late reporting of payments to people hired to gather signatures in support of the ballot initiative, a Consent Decree binding on the Commissioner's office was subsequently brought to the Deputy Commissioner's attention which requires the Deputy Commissioner to find no violation with respect to signature gathering.

With respect to the numerous other alleged violations, the Deputy Commissioner finds either no violation or *de minimis* violation not warranting use of state resources to pursue prosecution relating to those matters.

I. BACKGROUND

At the same time the Ballot Committee filed its Statement of Organization, a Form C-2 was filed with the Commissioner's office by an incidental political committee called Footloose Montana for Trap-Free Public Lands ("Incidental Committee.") The stated purpose of the Incidental Committee was: "To record financial contributions from Footloose Montana, a 501(c)(3) corporation, to the ballot initiative committee named 'Montanans for Trap-Free Public Lands."

Footloose Montana ("Footloose") was incorporated in 2007, two years earlier than formation of the Ballot Committee and the Footloose Incidental Committee. Footloose has an educational and advocacy purpose more general than supporting the ballot initiative. The web site of Footloose¹ states: "Footloose Montana's mission statement is to promote trap-free public lands for people, pets and wildlife. We provide information about the threat of trapping to public safety on public lands and its impact on our pets and wildlife." Footloose is the respondent in a related complaint filed by Buell and resolved by the undersigned Deputy Commissioner simultaneously with this matter.

Several of the same people were involved in Footloose, the Incidental Committee, and the Ballot Committee. Anja Heister was the executive director of Footloose from September 2007 to November 2012 and played a large role in the petition drive supported by the Ballot Committee. Dave Taylor is the partner of Anja Heister, worked on behalf of Footloose and the Ballot Committee, and contributed the use of an RV to promote Footloose's mission and, at times, to help gather signatures in support of I-160. A Helena Independent Record article appearing in April 2010 described Heister and Taylor's efforts to gather signatures for I-160, including: "Anja Heiser, director of Footloose Montana, has given up her job and gone into debt trying to make [the petition drive] happen."

Constance ("Connie") Poten, an owner of Ten Spoon Winery, was a founding member of the Ballot Committee. She is listed in the original C-2 as the Ballot Committee's vice-chair and in the 2011 amended C-2 as the organization's co-chair. She was also listed as Vice-Chair of the Incidental Committee in the original C-2 and secretary of that committee in a 2011 Amended C-2. She is also listed in the finance reports as a large in-kind contributor to I-160.

Marie Anderson was the original committee treasurer for both the Ballot Committee and the Incidental Committee. Timothy Provow was Chair for the Incidental Committee according to the original C-2 and Chair for the Ballot Committee according to that committee's original C-2 and 2011 amended C-2.

Buell's complaint against the Ballot Committee alleges violations with respect to the following nine campaign finance C-6 reports filed by the Ballot Committee:

¹ <http://www.footloosemontana.org/>

- A. May 1, 2009 to September 30, 2009;
- B. October 1, 2009 to December 31, 2009;
- C. January 1, 2010 to March 5, 2010;
- D. March 6, 2010 to April 5, 2010;
- E. April 6, 2010 to May 5, 2010;
- F. May 6, 2010 to May 19, 2010;
- G. May 20 to May 29, 2010;
- H. May 30 to June 5, 2010;
- I. June 6, 2010 to June 23, 2010.

Allegations with respect to use of a fax machine are common to several reports, so those allegations are addressed jointly below. The remaining complaints are addressed with respect to each report in chronological order.

II. FAX MACHINE COSTS

Buell asserts violation of campaign reporting requirements through failure to report use of a fax machine with respect to faxing of each of the above listed reports. In other words, he alleges that faxing of the C-6 reports to the Commissioner's office had a value that should have been reported as an in-kind donation and that failure to report the alleged donation violated §§ 13-37-208(1) and 13-37-229(11), MCA. There are two entities from which reports were faxed: Katie Ward & Associates and the Helena law firm Reynolds, Motl and Sherwood.

A. Faxing from Katie Ward & Associates

With respect to the report for May 1, 2009 to September 30, 2009, Buell notes the fax appears to have been sent from Katie Ward & Associates. Based on this allegation, he also alleges Katie Ward & Associates should have reported as an incidental committee.

Katie Ward & Associates is a real estate brokerage based in Missoula, Montana. On August 27, 2013, the independent investigator spoke with Kathy Olson, an employee of Katie Ward & Associates. Olson confirmed the fax number on the campaign report was the fax number of Katie Ward & Associates. She stated she was not positive who faxed the report from the office's fax machine, but noted that Marie Anderson, treasurer of the Ballot Committee when the fax was made, was her friend. Olson surmised she had allowed Anderson to use the fax machine.

Olson said there is no individual cost associated with use of the fax machine. Katie Ward & Associates pays a fee for use of five lines from Blackfoot communications. That fee is paid regardless of the amount of telephone or faxing through the lines. The faxing at issue added no cost to Katie Ward & Associates. Use of the fax machine is similar to allowing a friend to make a phone call from the business phone where one works.

In order to be an "in-kind contribution" invoking campaign reporting obligations, the services provided must be associated with an "out-of-pocket expense." See *Canyon Ferry*

Road Baptist Church of East Helena v. Unsworth, 556 F.3d 1021, 1029 (9th Cir. 2009) (discussing the due process vagueness standard for the definition of “in-kind contribution” under Mont. Admin. R. 44.10.321(2)(a) and 323(2)). When an activity brings no detriment and carries no market value, prosecution for campaign violations raises due process vagueness concerns due to lack of notice that provision of the service could represent a campaign contribution that must be reported.

Where there was no detriment to Katie Ward & Associates for allowing a fax to be made from the firm’s office, use of the fax machine cannot be considered an unreported in-kind contribution. Nor would Katie Ward and Associates become an incidental committee for purposes of Montana campaign law.

B. Faxing from Reynolds, Motl and Sherwood

With respect to the other reports, the faxes were made from Reynolds, Motl and Sherwood (RMS), a law firm in Helena, Montana. Buell alleges those faxes should have been reported as an in-kind contribution. He further asserts RMS became an incidental ballot committee by sending in the Ballot Committee’s reports via its fax.

The Ballot Committee responded that faxing was not an in-kind donation because the law firm was not a contributor to the Ballot Committee but rather a service provider. The Ballot Committee’s Amended Answer noted the law firm’s services had been reported by Footloose as an incidental committee contribution to the Ballot Committee.

The independent investigator interviewed Jami Welch, a paralegal at the RMS office regarding the faxing of the other campaign reports. Welch indicated faxing is a service provided by the firm as part of legal representation. Welch understood that local faxing carried no cost to the law firm separate from maintenance of phone lines and was not managed by the firm as a separate cost to clients. She reported the law firm does not keep a record of local faxes.

RMS legal services were duly noted on each campaign report as an expense or debt rather than a contribution. Under such circumstances, there was no violation of law with respect to faxing.

III. CHRONOLOGICAL DISCUSSION OF CAMPAIGN REPORTS

A. C-6 Report for Period from May 1, 2009 - September 30-2009.

i. In-Kind Contributions

Buell alleged the Ballot Committee violated campaign laws with respect to an event hosted by Footloose on September 10, 2009. Buell alleged the Ballot Committee failed to report in-kind donations or expenses “for advertising (poster included), wine served or for a venue at Ten Spoon Wines” in violation of §§ 13-37-208(1), 13-37-229(11), or 13-37-230(1)(g), MCA.

In defense against Buell's allegations, the Ballot Committee argues the event was primarily an event for Footloose membership, not primarily a fundraiser for I-160. The Ballot Committee notes that I-160 was not in fact approved for language or number until September 9, 2009, the day before the September 10 event. Under §13-1-101(17)(b), for purposes of chapters 35 and 37 of the election laws, which include contribution reporting requirements and flyer attribution requirements, a statewide ballot issue such as presented by I-160 "becomes a 'ballot issue' upon preparation and transmission by the secretary of state of the form of the petition or referral to the person who submitted the proposed issue."

Anja Heister was the executive director of Footloose at the time of the September 10, 2009 event. She and Connie Poten told the investigator the September 10th fundraiser was primarily an educational and promotional event for Footloose rather than primarily an event to support I-160.

While the Deputy Commissioner is persuaded Footloose as an organization created the flyer and distributed it to existing Footloose membership for purposes of allegations against the Ballot Committee under §13-35-225, MCA relating to flyer attribution (see below), the Ballot Committee cannot avoid its contribution reporting obligations by claiming distance from Footloose. Many of the same people involved in Footloose were involved in the Ballot Committee and the petition drive. Even if I-160 was not formally approved for signature-gathering until the day before the September 10 event, that event obviously focused on the petition drive. This was obviously known to officers and organizers of the Ballot Committee.

The flyer for the event (Appendix 1 to this decision) stated: "Please join us for a Footloose and Fancy-Free Fundraiser and **Celebration of our Petition Drive to End Trapping on Montana's Public Lands.**" The flyer promised: "Music *** Food *** Games *** Live & Silent Auction *** Ten Spoon wines *** Local brews *** Bonfire *** **Petition Signing to End Recreational Trapping on Public Lands.**" On the first Political Committee Finance Report (Form C-6) filed by the Ballot Committee, the September 10 event was described as, "**Petition Kick Off Party Outside with a Band, approximately 250-275 people.**" (Emphasis added).

Under §13-37-208, MCA, "the campaign treasurer of each candidate and each political committee shall keep detailed accounts of all contributions received and all expenditures made by or on behalf of the candidate or political committee that are required to be set forth in a report filed under this chapter." Section 13-37-229, MCA, requires reporting of contributions to a political committee, including in-kind contributions.

The in-kind reporting obligations arose after the contributions were made in the course of the event, which occurred after the Secretary of State had transmitted the form of the ballot initiative. The Ballot Committee recognized its reporting obligation relating to the event. On its C-6 for the period, the Ballot Committee reported \$3,393.75 in cash receipts from the fundraiser, as well as an in-kind contribution of \$5,325.82 from the Footloose Incidental Committee. The in-kind contribution is itemized into six contribution categories, half relating to organizing and ballot drafting and half relating to the September 10 event:

- salary for Anja Heister for organizing and drafting the ballot initiative (\$3,718.50)
- Verizon cell phone charges relating to organizing and drafting the initiative (\$298.37)
- legal services from RMS for advice on ballot initiative and drafting (\$750.00)
- “beer for petition kick off” from Big Sky Brewing (\$49.00)
- “tent, tables & chairs for petition kick off” (\$309.95)
- “band for initiative kickoff” (\$200.00)

There were no specific contributions reported for wine provided at the event or for use of the Ten Spoons venue. No contribution was reported for production and distribution of the flyer produced to promote the event.

In response to the complaint, the Ballot Committee pointed out that “it reported as an in-kind expense the full amount reported to it as an in-kind contribution by the Footloose incidental committee.” The Ballot Committee argued Footloose assigned a proportional share of the cost of the event as an in-kind contribution and that, as suggested in *Matter of the Complaint against Montanans for Common Sense Water Laws/Against I-122*, Footloose is best able to make a good faith determination of the fair application of costs for such an event.

Even accepting this proposition as a general guideline, the Deputy Commissioner concludes that individuals in responsibility for the Ballot Committee were involved in the September 10 event and obviously knew that wine provided for the event and the use of the Ten Spoons venue inured to the benefit of the Ballot Committee, as much or more than beer, furniture rentals, and perhaps even the band.

In particular, Marie Anderson was the initial treasurer for both political committees. Connie Poten, owner of Ten Spoons, was Vice-Chair of the Ballot Committee and Footloose Incidental Committee. As confirmed by investigation, as an owner of Ten Spoons, Poten was involved in wine donation and facility use. From the perspective of the Ballot Committee, of which Poten was Vice-Chair, there was obviously knowledge that the September 10 event was a “Petition Kick Off Party” and that donation of wine and venue inured to the benefit of the Ballot Committee and petition drive. Wine for the 250-275 people reportedly in attendance at the event could have had substantial in-kind cost. Even if some allocation between a “primarily Footloose purpose” and a “petition drive benefit” made any sense, the reporting made by the Ballot Committee was not sufficient to inform the public as to the in-kind donations involved in the event.

After the initial Summary of Facts and Finding of Sufficient Evidence to Show Violations of Montana’s Campaign Practices Act was issued on November 13, 2013, the Commissioner’s investigator obtained information regarding the costs of the venue and wine for the September 10, 2009 event. In 2009 the Ten Spoon Winery was just being established and a tasting room or tasting room staff did not exist at that time. Volunteers of Footloose and the Ballot Committee served the wine for the event. Only one other event was held at the venue during the summer of 2009 – a wedding for a friend – for which no charge was made for use of the venue. Similarly, Ten Spoon Winery did not charge either Footloose or the Ballot Committee for use of the venue; rather, they provided a tent, tables, and chairs for the event,

each of which were reported as in-kind contributions as discussed above. Starting in July 2013 the Ten Spoon Winery first charged non-profits for use of the venue and staff.

The cost of the wine that was served at the September 9, 2009 event was also obtained from Ten Spoon Winery – a total of 25 bottles with an in-kind contribution value of \$266.77. Under these circumstances, the Deputy Commissioner finds the Ballot Committee had a continuing obligation to comply with the campaign finance reporting laws by reporting the value of an in-kind contribution for the wine provided at the September 10, 2009 event.

The Deputy Commissioner further finds that the omission of reporting the in-kind contribution for the cost of the wine is not a *de minimis* violation. The Commissioner has not yet defined a *de minimis* violation by reference to a specific dollar amount. Rather, the Commissioner has applied the principle based on specific facts in individual cases. For example, in *Royston v. Crosby*, COPP-2012-CFP-0041, \$273 was spent on a newspaper advertisement regarding a local candidate. 26 people contributed to pay for the ad, and they as a group were found by the Commissioner to be an incidental committee that was not required to file a report of the expenditure since the amount spent by the committee was under \$500. *See* Mont. Admin. R. 44.10.411(3)(a). Although the group was found to have violated the registration, attribution, and naming/labeling requirements of a local incidental committee, the principle of *de minimis* was applied to those requirements based on six facts specific to the case.

Here, the Ballot Committee was a principal campaign ballot issue committee, and was required to disclose all contributions. Mont. Admin. R. 44.10.327(2)(a)(i) and 44.10.511, 513. Indeed, the Ballot Committee had timely disclosed in-kind contributions in excess of \$5,000 from the Footloose Incidental Committee for the same event. The Ballot Committee should have further disclosed the additional in-kind contribution for the cost of the wine served at the September 10, 2009 event, and this failure to disclose is a continuing violation of campaign finance reporting laws by the Ballot Committee.

Under these circumstances, the Deputy Commissioner finds the Ballot Committee to have violated campaign finance reporting laws with respect to omission of in-kind donation reporting for wine and venue at the September 10, 2009, event.

Buell also complained that cost of the flyer for the event should have been reported as an in-kind donation. In addition to the arguments noted above, the Ballot Committee asserts that any costs associated with the flyer are excluded from the definition of “contribution” under §13-1-101(7)(b)(iii), MCA. That subsection provides that “contribution” for purposes of the campaign contribution requirements does not include “the cost of any communication by any membership organization or corporation to its members, stockholders or employees.”

The Deputy Commissioner credits evidence that the flyer itself was primarily distributed by email and finds that any costs associated with it were minimal. Anja Heister told the investigator she made the flyer and distributed it to the membership of Footloose mostly by email. While not specifically attributed to flyer preparation, some of Anja Heister’s salary was reported by the Ballot Committee as an in-kind donation from Footloose Incidental Committee.

Even assuming some hard copies of the flyer were made, the Deputy Commissioner cannot conclude that any unreported costs associated with the flyer rose above a *de minimis* level as stated in the *Canyon Ferry Baptist Church*. See *Royston v. Crosby*, No. COPP 2012-CFP-41 (an expenditure of \$273 was considered *de minimis* and did not trigger violation of campaign reporting laws). In addition, the Deputy Commissioner is persuaded that the flyer itself was primarily directed to Footloose membership and deserves protection as a communication to membership.

ii. Flyer attributions (September 10, 2009, Event)

Buell also alleged the poster (more accurately described as a flyer) violated §13-35-225(1) with respect to information that should have been included.

Section 13-35-225, MCA, in pertinent part, requires that:

All communications advocating the success or defeat of a candidate, political party, or ballot issue through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, poster, handbill, bumper sticker, internet website, or other form of general political advertising 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.

As noted above, Anja Heister told the investigator she made the flyer and distributed it to the membership of Footloose mostly by email. The flyer for the September 10th fundraiser does not have a "paid for by" attribution, but does have a logo indicating it was an event sponsored by Footloose Montana.

As also noted above, people associated with Footloose and the Ballot Committee told the investigator the event was primarily for Footloose membership, rather than for I-160. The Deputy Commissioner has already cited evidence indicating the event focused on the ballot initiative so as to require reporting of in-kind contributions, but views the question of required attribution under §13-35-225, MCA, as a separate matter. Most importantly, even while the event inured to the benefit of the petition drive and Ballot Committee, the Deputy Commissioner finds that Footloose as an entity created the flyer, while the present complaint is against the Ballot Committee.

The Deputy Commissioner also notes constitutional limits on interpreting communications as "advocacy" so as to invoke the requirements of §13-35-225, MCA. Under that section, all communications "advocating the success or defeat of a candidate or ballot issue" (emphasis added) must have a conspicuous "paid for by" attribution. Prior decisions of the Commissioner of Political Practices have interpreted §13-35-225, MCA, to apply only to communications that "expressly advocate" the success of a candidate, political party, or ballot issue. *Roberts v. Griffin & Lewis & Clark County*, Summary of Facts and Statement of Findings, at 8 (Nov. 19, 2009). While Montana statutes do not define "express advocacy,"

federal case law offers authority to assist interpretation of the term to ensure that enforcement of Montana law is consistent with federal constitutional principles.

Extensive review of that law is not necessary for this decision, but the Deputy Commissioner notes that, since, *Buckley v. Valeo*, 424 U.S. 1 (1976), the United States Supreme Court has construed “express advocacy” so as to avoid hindrance of rights to free speech. In *Buckley*, the Court recognized that general discussions of issues and candidates are distinguishable from more pointed exhortations to vote for or against particular persons. In a footnote, the Court listed examples of express advocacy, which have become known as “magic words,” including phrases such as “vote for,” “elect,” “support,” “cast your ballot for,” “vote against,” “defeat,” “reject,” etc. *Buckley* at 44, n. 52. More recently, the United States Supreme Court held that “a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Wisconsin Right to Life v. Federal Election Comm'n*, 551 U.S. 449, 469-70 (2007) (“WRTL”).

While clearly focusing on the upcoming Petition Drive and stating that “petition signing” would occur at the event, the flyer does not, in itself, advocate passage of I-160, which had not yet even been approved in form by the Secretary of State when the flyer was drafted and distributed. Given that the flyer was created before the Secretary of State had transmitted the form of the initiative, pursuant to §13-1-101(17)(b), a ballot issue for purposes of attribution requirements does not appear to have existed at the time the flyer was created.

Most importantly, insofar as a complaint against the Ballot Committee is concerned, the Ballot Committee should not be held accountable for any failure of attribution on what the Deputy Commissioner is convinced was a flyer of the Footloose organization, communicated to its existing membership. For these reasons, no violation of §13-35-225, MCA, is found against the Ballot Committee with respect to the September 10, 2009, flyer.

B. C-6 Report for the Period from October 1, 2009 to December 31, 2009

i. Reporting issues concerning November 8, 2009 event

Buell alleged violations for:

- failure of the Ballot Committee to list the number of people in attendance at five fundraisers,
- omission of costs associated with a flyer used for an event held on November 8, 2009, and
- failure to report in-kind expenses relating to the fundraisers.

In its Amended Answer, the Ballot Committee explained there were not five fundraising events, but rather one. That event took place on November 8, 2009 at biga pizza in Missoula. In-kind contribution costs for that one event appear to have been properly reported on the C-6 for this period.

Anja Heister confirmed to the investigator that only one fundraiser occurred during this period, but noted that tables were set up at various farmers' markets where donations were received and petitions were available for signing. The amount of donations from those tables was duly reported on the C-6, which presumably led to Buell's conclusion that five events took place.

With respect to the November 8, 2009, event, the original C-6 report of the Ballot Committee does not list the number of people attending but does list the amount of \$634 as contributions to the Ballot Committee in donations of \$35 or less.

The Ballot Committee filed an Amended Report with its Amended Answer. The Amended Report listed the number of people attending as 100. As Anja Heister and Dave Taylor told the investigator, this was based on their memory and their conversation with Bob Marshall, the owner of biga pizza. The Ballot Committee acknowledged reporting the number of people attending the event was late, but suggested this should be found a *de minimis* violation and should not be the basis for a civil prosecution.

In the context of this matter, the Deputy Commissioner finds the failure to report the number of people attending the biga pizza event a violation of campaign finance reporting laws. Commissioner of Political Practices Rule 44.10.521(1) (b) requires reporting of the "approximate number of individuals in attendance at a fund-raising event" when individual contributions under \$35 are lumped together for reporting purposes. Reporting the number of people in attendance at an event is not unimportant, as this becomes a gauge for evaluating the legitimacy of other matters reported. However, where contribution amounts, both in-kind and actual, were duly reported, the Deputy Commissioner finds that prosecution for belated identification of the number of people in attendance is not warranted.

The Ballot Committee maintained that the costs of the poster and its distribution need not be reported as a *de minimis* expense under the *Canyon Ferry Baptist Church* decision. For the reasons noted with respect to the flyer for the September 10, 2009, event, the Deputy Commissioner finds any costs of this flyer were a *de minimis* expense not sufficient to provide notice to persons involved that an expense must be reported as a contribution.

ii. Flyer attributions (November 8, 2009, Event)

Buell asserted the flyer of November 8, 2009 did not comply with § 13-35-225(1), MCA.

Anja Heister confirmed that she also produced this flyer and distributed it among the Footloose membership, as she had the flyer for the September event. Both Anja Heister and Connie Posten stated this event was also generally for Footloose.

As with the flyer for the September 10th event, the flyer for the November 8, 2009, event (Appendix 2 to this decision) did not directly advocate support or opposition to I-160. This flyer did not even reference the petition drive. It reads: "Footloose Montana invites you to

a party In Support of Trap Free Public Lands at biga pizza." It also stated: "Help make our public lands safe for people, pets and wildlife."

For the reasons noted with respect to the September 10 flyer, the Deputy Commissioner declines to find a violation against the Ballot Committee under §13-35-225, MCA. Primarily, the Deputy Commissioner is persuaded this event was promoted by Footloose as an organization and holding the Ballot Committee responsible for attributions is not appropriate, whether or not the flyer represented express advocacy.

C. C-6 Reports for the Periods from January 1, 2010 to March 5, 2010 and March 6 to April 5.

Buell alleged the Ballot Committee failed to properly describe a fundraising event and failed to list the number of people in attendance at the event.

The Ballot Committee responded that the event was actually a petition-training workshop attended by 15 people. Anja Heisler confirmed to the investigator that the event was a workshop, not a fundraising event. A donation jar was at the workshop, resulting in \$104 in donations, which were duly reported on the C-6 for this period. The C-6 describes a "Missoula workshop; all cash donations less than \$35.00."

The Amended Answer of the Ballot Committee listed the number of people at the workshop as 15. In these circumstances, the Deputy Commissioner is not persuaded the workshop was a fundraiser requiring reporting as such. Even if it were, the Deputy Commissioner finds the only potential violation to involve late reporting of the number of people at the workshop. In these circumstances, given that the number of people attending was eventually provided, any violation is not appropriately referred for prosecution.

D. C-6 Report for the Period from April 6-May 5, 2010

Buell alleged four violations with respect to this period:

- that a flyer for another event held at biga pizza in Missoula was in violation of §13-35-225(1), MCA;
- that the C-6 report for this period failed to describe the fundraising event and the number of people in attendance;
- that the report failed to list in-kind donation of wine; and
- that 13 other listed contributions failed to contain mandatory information such as occupation, name of donor in the case of donations from joint checking accounts, and addresses.

The flyer for a fundraising event held on April 11, 2010 contained essentially the same information as the flyer for the November 8th event. (See Appendix 3). The Deputy Commissioner reads the flyer as primarily an invitation to a Footloose fundraiser. For the reasons noted above with respect to the earlier flyers, the Deputy Commissioner declines to find

a statutory violation under §13-35-225(1), MCA, with respect to missing attributions on this flyer.

With respect to the remaining alleged reporting errors, the Deputy Commissioner finds the nature of the event is revealed through the filing, as well as the wine donation. As in a prior reporting period, the Deputy Commissioner finds a violation through failing to report the number of people in attendance at the event, but will not refer that violation for prosecution under the *de minimis* principle.

The Amended Report filed only a few days after the original, which was not likely seen by Buell, provided information regarding profession. Information regarding which of the people named on checks was the actual contributor is typically obtained by the Commissioner's office through email or other communications. It appears the Ballot Committee was cooperative in providing such information. Violations will not be found with respect to dual names.

E. C-6 Report filed for the period from May 6 to May 19, 2010

Buell alleged:

- the "Cash in Bank" entry on this report did not match the prior report,
- there were three entries of dual names inappropriately listed,
- the Humane Society of Billings failed to file as an incidental committee,
- the total amount of Connie Poten's contribution was incorrect, and
- the entry concerning the expense to Fleet Maintenance and related to the correction referencing the May Amended Report made no sense.

Allegations concerning "Cash in Bank," the total amount of Connie Poten's contribution, and the reference to Fleet Maintenance and a correction report were apparently based on Buell not having been aware of the May Amended Report. When the Amended Report is taken into account, the Deputy Commissioner does not find violations with respect to these matters.

The allegation concerning the failure of the Humane Society of Billings to register as an incidental committee was not a responsibility of the Ballot Committee. The Ballot Committee satisfied its obligation by reporting an in-kind contribution from the Humane Society of Billings.

With respect to the dual listing of three couples, as noted above, the Commissioner's office typically follows up for this information and the Ballot Committee appears to have been responsive. In addition, in response to this allegation, the Ballot Committee responded that listing individuals separately with respect to contributions made on a ballot initiative is not necessary because there is no contribution limit applicable to support of ballot initiatives. The Ballot Committee also maintained such an error is *de minimis* and not a legitimate basis for a civil penalty. The Commissioner recently addressed this issue in Baker v. KEY, No. COPP 2011-CFP-32, holding that although § 13-37-229, MCA, requires that contributions be

disclosed as to "each person," such a violation was *de minimis* and would not be pursued. Here, no violation is found and if there were a violation, the Deputy Commissioner finds that it would not be appropriately prosecuted in this matter under the *de minimis* principles.

The Deputy Commissioner also notes that Rule 44.10.511(2), Admin. R. Mont. states that when a contribution is received by a check drawn on a joint checking account, the contribution is deemed to come from the person signing the check unless otherwise specified in writing at the time the contribution is received. Because the filings with the Commissioner's office do not include check copies, listing of the name is appropriate on reports, but can be listed by the filing parties based on who signed checks.

F. C-6 for the Reporting Period from May 20 to May 29, 2010.

i. Signature gathering

Buell alleged violations with respect to reporting of payments by the Ballot Committee to ballot signature gatherers. The C-6 for this period listed two payments to Express Personnel services as "payment for hiring signature gatherers," but does not list the names or addresses of the signature gatherers. Buell alleges this violates the general reporting requirements in § 13-37-230(1) and also references § 13-27-112(2), MCA, which requires that information on signature gathering payments must include "the amount paid to a paid signature gatherer."

The Ballot Committee filed an Amended Report with its Amended Answer, and attached an "Exhibit 1" stating amounts paid to and addresses of signature gatherers. Exhibit 1 lists names and addresses of the signature gatherers, total amount paid to each signature gatherer, and the date on which the total amount was paid. For example, with reference to signature gatherer Maura Browne, Exhibit 1 states she was paid \$274.50 for 30.5 hours worked. The column lists her as having done this work on June 13, 2010. With respect to other signature gatherers, the total number of hours work and the amount paid are shown, but the actual days worked are not indicated. Anja Heister stated that the information provided in Exhibit 1 was presented in the format used by Express Services.

In August of 2005 the Montana Public Interest Research Group, and others, entered into a stipulated agreement with the Secretary of State and Attorney General for the State of Montana in order to resolve a challenge to Montana's signature gatherer disclosure requirements as set forth in Mont. Code Ann. § 13-27-112. (United States District Court Cause No. CV 03-183-M-DWM). On August 24, 2005 Judge Molloy approved the stipulation and permanently enjoined enforcement of the statute to the extent it could be interpreted to require the disclosure of individual paid signature gatherers' names and addresses, while leaving in place the disclosure requirements of the amount paid to signature gatherers. *See Montanans for In-Home Care for I-159, SEIU 775 Montana, and SEIU 775 PAC*, decided August 31, 2011 (Deputy Commissioner Colburg).

The Ballot Committee paid Express Personnel and A2Z staffing for training and employing signature gatherers throughout the 2010 election cycle. The Ballot Committee disclosed its expenses for signature gatherers in full and on time, and disclosed the address of

the temp agencies that provided the signature gatherers as required by Mont. Code Ann. § 13-27-112. The Deputy Commissioner therefore finds the information provided by the Ballot Committee regarding paid signature gatherers to be sufficient and timely, and no violation of the reporting requirement is found.

ii. Booher loan

Buell also alleged the Ballot Committee failed to properly report a loan from Barbara Booher. Buell pointed out the C-6 did not list the purpose of the loan. The Ballot Committee argued in its Amended Answer that the purpose of the loan was obviously to support the ballot committee and no further description should be required.

The investigator asked Anja Heister about the Booher loan. Heister stated it was eventually just a donation to the Ballot Committee and no repayments were made. The records of the Commissioner's office, as well as subsequent filings, indicate the loan was transformed into a straight contribution. Proper notice of this transformation was provided to the Commissioner's office.

Rule 44.10.515(1), Mont. Ad. Rules, provides:

44.10.515 LOANS AS CONTRIBUTIONS, REPORTING

(1) For the purposes of Title 13, chapter 37, MCA, and these rules, a loan shall be reported as follows:

(a) A candidate or political committee shall report a loan on the appropriate reporting schedule and, in addition to the reporting requirements specified in ARM 44.10.511, shall identify it as to its nature.

(b) A loan made to a candidate or political committee by a person, other than in the regular course of the lender's business, shall be deemed a contribution by that person.

(c) A loan made to a candidate or political committee by any person in the regular course of the lender's business shall be deemed a contribution by the obligor on the loan and by any other person endorsing the loan. (Emphasis added).

The regulation requires reporting of the "nature" of a loan. The Deputy Commissioner concludes that the "nature" of the loan to the Ballot Committee was sufficiently obvious, that is, to provide resources supporting the efforts of the initiative drive. No violation is found with respect to the loan.

G. C-6 for the Period from May 30 to June 5, 2010.

Apparently because he was not able to review the Amended Report filed in May 2010 by the Ballot Committee, Buell alleged that the amount of in-kind contributions from Connie Poten were not calculated correctly. He also alleged violations with respect to expenditures for the RV used by Anja Heister and Dave Taylor to gather signatures. When the Amended Report

is taken into account, the Deputy Commissioner is satisfied that these matters were sufficiently reported and that no violation is established.

Buell also alleged violations with respect to the general reporting of expenses associated with payment to signature gatherers. As noted above, no violation is appropriate with respect to paid signature gatherers.

H. C-6 for the Period from June 6 to June 23, 2010.

Buell alleged violations for:

- failure to list the occupations of two contributors;
- accepting an improper corporate donation from Wildeye Photography;
- reporting a questionable amount of in-kind contributions from Connie Poten;
- improper reporting relating to signature gatherers;
- and reporting a questionable amount for use of the RV.

The Ballot Committee contends the occupation of one individual was provided in a subsequent filing and the occupation of the second person in the Amended Answer to Buell's complaint. Listing the profession of a contributor is required; failing to provide that information establishes a violation. However, in this context where substantial information was provided, the Deputy Commissioner finds the late provided information not warranting prosecution under the *de minimis* principle.

As noted by the Ballot Committee, the prohibition on contribution from a corporation or business does not apply to a ballot committee. No violation is established with respect to accepting a contribution from Wildeye Photography.

The in-kind contributions from Connie Poten are linked back to the May Amended Report. No violation is established.

For the reasons noted above, no violation is found with respect to signature gatherers.

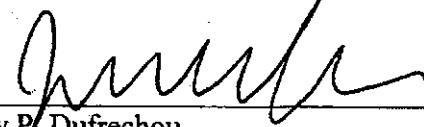
With respect to use of the RV, Dave Taylor stated he purchased the RV and donated it to Footloose in 2007 when Footloose was first organized. Footloose used the RV for educational purposes on various occasions since that time. Anja Heisler and Taylor used the RV to travel around Montana providing workshops on trapping. During May 2010 the RV was used by Taylor and Heister not only for continued educational programs for Footloose, but also to gather signatures for I-160. The proportional rent of the RV was listed on the May Amended Report. Costs and gas associated with use of the RV for signature gathering purposes are also listed on the May Amended Report. No violation is established relating to the RV.

IV. CONCLUSION

For the reasons stated above, there is sufficient evidence to conclude that the Ballot Committee violated Montana campaign finance and practice laws warranting referral for

prosecution with respect to failure to identify in-kind contributions for wine value relating to the September 10, 2009 event.

Dated this 6th day of January, 2014.



Jay P. Dufrechou
Deputy Commissioner of Political Practices

Please Note:

**The original sufficiency decision
dated November 13, 2013
is below this page,
and provided for informational purposes only,
as it has been superseded and replaced by the
Amended Sufficiency Decision
dated January 6, 2014 above.**

BEFORE THE COMMISSIONER
OF POLITICAL PRACTICES

Buell v. Montanans for Trap Free Public Lands, a ballot committee	Summary of Facts and Finding of Sufficient Evidence to Show Violations of Montana's Campaign Practices Act (Some Allegations Dismissed)
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Montanans for Trap Free Public Lands ("Ballot Committee") is a ballot issue committee organized in August 2009 to support Initiative 160, a proposed law that would have, with certain exceptions, prohibited the trapping of wild mammals and birds on Montana public lands. The Statement of Organization (Form C-2) filed by the ballot committee on August 20, 2009, stated the purpose of the committee was: "To gather signatures state-wide to place the Montana Trap-Free Public Lands initiative on the 2010 ballot." According to the official statements on the website of the Montana Secretary of State, not enough signatures were gathered to qualify I-160 for the 2010 election.

Montanans for Effective Wildlife Management was a ballot issue committee organized to oppose I-160. On July 8, 2010, Jim Buell, the treasurer for Montanans for Effective Wildlife Management, filed a complaint against the Ballot Committee. The complaint alleged numerous violations as detailed below.

In September of 2010, an answer and amended answer were filed by the Ballot Committee's attorney, Jonathan Motl, which included an amended campaign report ("Amended Report") as well as an exhibit regarding the identity and payment of signature gatherers. During May 2013, Jonathan Motl was appointed Commissioner of Political Practices. An investigator outside the staff of the Commissioner's office was appointed to investigate the factual allegations raised by this complaint. The undersigned was appointed, pursuant to §13-37-111, MCA, as Deputy Commissioner of Political Practices for purposes of resolving this complaint and the related complaint, Buell v. Footloose Montana for Trap Free Public Lands.

For the reasons explained below, the Deputy Commissioner finds the Ballot Committee in violation of statutory reporting requirements with respect to (1) the failure to report in-kind contributions relating to wine and use of Ten Spoons winery as a venue for an event on September 10, 2009 and (2) late reporting of payments to people hired to gather signatures in support of the ballot initiative. With respect to the numerous other alleged violations, the Deputy Commissioner finds either no violation or *de minimis* violation not warranting use of state resources to pursue prosecution relating to those matters.

I. BACKGROUND

At the same time the Ballot Committee filed its Statement of Organization, a Form C-2 was filed with the Commissioner's office by an incidental political committee called Footloose Montana for Trap-Free Public Lands ("Incidental Committee.") The stated purpose of the Incidental Committee was: "To record financial contributions from Footloose Montana, a 501(c)(3) corporation, to the ballot initiative committee named 'Montanans for Trap-Free Public Lands.'"

Footloose Montana ("Footloose") was incorporated in 2007, two years earlier than formation of the Ballot Committee and the Footloose Incidental Committee. Footloose has an educational and advocacy purpose more general than supporting the ballot initiative. The web site of Footloose¹ states: "Footloose Montana's mission statement is to promote trap-free public lands for people, pets and wildlife. We provide information about the threat of trapping to public safety on public lands and its impact on our pets and wildlife." Footloose is the respondent in a related complaint filed by Buell and resolved by the undersigned Deputy Commissioner simultaneously with this matter.

Several of the same people were involved in Footloose, the Incidental Committee, and the Ballot Committee. Anja Heister was the executive director of Footloose from September 2007 to November 2012 and played a large role in the petition drive supported by the Ballot Committee. Dave Taylor is the partner of Anja Heister, worked on behalf of Footloose and the Ballot Committee, and contributed the use of an RV to promote Footloose's mission and, at times, to help gather signatures in support of I-160. A Helena Independent Record article appearing in April 2010 described Heister and Taylor's efforts to gather signatures for I-160, including: "Anja Heiser, director of Footloose Montana, has given up her job and gone into debt trying to make [the petition drive] happen."

Constance ("Connie") Poten, an owner of Ten Spoon Winery, was a founding member of the Ballot Committee. She is listed in the original C-2 as the Ballot Committee's vice-chair and in the 2011 amended C-2 as the organization's co-chair. She was also listed as Vice-Chair of the Incidental Committee in the original C-2 and secretary of that committee in a 2011 Amended C-2. She is also listed in the finance reports as a large in-kind contributor to I-160.

Marie Anderson was the original committee treasurer for both the Ballot Committee and the Incidental Committee. Timothy Provow was Chair for the Incidental Committee according to the original C-2 and Chair for the Ballot Committee according to that committee's original C-2 and 2011 amended C-2.

Buell's complaint against the Ballot Committee alleges violations with respect to the following nine campaign finance C-6 reports filed by the Ballot Committee:

- A. May 1, 2009 to September 30, 2009;
- B. October 1, 2009 to December 31, 2009;
- C. January 1, 2010 to March 5, 2010;

¹ <http://www.footloosemontana.org/>

- D. March 6, 2010 to April 5, 2010;
- E. April 6, 2010 to May 5, 2010;
- F. May 6, 2010 to May 19, 2010;
- G. May 20 to May 29, 2010;
- H. May 30 to June 5, 2010;
- I. June 6, 2010 to June 23, 2010.

Allegations with respect to use of a fax machine are common to several reports, so those allegations are addressed jointly below. The remaining complaints are addressed with respect to each report in chronological order.

II. FAX MACHINE COSTS

Buell asserts violation of campaign reporting requirements through failure to report use of a fax machine with respect to faxing of each of the above listed reports. In other words, he alleges that faxing of the C-6 reports to the Commissioner's office had a value that should have been reported as an in-kind donation and that failure to report the alleged donation violated §§ 13-37-208(1) and 13-37-229(11), MCA. There are two entities from which reports were faxed: Katie Ward & Associates and the Helena law firm Reynolds, Motl and Sherwood.

A. Faxing from Katie Ward & Associates

With respect to the report for May 1, 2009 to September 30, 2009, Buell notes the fax appears to have been sent from Katie Ward & Associates. Based on this allegation, he also alleges Katie Ward & Associates should have reported as an incidental committee.

Katie Ward & Associates is a real estate brokerage based in Missoula, Montana. On August 27, 2013, the independent investigator spoke with Kathy Olson, an employee of Katie Ward & Associates. Olson confirmed the fax number on the campaign report was the fax number of Katie Ward & Associates. She stated she was not positive who faxed the report from the office's fax machine, but noted that Marie Anderson, treasurer of the Ballot Committee when the fax was made, was her friend. Olson surmised she had allowed Anderson to use the fax machine.

Olson said there is no individual cost associated with use of the fax machine. Katie Ward & Associates pays a fee for use of five lines from Blackfoot communications. That fee is paid regardless of the amount of telephone or faxing through the lines. The faxing at issue added no cost to Katie Ward & Associates. Use of the fax machine is similar to allowing a friend to make a phone call from the business phone where one works.

In order to be an "in-kind contribution" invoking campaign reporting obligations, the services provided must be associated with an "out-of-pocket expense." See *Canyon Ferry Road Baptist Church of East Helena v. Unsworth*, 556 F.3d 1021, 1029 (9th Cir. 2009) (discussing the due process vagueness standard for the definition of "in-kind contribution" under Mont. Admin. R. 44.10.321(2)(a) and 323(2)). When an activity brings no detriment and carries no market value, prosecution for campaign violations raises due process vagueness

concerns due to lack of notice that provision of the service could represent a campaign contribution that must be reported.

Where there was no detriment to Katie Ward & Associates for allowing a fax to be made from the firm's office, use of the fax machine cannot be considered an unreported in-kind contribution. Nor would Katie Ward and Associates become an incidental committee for purposes of Montana campaign law.

B. Faxing from Reynolds, Motl and Sherwood

With respect to the other reports, the faxes were made from Reynolds, Motl and Sherwood (RMS), a law firm in Helena, Montana. Buell alleges those faxes should have been reported as an in-kind contribution. He further asserts RMS became an incidental ballot committee by sending in the Ballot Committee's reports via its fax.

The Ballot Committee responded that faxing was not an in-kind donation because the law firm was not a contributor to the Ballot Committee but rather a service provider. The Ballot Committee's Amended Answer noted the law firm's services had been reported by Footloose as an incidental committee contribution to the Ballot Committee.

The independent investigator interviewed Jami Welch, a paralegal at the RMS office regarding the faxing of the other campaign reports. Welch indicated faxing is a service provided by the firm as part of legal representation. Welch understood that local faxing carried no cost to the law firm separate from maintenance of phone lines and was not managed by the firm as a separate cost to clients. She reported the law firm does not keep a record of local faxes.

RMS legal services were duly noted on each campaign report as an expense or debt rather than a contribution. Under such circumstances, there was no violation of law with respect to faxing.

III. CHRONOLOGICAL DISCUSSION OF CAMPAIGN REPORTS

A. C-6 Report for Period from May 1, 2009 - September 30-2009.

i. In-Kind Contributions

Buell alleged the Ballot Committee violated campaign laws with respect to an event hosted by Footloose on September 10, 2009. Buell alleged the Ballot Committee failed to report in-kind donations or expenses "for advertising (poster included), wine served or for a venue at Ten Spoon Wines" in violation of §§ 13-37-208(1), 13-37-229(11), or 13-37-230(1)(g), MCA.

In defense against Buell's allegations, the Ballot Committee argues the event was primarily an event for Footloose membership, not primarily a fundraiser for I-160. The Ballot Committee notes that I-160 was not in fact approved for language or number until September 9,

2009, the day before the September 10 event. Under §13-1-101(17)(b), for purposes of chapters 35 and 37 of the election laws, which include contribution reporting requirements and flyer attribution requirements, a statewide ballot issue such as presented by I-160 "becomes a 'ballot issue' upon preparation and transmission by the secretary of state of the form of the petition or referral to the person who submitted the proposed issue."

Anja Heister was the executive director of Footloose at the time of the September 10, 2009 event. She and Connie Poten told the investigator the September 10th fundraiser was primarily an educational and promotional event for Footloose rather than primarily an event to support I-160.

While the Deputy Commissioner is persuaded Footloose as an organization created the flyer and distributed it to existing Footloose membership for purposes of allegations against the Ballot Committee under §13-35-225, MCA relating to flyer attribution(see below), the Ballot Committee cannot avoid its contribution reporting obligations by claiming distance from Footloose. Many of the same people involved in Footloose were involved in the Ballot Committee and the petition drive. Even if I-160 was not formally approved for signature-gathering until the day before the September 10 event, that event obviously focused on the petition drive. This was obviously known to officers and organizers of the Ballot Committee.

The flyer for the event (Appendix 1 to this decision) stated: "Please join us for a Footloose and Fancy-Free Fundraiser and **Celebration of our Petition Drive to End Trapping on Montana's Public Lands.**" The flyer promised: "Music *** Food *** Games *** Live & Silent Auction *** Ten Spoon wines *** Local brews *** Bonfire *** **Petition Signing to End Recreational Trapping on Public Lands.**" On the first Political Committee Finance Report (Form C-6) filed by the Ballot Committee, the September 10 event was described as, "**Petition Kick Off Party Outside with a Band, approximately 250-275 people.**" (Emphasis added).

Under §13-37-208, MCA, "the campaign treasurer of each candidate and each political committee shall keep detailed accounts of all contributions received and all expenditures made by or on behalf of the candidate or political committee that are required to be set forth in a report filed under this chapter." Section 13-37-229, MCA, requires reporting of contributions to a political committee, including in-kind contributions.

The in-kind reporting obligations arose after the contributions were made in the course of the event, which occurred after the Secretary of State had transmitted the form of the ballot initiative. The Ballot Committee recognized its reporting obligation relating to the event. On its C-6 for the period, the Ballot Committee reported \$3,393.75 in cash receipts from the fundraiser, as well as an in-kind contribution of \$5,325.82 from the Footloose Incidental Committee. The in-kind contribution is itemized into six contribution categories, half relating to organizing and ballot drafting and half relating to the September 10 event:

- salary for Anja Heister for organizing and drafting the ballot initiative (\$3,718.50)
- Verizon cell phone charges relating to organizing and drafting the initiative (\$298.37)
- legal services from RMS for advice on ballot initiative and drafting (\$750.00)

- “beer for petition kick off” from Big Sky Brewing (\$49.00)
- “tent, tables & chairs for petition kick off” (\$309.95)
- “band for initiative kickoff” (\$200.00)

There were no specific contributions reported for wine provided at the event or for use of the Ten Spoons venue. No contribution was reported for production and distribution of the flyer produced to promote the event.

In response to the complaint, the Ballot Committee pointed out that “it reported as an in-kind expense the full amount reported to it as an in-kind contribution by the Footloose incidental committee.” The Ballot Committee argued Footloose assigned a proportional share of the cost of the event as an in-kind contribution and that, as suggested in *Matter of the Complaint against Montanans for Common Sense Water Laws/Against I-122*, Footloose is best able to make a good faith determination of the fair application of costs for such an event.

Even accepting this proposition as a general guideline, the Deputy Commissioner concludes that individuals in responsibility for the Ballot Committee were involved in the September 10 event and obviously knew that wine provided for the event and the use of the Ten Spoons venue inured to the benefit of the Ballot Committee, as much or more than beer, furniture rentals, and perhaps even the band.

In particular, Marie Anderson was the initial treasurer for both political committees. Connie Poten, owner of Ten Spoons, was Vice-Chair of the Ballot Committee and Footloose Incidental Committee. As confirmed by investigation, as an owner of Ten Spoons, Poten was involved in wine donation and facility use. From the perspective of the Ballot Committee, of which Poten was Vice-Chair, there was obviously knowledge that the September 10 event was a “Petition Kick Off Party” and that donation of wine and venue inured to the benefit of the Ballot Committee and petition drive. Wine for the 250-275 people reportedly in attendance at the event could have had substantial in-kind cost. Even if some allocation between a “primarily Footloose purpose” and a “petition drive benefit” made any sense, the reporting made by the Ballot Committee was not sufficient to inform the public as to the in-kind donations involved in the event.

Under these circumstances, the Deputy Commissioner finds the Ballot Committee to have violated campaign finance reporting laws with respect to omission of in-kind donation reporting for wine and venue at the September 10, 2009, event.

With respect to the flyer, Buell’s complaint about flyer attribution requirements is handled below, but the Deputy Commissioner addresses here Buell’s complaint that the cost of producing the flyer for the event should have been reported as an in-kind donation. In addition to the arguments noted above, the Ballot Committee asserts that any costs associated with the flyer are excluded from the definition of “contribution” under §13-1-101(7)(b)(iii), MCA. That subsection provides that “contribution” for purposes of the campaign contribution requirements does not include “the cost of any communication by any membership organization or corporation to its members, stockholders or employees.”

The Deputy Commissioner credits evidence that the flyer itself was primarily distributed by email and finds that any costs associated with it were minimal. Anja Heister told the investigator she made the flyer and distributed it to the membership of Footloose mostly by email. While not specifically attributed to flyer preparation, some of Anja Heister's salary was reported by the Ballot Committee as an in-kind donation from Footloose Incidental Committee. Even assuming some hard copies of the flyer were made, the Deputy Commissioner cannot conclude that any unreported costs associated with the flyer rose above a *de minimis* level as stated in the *Canyon Ferry Baptist Church*. See *Royston v. Crosby*, No. COPP 2012-CFP-41 (an expenditure of \$273 was considered *de minimis* and did not trigger violation of campaign reporting laws). In addition, the Deputy Commissioner is persuaded that the flyer itself was primarily directed to Footloose membership and deserves protection as a communication to membership.

ii. **Flyer attributions (September 10, 2009, Event)**

Buell also alleged the poster (more accurately described as a flyer) violated §13-35-225(1) with respect to information that should have been included.

Section 13-35-225, MCA, in pertinent part, requires that:

All communications advocating the success or defeat of a candidate, political party, or ballot issue through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, poster, handbill, bumper sticker, internet website, or other form of general political advertising 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.

As noted above, Anja Heister told the investigator she made the flyer and distributed it to the membership of Footloose mostly by email. The flyer for the September 10th fundraiser does not have a "paid for by" attribution, but does have a logo indicating it was an event sponsored by Footloose Montana.

As also noted above, people associated with Footloose and the Ballot Committee told the investigator the event was primarily for Footloose membership, rather than for I-160. The Deputy Commissioner has already cited evidence indicating the event focused on the ballot initiative so as to require reporting of in-kind contributions, but views the question of required attribution under §13-35-225, MCA, as a separate matter. Most importantly, even while the event inured to the benefit of the petition drive and Ballot Committee, the Deputy Commissioner finds that Footloose as an entity created the flyer, while the present complaint is against the Ballot Committee.

The Deputy Commissioner also notes constitutional limits on interpreting communications as "advocacy" so as to invoke the requirements of §13-35-225, MCA. Under that section, all communications "advocating the success or defeat of a candidate or ballot issue" (emphasis added) must have a conspicuous "paid for by" attribution. Prior decisions of

the Commissioner of Political Practices have interpreted §13-35-225, MCA, to apply only to communications that “expressly advocate” the success of a candidate, political party, or ballot issue. *Roberts v. Griffin & Lewis & Clark County*, Summary of Facts and Statement of Findings, at 8 (Nov. 19, 2009). While Montana statutes do not define “express advocacy,” federal case law offers authority to assist interpretation of the term to ensure that enforcement of Montana law is consistent with federal constitutional principles.

Extensive review of that law is not necessary for this decision, but the Deputy Commissioner notes that, since, *Buckley v. Valeo*, 424 U.S. 1 (1976), the United States Supreme Court has construed “express advocacy” so as to avoid hindrance of rights to free speech. In *Buckley*, the Court recognized that general discussions of issues and candidates are distinguishable from more pointed exhortations to vote for or against particular persons. In a footnote, the Court listed examples of express advocacy, which have become known as “magic words,” including phrases such as “vote for,” “elect,” “support,” “cast your ballot for,” “vote against,” “defeat,” “reject,” etc. *Buckley* at 44, n. 52. More recently, the United States Supreme Court held that “a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Wisconsin Right to Life v. Federal Election Comm'n*, 551 U.S. 449, 469-70 (2007) (“WRTL”).

While clearly focusing on the upcoming Petition Drive and stating that “petition signing” would occur at the event, the flyer does not, in itself, advocate passage of I-160, which had not yet even been approved in form by the Secretary of State when the flyer was drafted and distributed. Given that the flyer was created before the Secretary of State had transmitted the form of the initiative, pursuant to §13-1-101(17)(b), a ballot issue for purposes of attribution requirements does not appear to have existed at the time the flyer was created.

Most importantly, insofar as a complaint against the Ballot Committee is concerned, the Ballot Committee should not be held accountable for any failure of attribution on what the Deputy Commissioner is convinced was a flyer of the Footloose organization, communicated to its existing membership. For these reasons, no violation of §13-35-225, MCA, is found against the Ballot Committee with respect to the September 10, 2009, flyer.

B. C-6 Report for the Period from October 1, 2009 to December 31, 2009

i. Reporting issues concerning November 8, 2009 event

Buell alleged violations for:

- failure of the Ballot Committee to list the number of people in attendance at five fundraisers,
- omission of costs associated with a flyer used for an event held on November 8, 2009, and
- failure to report in-kind expenses relating to the fundraisers.

In its Amended Answer, the Ballot Committee explained there were not five fundraising events, but rather one. That event took place on November 8, 2009 at biga pizza in Missoula. In-kind contribution costs for that one event appear to have been properly reported on the C-6 for this period.

Anja Heister confirmed to the investigator that only one fundraiser occurred during this period, but noted that tables were set up at various farmers' markets where donations were received and petitions were available for signing. The amount of donations from those tables was duly reported on the C-6, which presumably led to Buell's conclusion that five events took place.

With respect to the November 8, 2009, event, the original C-6 report of the Ballot Committee does not list the number of people attending but does list the amount of \$634 as contributions to the Ballot Committee in donations of \$35 or less.

The Ballot Committee filed an Amended Report with its Amended Answer. The Amended Report listed the number of people attending as 100. As Anja Heister and Dave Taylor told the investigator, this was based on their memory and their conversation with Bob Marshall, the owner of biga pizza. The Ballot Committee acknowledged reporting the number of people attending the event was late, but suggested this should be found a *de minimis* violation and should not be the basis for a civil prosecution.

In the context of this matter, the Deputy Commissioner finds the failure to report the number of people attending the biga pizza event a violation of campaign finance reporting laws. Commissioner of Political Practices Rule 44.10.521(1) (b) requires reporting of the "approximate number of individuals in attendance at a fund-raising event" when individual contributions under \$35 are lumped together for reporting purposes. Reporting the number of people in attendance at an event is not unimportant, as this becomes a gauge for evaluating the legitimacy of other matters reported. However, where contribution amounts, both in-kind and actual, were duly reported, the Deputy Commissioner finds that prosecution for belated identification of the number of people in attendance is not warranted.

The Ballot Committee maintained that the costs of the poster and its distribution need not be reported as a *de minimis* expense under the *Canyon Ferry Baptist Church* decision. For the reasons noted with respect to the flyer for the September 10, 2009, event, the Deputy Commissioner finds any costs of this flyer were a *de minimis* expense not sufficient to provide notice to persons involved that an expense must be reported as a contribution.

ii. Flyer attributions (November 8, 2009, Event)

Buell asserted the flyer of November 8, 2009 did not comply with § 13-35-225(1), MCA.

Anja Heister confirmed that she also produced this flyer and distributed it among the Footloose membership, as she had the flyer for the September event. Both Anja Heister and Connie Posten stated this event was also generally for Footloose.

As with the flyer for the September 10th event, the flyer for the November 8, 2009, event (Appendix 2 to this decision) did not directly advocate support or opposition to I-160. This flyer did not even reference the petition drive. It reads: "Footloose Montana invites you to a party In Support of Trap Free Public Lands at biga pizza." It also stated: "Help make our public lands safe for people, pets and wildlife."

For the reasons noted with respect to the September 10 flyer, the Deputy Commissioner declines to find a violation against the Ballot Committee under §13-35-225, MCA. Primarily, the Deputy Commissioner is persuaded this event was promoted by Footloose as an organization and holding the Ballot Committee responsible for attributions is not appropriate, whether or not the flyer represented express advocacy.

C. C-6 Reports for the Periods from January 1, 2010 to March 5, 2010 and March 6 to April 5.

Buell alleged the Ballot Committee failed to properly describe a fundraising event and failed to list the number of people in attendance at the event.

The Ballot Committee responded that the event was actually a petition-training workshop attended by 15 people. Anja Heisler confirmed to the investigator that the event was a workshop, not a fundraising event. A donation jar was at the workshop, resulting in \$104 in donations, which were duly reported on the C-6 for this period. The C-6 describes a "Missoula workshop; all cash donations less than \$35.00."

The Amended Answer of the Ballot Committee listed the number of people at the workshop as 15. In these circumstances, the Deputy Commissioner is not persuaded the workshop was a fundraiser requiring reporting as such. Even if it were, the Deputy Commissioner finds the only potential violation to involve late reporting of the number of people at the workshop. In these circumstances, given that the number of people attending was eventually provided, any violation is not appropriately referred for prosecution.

D. C-6 Report for the Period from April 6-May 5, 2010

Buell alleged four violations with respect to this period:

- that a flyer for another event held at biga pizza in Missoula was in violation of §13-35-225(1), MCA;
- that the C-6 report for this period failed to describe the fundraising event and the number of people in attendance;
- that the report failed to list in-kind donation of wine; and
- that 13 other listed contributions failed to contain mandatory information such as occupation, name of donor in the case of donations from joint checking accounts, and addresses.

The flyer for a fundraising event held on April 11, 2010 contained essentially the same information as the flyer for the November 8th event. (See Appendix 3). The Deputy Commissioner reads the flyer as primarily an invitation to a Footloose fundraiser. For the reasons noted above with respect to the earlier flyers, the Deputy Commissioner declines to find a statutory violation under §13-35-225(1), MCA, with respect to missing attributions on this flyer.

With respect to the remaining alleged reporting errors, the Deputy Commissioner finds the nature of the event is revealed through the filing, as well as the wine donation. As in a prior reporting period, the Deputy Commissioner finds a violation through failing to report the number of people in attendance at the event, but will not refer that violation for prosecution under the *de minimis* principle.

The Amended Report filed only a few days after the original, which was not likely seen by Buell, provided information regarding profession. Information regarding which of the people named on checks was the actual contributor is typically obtained by the Commissioner's office through email or other communications. It appears the Ballot Committee was cooperative in providing such information. Violations will not be found with respect to dual names.

E. C-6 Report filed for the period from May 6 to May 19, 2010

Buell alleged:

- the "Cash in Bank" entry on this report did not match the prior report,
- there were three entries of dual names inappropriately listed,
- the Humane Society of Billings failed to file as an incidental committee,
- the total amount of Connie Poten's contribution was incorrect, and
- the entry concerning the expense to Fleet Maintenance and related to the correction referencing the May Amended Report made no sense.

Allegations concerning "Cash in Bank," the total amount of Connie Poten's contribution, and the reference to Fleet Maintenance and a correction report were apparently based on Buell not having been aware of the May Amended Report. When the Amended Report is taken into account, the Deputy Commissioner does not find violations with respect to these matters.

The allegation concerning the failure of the Humane Society of Billings to register as an incidental committee was not a responsibility of the Ballot Committee. The Ballot Committee satisfied its obligation by reporting an in-kind contribution from the Humane Society of Billings.

With respect to the dual listing of three couples, as noted above, the Commissioner's office typically follows up for this information and the Ballot Committee appears to have been responsive. In addition, in response to this allegation, the Ballot Committee responded that listing individuals separately with respect to contributions made on a ballot initiative is not

necessary because there is no contribution limit applicable to support of ballot initiatives. The Ballot Committee also maintained such an error is *de minimis* and not a legitimate basis for a civil penalty. The Commissioner recently addressed this issue in Baker v. KEY, No. COPP 2011-CFP-32, holding that although § 13-37-229, MCA, requires that contributions be disclosed as to "each person," such a violation was *de minimis* and would not be pursued. Here, no violation is found and if there were a violation, the Deputy Commissioner finds that it would not be appropriately prosecuted in this matter under the *de minimis* principles.

The Deputy Commissioner also notes that Rule 44.10.511(2), Admin. R. Mont. states that when a contribution is received by a check drawn on a joint checking account, the contribution is deemed to come from the person signing the check unless otherwise specified in writing at the time the contribution is received. Because the filings with the Commissioner's office do not include check copies, listing of the name is appropriate on reports, but can be listed by the filing parties based on who signed checks.

F. C-6 for the Reporting Period from May 20 to May 29, 2010.

i. Signature gathering

Buell alleged violations with respect to reporting of payments by the Ballot Committee to ballot signature gatherers. The C-6 for this period listed two payments to Express Personnel services as "payment for hiring signature gatherers," but does not list the names or addresses of the signature gatherers. Buell alleges this violates the general reporting requirements in § 13-37-230(1) and also references § 13-27-112(2), MCA, which requires that information on signature gathering payments must include "the amount paid to a paid signature gatherer."

The Ballot Committee filed an Amended Report with its Amended Answer, and attached an "Exhibit 1" stating amounts paid to and addresses of signature gatherers. Exhibit 1 lists names and addresses of the signature gatherers, total amount paid to each signature gatherer, and the date on which the total amount was paid. For example, with reference to signature gatherer Maura Browne, Exhibit 1 states she was paid \$274.50 for 30.5 hours worked. The column lists her as having done this work on June 13, 2010. With respect to other signature gatherers, the total number of hours work and the amount paid are shown, but the actual days worked are not indicated.

The investigator learned from Commissioner of Political Practices Program Supervisor Mary Baker that the Commissioner's office advises the public that only the total amount and name and address need be reported with respect to payment of signature gatherers. Anja Heister stated that the information provided in Exhibit 1 was presented in the format used by Express Services.

The Deputy Commissioner finds the information provided to be sufficient in the context of this matter, but the information was provided late, only after filing of the complaint. This violation is not *de minimis* where signature gathering is treated as particularly significant under Montana campaign statutes – indicated by separate §13-27-112, MCA – and given that late

providing of information cannot be routinely deemed to rescue violations under a *de minimis* theory.

The Ballot Committee maintained that delay in providing the detail on signature gatherers in Exhibit 1 is a *de minimis* violation because failure to provide that information in a timely manner "caused no harm." However, lack of evidence of actual harm is not a standard incorporated into campaign violation laws.

ii. Booher loan

Buell also alleged the Ballot Committee failed to properly report a loan from Barbara Booher. Buell pointed out the C-6 did not list the purpose of the loan. The Ballot Committee argued in its Amended Answer that the purpose of the loan was obviously to support the ballot committee and no further description should be required.

The investigator asked Anja Heister about the Booher loan. Heister stated it was eventually just a donation to the Ballot Committee and no repayments were made. The records of the Commissioner's office, as well as subsequent filings, indicate the loan was transformed into a straight contribution. Proper notice of this transformation was provided to the Commissioner's office.

Rule 44.10.515(1), Mont. Ad. Rules, provides:

44.10.515 LOANS AS CONTRIBUTIONS, REPORTING

(1) For the purposes of Title 13, chapter 37, MCA, and these rules, a loan shall be reported as follows:

- (a) A candidate or political committee shall report a loan on the appropriate reporting schedule and, in addition to the reporting requirements specified in ARM 44.10.511, shall identify it as to its nature.
- (b) A loan made to a candidate or political committee by a person, other than in the regular course of the lender's business, shall be deemed a contribution by that person.
- (c) A loan made to a candidate or political committee by any person in the regular course of the lender's business shall be deemed a contribution by the obligor on the loan and by any other person endorsing the loan. (Emphasis added).

The regulation requires reporting of the "nature" of a loan. The Deputy Commissioner concludes that the "nature" of the loan to the Ballot Committee was sufficiently obvious, that is, to provide resources supporting the efforts of the initiative drive. No violation is found with respect to the loan.

G. C-6 for the Period from May 30 to June 5, 2010.

Apparently because he was not able to review the Amended Report filed in May 2010 by the Ballot Committee, Buell alleged that the amount of in-kind contributions from Connie

Poten were not calculated correctly. He also alleged violations with respect to expenditures for the RV used by Anja Heister and Dave Taylor to gather signatures. When the Amended Report is taken into account, the Deputy Commissioner is satisfied that these matters were sufficiently reported and that no violation is established.

Buell also alleged violations with respect to the general reporting of expenses associated with payment to signature gatherers. As noted above, the Ballot Committee has been found in violation of reporting statutes with respect to signature gathering expenses as noted above. The violation crosses over several reporting periods.

H. C-6 for the Period from June 6 to June 23, 2010.

Buell alleged violations for:

- failure to list the occupations of two contributors;
- accepting an improper corporate donation from Wildeye Photography;
- reporting a questionable amount of in-kind contributions from Connie Poten;
- improper reporting relating to signature gatherers;
- and reporting a questionable amount for use of the RV.

The Ballot Committee contends the occupation of one individual was provided in a subsequent filing and the occupation of the second person in the Amended Answer to Buell's complaint. Listing the profession of a contributor is required; failing to provide that information establishes a violation. However, in this context where substantial information was provided, the Deputy Commissioner finds the late provided information not warranting prosecution under the *de minimis* principle.

As noted by the Ballot Committee, the prohibition on contribution from a corporation or business does not apply to a ballot committee. No violation is established with respect to accepting a contribution from Wildeye Photography.

The in-kind contributions from Connie Poten are linked back to the May Amended Report. No violation is established.

The payment to signature gatherers has been found to establish a violation.

With respect to use of the RV, Dave Taylor stated he purchased the RV and donated it to Footloose in 2007 when Footloose was first organized. Footloose used the RV for educational purposes on various occasions since that time. Anja Heisler and Taylor used the RV to travel around Montana providing workshops on trapping. During May 2010 the RV was used by Taylor and Heister not only for continued educational programs for Footloose, but also to gather signatures for I-160. The proportional rent of the RV was listed on the May Amended Report. Costs and gas associated with use of the RV for signature gathering purposes are also listed on the May Amended Report. No violation is established relating to the RV.

IV. CONCLUSION

For the reasons stated above, there is sufficient evidence to conclude that the Ballot Committee violated Montana campaign finance and practice laws warranting referral for prosecution with respect to failure to identify in-kind contributions for wine and venue-use relating to the September 10, 2009, event, and post-complaint identification of information regarding paid signature gatherers.

Dated this 13th day of November, 2013



Jay E. Dufrechou
Deputy Commissioner of Political Practices