

BEFORE THE COMMISSIONER
OF POLITICAL PRACTICES OF THE STATE OF MONTANA

Clark v. Assembly Action Fund No. COPP-2010-CFP-013	Summary of Facts and Finding of Sufficient Evidence To Show a Violation of Montana's Campaign Practices Act
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Kelly Flynn of Townsend and Terry Bannan of Belgrade were candidates for the Montana House of Representatives, House District 68, (HD 68) in the 2010 Republican primary election. In July of 2010 Linda Clark of Belgrade filed a complaint against Assembly Action Fund (AAF) alleging impropriety in its use of an attack flyer in the 2010 HD 68 Republican primary election. On November 12, 2013 the Clark complaint was expanded to new complaints against Candidate Bannan and Western Tradition Partnership, with the new complaints including a review of coordination and corporate contribution issues. The new complaints referenced and incorporated the issues identified in the Commissioner's Decision of *Bonogofsky v. Kennedy*, COPP 2010-CFP-15. The Decision in this matter is released simultaneously with the Decision in *Clark v. Bannan*, COPP-2010-CFP-023.

I. INTRODUCTION

The 2010 HD 68 primary election involved two candidates, Kelly Flynn and Terry Bannan. Candidate Flynn defeated Candidate Bannan in the June 8, 2010 primary election by a vote of 1,473 to 654. Candidate Flynn went on to win the general election and became a representative to the 2010 Montana legislature from HD 68. (SOS Website).

Linda Clark filed a post-election complaint against Assembly Action Fund (AAF) because she believed that AAF made unreported and undisclosed 2010 HD 68 election expenditures. Clark complained that the AAF election expenditures were electioneering and that AAF improperly acted without reporting and disclosing as required by Montana law.

An election expense such as those addressed in this Decision falls into one of three types. The first type is that of a candidate election expense. A candidate election expense includes money spent in an election that is contributed to and expended by a candidate. Candidate election expenses are, of course, subject to prohibitions and contribution limits and they must be attributed, disclosed and reported by the candidate. A candidate election expense includes a third party election expense coordinated with a candidate, as a coordinated expense is deemed to be an in-kind contribution to a candidate.

The companion *Clark v. Bannan* Decision determined that the AAF expenses are election expenses. The Decision has further determined that the

AAF expenses are an in-kind contribution to Candidate Bannan, through coordination.

The *Clark v. Bannan* Decision means that it is not necessary to determine whether the AAF election expenses fall into one of the remaining two types of election expense; that is, whether the AAF expenses are independent expenditure or an issue advocacy expenditure. An independent expenditure is that of a third party entity independent of a candidate, but focused on a candidate in the election. Any “independent expenditure” must be disclosed, reported, and attributed, albeit by the third party rather than the candidate. An independent expenditure, however, is not attributed as a contribution to a candidate and therefore it is not subject to contribution limits or to reporting by a candidate.

The third type of election expense is that made coincident to the election by a third party entity independent of a candidate, but with the use of the money focused on an issue and not on a candidate. This election expense is called issue advocacy. This “issue advocacy” expense is not considered to be a candidate related expense and therefore is not subject to campaign practice requirements. Specifically, Montana law does not require that an issue advocacy expense be attributed, reported or disclosed.¹

¹ The 2012 Montana Legislative session considered several bills that would have required reporting and reporting and disclosure of any election expense, including issue advocacy, made within 60 days of the date of an election. None of these bills passed into law. A 2014 ballot initiative has been proposed to address this issue.

II. SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: 1) Coordination; and 2) Illegal Corporation Contributions.

III. DISCUSSION

This Decision does not repeat, but incorporates and relies on, the determinations and reasoning set out in *Clark v. Bannan*, COPP-2010-CFP-023. The *Clark v. Bannan* Decision determined that sufficient evidence existed to show that certain election expenses made by or orchestrated by WTP, either directly or through AAF, were coordinated with Candidate Bannan such they became in-kind election contributions to Candidate Bannan. Another companion Decision (*Clark v. WTP*, COPP-2010-CFP-024) finds sufficient evidence to show WTP jointly responsible for AAF actions. This Decision finds sufficient evidence to show that AAF is independently responsible for these actions.

The basis for a finding of coordination, as explained by *Clark v. Bannan* is that Candidate Bannan and WTP and/or AAF acted together such that in-kind election expenses made by AAF became in-kind election contributions to Candidate Bannan. *Clark v. Bannan* identified an AAF endorsed Slick as a 2010 HD 68 coordinated election expense as made by, or under the direction of, WTP acting with AAF.

Coordination is a two way street. *Clark v. Bannan* found sufficient evidence to determine that Candidate Bannan coordinated illegal WTP and/or AAF corporate election expenses as an in-kind contribution to his campaign.

This companion Decision finds sufficient evidence that AAF, as the other part of the coordinated expense, made illegal coordinated corporate election expenses on behalf of Candidate Bannan.

IV. FINDINGS

The Commissioner incorporates the *Clark v. Bannan* findings as to AAF election expenses in the 2010 Montana HD 68 election. These findings include a finding of AAF election expenses and AAF coordinated election expenses. In addition *Clark v. Bannan* found that AAF was incorporated in the State of Colorado.

V. SUMMARY OF CAMPAIGN PRACTIC VIOLATIONS

The Commissioner finds there is sufficient evidence to show that AAF violated Montana's campaign practice laws, including but not limited to § 13-35-227(1) MCA. Section 13-35-227 MCA prohibits corporate contributions to any Montana candidate for public office. The *Clark v. Bannan* Decision found sufficient evidence to show that Candidate Bannan violated §13-35-227(2) MCA, the subsection of law that prohibits a candidate from accepting a corporate contribution. In this Decision the Commissioner finds sufficient evidence to show that AAF violated subsection one, the prohibition on a corporation making such an election contribution.

Because AAF's election contribution to a candidate was prohibited in any amount, AAF could not cure the contribution by attribution, registration, reporting or disclosure. Section 13-35-227 MCA is enforced under the civil

provisions of Chapter 37, specifically §13-37-128 MCA. See §13-35-227(4) MCA.

VI. 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 make, a decision as the law mandates that the Commissioner (“shall investigate,” see §13-37-111(2)(a) MCA) investigate any alleged violation of campaign practices law. The mandate to investigate is followed by a mandate to take action as the law requires that if there is “sufficient evidence” of a violation the Commissioner must (“shall notify”, see §13-37-124 MCA) initiate consideration for adjudication.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence, as set out in this Decision, to show that AAF has, as a matter of law, violated Montana’s campaign practice laws, including but not limited to §13-35-227 MCA. Having determined that sufficient evidence of a campaign practice violation exists, the next step is to determine whether there are circumstances or explanations that may affect adjudication of the violation and/or the amount of the fine.

The many decisions to act or to not act made by AAF in this matter were choices. Excusable neglect cannot be applied to such choices. See discussion of excusable neglect principles in *Matters of Vincent*, CPP-2013-CFP-0006 and

0009. Montana has determined that political discourse is more fairly advanced when election funding is kept fair and, through disclosure, the public is informed as to the identity of those who seek to influence elections. There can be no excuse, but only punishment, for illegal election contributions such as are involved in this matter.

Likewise, the amounts of money are too significant to be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, CPP-2013-CFP-006 and 009. With the above analysis in mind, this Matter is also not appropriate for application of the *de minimis* theory.

Because there is a finding of sufficient showing of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil adjudication and/or a civil fine is justified, §13-37-124 MCA. This Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil adjudication under §13-37-124 MCA. This matter will now be submitted to (or “noticed to”)² the Lewis and Clark County attorney for his review for appropriate civil action, §13-37-124(1) MCA. Should the County Attorney waive the right to adjudicate (§13-37-124(2) MCA) or fail to adjudicate within 30 days (§13-37-124(1) MCA) this Matter returns to this Commissioner for possible adjudication. *Id.*

Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further


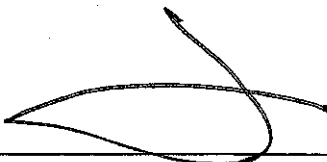
² Notification is to “...the county attorney in which the alleged violation occurred...” §13-37-124(1) MCA. The failure to attribute occurred in Yellowstone County and the failure to report occurred in Lewis and Clark County. This Commissioner chooses to Notice this matter to the county attorney in Lewis and Clark County.

consideration. Assuming that this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil adjudication as the Commissioner has discretion ("may then initiate" see §13-37-124(1) MCA) in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of Chapter 37, including those of §13-37-226 (see 13-37-128 MCA). Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

VII. CONCLUSION

Based on the preceding discussion as Commissioner I find and decide that there is sufficient evidence to show that AAF violated Montana's campaign practices laws. This matter is hereby submitted to [or "noticed to"] the Lewis and Clark County Attorney for his review for appropriate civil action.

Dated this 22nd day of January, 2014.



Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana
P.O. Box 202401
1205 8th Avenue
Helena, MT 59620
Phone: (406) 444-4622