

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Duffy v. Neil No. COPP 2015-CFP-015	Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act DISMISSAL OF COMPLAINT BY APPLICATION OF DE MINIMIS PRINCIPLE
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On October 26, 2015, George Duffy, a resident of Vaughn, Montana filed a complaint against Kay Neil, a resident of Great Falls, Montana and 2015 candidate for the Vaughn-Cascade County Water & Sewer District board. Mr. Duffy alleged that Candidate Neil violated Montana finance and practice laws by posting campaign materials in public view without including an attribution statement listing the name and address of the person who paid for the campaign materials.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this Decision is that of attribution relating to a water and sewer board election.

SUMMARY OF RELEVANT FACTS:

The facts necessary for a determination in this matter are as follows:

Finding of Fact No. 1: Vaughn, Montana is an unincorporated population center (“town”) that is located within Cascade County and considered part of the Great Falls metropolitan area. (Wikipedia, Vaughn related websites).

Finding of Fact No. 2: The town of Vaughn is not organized as a political entity but the people of Vaughn have organized, through Cascade County, as the Vaughn Cascade County Water and Sewer District (VWSD). The VWSD is governed by a 5 member Board whose members are appointed or elected. The Board is considered “volunteer” with members receiving a stipend of \$60 per month. There were two open VWSD Board seats up for election in the November 3, 2015 Municipal City Election (Great Falls, Montana – Cascade County).

Finding of Fact No. 3: No 2015 candidate for election to the VWSD Board timely filed with the Cascade County Election’s Office. Thus, there were no VWSD Board candidates listed in the 2015 ballots provided to Vaughn voters.

(Cascade County Election’s Office, VWSD board member, and Response to the Complaint).

Finding of Fact No. 4: Four 2015 “write-in” candidates for the VWSD Board announced for election: Kay Neil, Sean Beach, Nancy Ackerson and George Duffy. (Investigator’s notes, Response to the Complaint).

Finding of Fact No. 5 George Duffy, one of the 2015 write-in candidates for election the VWSD board, filed the complaint in this Matter. The Complaint alleged that Candidate Neil posted campaign posters in public places in the town of Vaughn advocating the election of certain write-in candidates (Poster). Mr. Duffy further alleged that Candidate Neil did not include an attribution statement on the posters identifying who paid for the Posters. (Complaint).¹

¹ Mr. Duffy had previously served on the VWSD board for 10 years.

Finding of Fact No. 6: The Posters, as printed, were 17” x 11” in size. Each poster listed 3 out of the 4 write-in candidates for election to the VWSD Board: Kay Neil, Sean Beach and Nancy Ackerson. Voters were urged to “write-in” in the name(s) of “Kay L. Neil, Sean Beach or Nancy L. Ackerson.”² (Complaint and inspection of Poster).

Finding of Fact No. 7: Candidate Neil spoke with the Commissioner’s investigator and stated that she had printed a total of 5 identical Posters (see FOF No. 6). The Posters were hung by Candidate Neil in her own business and at 4 other public places around Vaughn.³ (Investigator’s notes).

Finding of Fact No. 8: Candidate Neil said she printed the Posters herself, spending up to \$30 on ink and materials, including paper slips bearing the correct spelling of candidate names that were affixed to but could be removed from the posters. Candidate Neil mentioned that one of the Posters was removed from the place where she had posted it. (Investigator’s notes).

Finding of Fact No. 9: Candidate Neil said she made the Posters to assist in providing voters with the correct spelling of the names of three candidates. Candidate Neil did this because the names of write-in candidates must be listed on the ballot as an exact match to the name listed on the form filed with the Election’s Office in order for the vote to count. (Cascade County Election’s Office, Investigator’s notes).

DISCUSSION

This Matter concerns the election, including money spent on an election, of members of the board of a water and sewer district. (FOF Nos. 1-9) Under Montana law a water and sewer district election, including that of the VWSD Board, is deemed a “special district” election that is generally not subject to the reporting and disclosure requirements of Montana’s Campaign Practice Act. See §13-37-206(2) MCA. Both “sewer districts” and “water districts” are listed as entities that are exempt from such general requirements. *Id.* Water and sewer district elections, however, are not exempted from the “attribution”

² George Duffy’s name as a fourth write-in candidate was not listed on the Poster.

³ Candidate Neil spoke with the Commissioner’s investigator on October 29 and 30, 2015.

requirements of §13-35-225, MCA. The Complaint specifically alleges a violation of this attribution requirement.

The determination of attribution as to these particular Posters is nuanced. The Posters are anonymous and, under some circumstances, 1st amendment principles limit enforcement of the attribution requirement of §13-35-225 MCA in regard to anonymous campaign documents. This measure is best defined in the case of *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995): “[u]nder our Constitution, anonymous pamphleteering is not a pernicious fraudulent practice, but an honorable tradition of advocacy and dissent.”

Past Montana Commissioners, citing *McIntyre*, have determined that the 1st Amendment protects written displays (leaflets, pamphlets, signs, posters) of unattributed (anonymous) speech from application of parts of Montana’s Campaign Practice Act: *Vanmeter v. asksheriffluckylarson*, November 10, 2011 (Commissioner Gallik), *Wittich v. Campbell*, November 17, 2009 (Commissioner Unsworth), *McAllister v Gardiner School District*, April 2003 (Commissioner Vaughey) and *Harmon v. Sweet*, December 31, 1997 (Commissioner Argenbright).

In this particular matter, however, the Commissioner determines that anonymity was waived. First, Candidate Neil paid for the Posters and placed her name in the Posters.⁴ Second, Candidate Neil informs that she hung the

⁴ This use of her name in the document alone argues against an intention of anonymity. See *Bixler v. Suprock*, COPP-2013-CFP-013 (Commissioner Motl) and *Olsen v. Valance*, November 17, 2009 (Commissioner Unsworth).

Poster in her own place of business and posted it herself in 4 other public places around town. (FOF No. 7). Both of these actions demonstrate that Candidate Neil did not intend anonymity as to her actions in paying for the Posters. Simply put, Candidate Neil failed to attribute by oversight, not because of a desire for anonymity.⁵

There being a surrender of anonymity by a candidate the language of §13-35-225(1) MCA is applied without check by *McIntyre* principles. When applied, §13-35-225(1) MCA requires attribution on “[a]ll communications advocating the success or defeat of a candidate...” The facts dictating application of the §13-35-225 (1), MCA in this Matter are:

- There were four write-in candidates for the VWSD. (FOF No.4);
- There was a Poster (communication) that made such an advocacy statement for 3 of the 4 candidates. (FOF No. 6);
- The Poster cost money. (FOF No. 5); and,
- The Poster did not have an attribution as to who paid the cost of printing the Poster. (Investigator’s review of Poster).

Based on the above the facts the Commissioner determines that the Poster is an advocacy publication requiring attribution:

Sufficiency Finding No. 1: The Commissioner determines that sufficient facts exist to show that Candidate Neil violated Montana’s campaign practice act by failing to properly attribute the Poster complained of in this Matter.

⁵ Candidate Neil was also required to acknowledge campaign expenses: “...made by a candidate ...to support or oppose a candidate...”(§13-1-101(17)(a)MCA). Citations made in this Decision reference the 2015 Montana Code Annotated rather than the 2013 version of the Montana Code in place at the time of 2014 elections. The numbering sequence in the 2015 Code changed from 2013 but the substance of the referenced section of law did not change. Use of 2015 citations allows a reader to more readily locate the cited law.

Candidate Neil explained her failure to attribute as unintentional. When notified Candidate Neil promptly corrected the omission by adding an attribution to the Posters.⁶ (Investigator's notes). The Commissioner determines that Candidate Neil's failure to attribute was due to oversight and not intention. Having determined a lack of intention, the issue the Commissioner next addresses is whether Candidate Neil's oversight can be excused as *de minimis*. *De minimis* is an established concept of law meaning that "the law does not care for, or take notice of, very small or trifling matters." Black's Law Dictionary 4th Edition.

The COPP began to regularly apply a *de minimis* exception to civil enforcement of a non-intentional, technical or minor violation of Montana's campaign practice, when directed to do so by the 9th circuit court of appeals in that matter of *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F. 3d 1021, 1028-29 (9th Cir. 2009). The *de minimis* actions in *Canyon Ferry* were the limited use of staff and copying expenditures by a party involved in a ballot issue campaign.

While not always identifying it as *de minimis*, Commissioners have long used the concept to dismiss prosecution of certain technical violations: no enforcement adjudication for lack of address, *Shannon v. Andrews*, COPP-2012-CFP-035 (Commissioner Murry); no enforcement adjudication for failure to list political party affiliation or funding source on a candidate website display, *Fitzpatrick v. Zook*, COPP-2011-CFP-014 (Commissioner Gallik); and no

⁶ The Commissioner notes that Candidate Neil's action met the correction requirement of §13-35-225(5)MCA.

enforcement adjudication when full name of committee treasurer omitted, *Ellis v. Yes on CI-97*, April 15, 2008 (Commissioner Unsworth). This Commissioner has applied *de minimis* to excuse technical violations for: omitting a 'paid for by' attribution, *Ulvestad v. Brown*, COPP-2013-CFR-025; accepting a contribution of \$40 over the allowed amount, *Rodda v. Bennett*, COPP-2014-CFR-013; failing to register/attribute as a political committee, *Royston v. Crosby*, COPP-2012-CFP-041; failure to fully attribute on a candidate letter, *Ponte v. Buttrey*, COPP-2014-CFP-007; failure to properly apportion total allowed amount of contribution between husband and wife, *Kenat v. Van Dyk*, No. COPP-2014-CFP-004, failure to list political party, *Strizich v. Loney*, COPP 2014-CFP-034 and failure to fully attribute a radio ad, *Cohenour v. Dooling*, No. COPP 2014-CFP-043.

Further, this Commissioner, in a January 31, 2014 advisory opinion to Emilie Boyles, generally placed the *de minimis* principle in Montana campaign practice law as follows:

Second, there is a *de minimis* exception to Montana's definition of campaign contribution. This means that costs, fees or charges associated with a minor amount of campaign speech need not be reported. The *de minimis* principle holds that robust election speech is favored such that minimal election speech actions cannot be burdened with any requirements. This principle would apply to exclude small cost amounts (such as one time electronic campaigning costs) from disclosure or reporting requirements.

COPP-2014-AO-003, Boyles.⁷

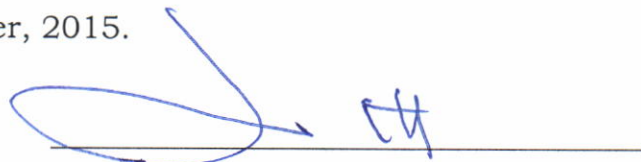
⁷ The constitutional considerations inherent in the "robust election speech issue" raised in the advisory opinion are further discussed in *Landsgaard v. Peterson*, COPP-2014-CFP-008.

Turning now to the Candidate Neil's activity, the Commissioner notes that the failure to attribute was of a limited nature (4 Posters) and promptly corrected when called to the attention of Candidate Neil. With these (and the above) considerations in mind, the Commissioner applies *de minimis* principle and dismisses the technical violation found in this Matter.

OVERALL DECISION

This Commissioner, having duly considered his review and investigation, hereby holds and determines, under the above stated reasoning, that there is insufficient reason to justify a civil adjudication against the parties as to the matters raised in the Complaint. Having applied the *de minimis* principle the Commissioner hereby dismisses this complaint in full.

DATED this 5th day of November, 2015.



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