

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Eaton v. Montanans for Experienced Judges No. COPP 2016-CFP-035	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION
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On October 11, 2016, Jake Eaton of Billings, Montana filed a complaint against Montanans for Experienced Judges (MEJ), a Montana political committee, for failing to choose a proper name for the political committee.¹

Discussion

The Complaint states one claim, that being a violation by MEJ of Montana’s “naming and labeling” statute, §13-37-210, MCA. ² A determination

¹ The involvement of two COPP contracted counsel in this Matter caused the Commissioner to consider but reject recusal under §13-37-111(3), MCA. Recusal was rejected on the basis that the issues raised by the Complaint involved settled campaign practice interpretation by Commissioners and on the basis that a late-in-the-campaign-cycle Complaint is best resolved by swift action by the Commissioner. *See Greenwood v. MSWD*, COPP-2014-CFP-062 for a further discussion of a comparable recusal situation.

² The Complaint attempts other claims but there is only one violation possible under the law at issue in this Matter.

of whether the naming and labeling statute has been violated is based on a review of employer and occupation information presented in the campaign finance reports (forms C-6) filed with the COPP. *BFP v. Responsible Land Use*, (January 6, 2010, Commissioner Unsworth). The naming and labeling review of employer and occupation information taken from the campaign finance reports is based on a review of all contributors, regardless of reporting period, to the date of filing of the complaint. *Trap Free v. MTA*, COPP-2014-CFP-023 (Commissioner Motl).

Finding of Fact No. 1: On July 18, 2016 MEJ filed a Statement of Organization (Form C-2) with the COPP, thereby registering as a Montana independent political committee. (COPP Website.)

Finding of Fact No. 2: As of the date of the Complaint MEJ had filed three campaign finance reports, disclosing \$3,852.21 in contributions (\$3,200 in cash and \$652.21 in in-kind). (COPP Records.)

Finding of Fact No. 3: The in-kind and cash contributions came from six contributors (five individuals and one entity): Randy Bishop, John Heenan, Gene Jarussi, Montana Trial Lawyers Association, Shane Colton, and Wade Larson. (COPP Records.)

Finding of Fact No. 4: Three of the six contributors are employed with the Billings law firm of Bishop, Heenan and Davis. The other three contributors were not employed with the Billings law firm of Bishop, Heenan and Davis. (COPP Records.)³

Finding of Fact No. 5: Four of the six contributors are lawyers and an additional contributor represents a group of lawyers.⁴ (COPP Records.)

³ There is no majority of contributors with a common employer, given the equal split of contributors.

⁴ There is an identifiable economic or special interest (that of lawyer) in a majority of contributors.

Montana law requires that a political committee name itself using a name that “clearly identifies the economic or special interest, if identifiable, of a majority of its contributors.” §13-37-210 MCA.

Sufficiency Finding No. 1: Sufficient facts exist to show that the name of Montanans for Experienced Judges failed to meet the naming and labeling requirements of Montana law because it did not identify the economic and special interest of “lawyers” in its name.

Prior Commissioners have conducted naming and labeling reviews comparable to that set out in FOF Nos. 1-5. *See, Hanson v. No on CA-30*, November 15, 1996, (Commissioner Argenbright). In making such a naming and labeling determination the Commissioner examines as to “whether or not an economic or special interest between the two contributors to the [political] committee exists.” *Feaver v. Billings Education Advocates*, June 17, 1996 (Commissioner Argenbright). *Common Cause v. Committee to Defend First Amendment Rights*, October 11, 1996 (Commissioner Argenbright). Such an economic interest determination required a political committee to include the descriptive word “trappers” in its name, as trappers were identified as a majority of contributors to the political committee. *Trap Free v. MTA, COPP-2014-CFP-023* (Commissioner Motl). The Sufficiency Finding in this Matter, requiring the descriptive word “lawyers” in the name of the political committee is consistent with Montana law, as interpreted by prior Decisions made by Commissioners.

Having made this Decision, the Commissioner notes that MEJ responded

swiftly to the Complaint.

Finding of Fact No. 6: The Complaint was filed at 9:37 AM on October 11, 2016. (COPP Records.)

Finding of Fact No. 7: At 2:55 PM on October 11, 2016 MEJ filed an amended C-2 changing the political committee's name to "Montanans and Lawyers for Experienced Judges." (COPP Records.)

Finding of Fact No. 8: On October 12, 2016 Montanans and Lawyers for Experienced Judges filed an out-of-cycle (voluntary) campaign finance report disclosing an additional \$315 in contributions (\$165 cash and \$150 in-kind). The cash contributions came from nine individuals, eight of whom were non-lawyers. One cash contribution and the in-kind contribution came from lawyers. (COPP Records.)

Finding of Fact No. 9: On October 12, 2016 Montanans and Lawyers for Experienced Judges filed an amended C-2 from changing the political committee's name back to MEJ. (COPP Records.)⁵

The above sequence of events illustrates two issues. First, MEJ recognized its error and immediately changed its name (FOF No. 7) to include the name of the economic interest (lawyers) shown by the majority of the six disclosed contributors. Second, the newly named entity (Montanans and Lawyers for Experienced Judges) recruited eight additional non-lawyer contributors (FOF No. 8). These additional non-lawyer contributors were sufficient in number to remove lawyers as a majority of contributors to the political committee, thereby allowing the filing of a second amended C-2 form returning the name of the political committee to MEJ.⁶

⁵ The cash contributions from eight non-lawyers reduced the number of lawyer contributors to less than a majority.

⁶ It is not uncommon for political committees, particularly those with low number of contributors, to recruit small dollar amount contributors so as to avoid a majority of contributors from a single employer or an identifiable economic interest. For example, the

The prompt and appropriate actions of MEJ will be a mitigating factor in determination of any fine.⁷ The MEJ actions can be particularly contrasted with the uncooperative actions taken by the political committee in the separate Decision released simultaneously today. *See Krause v. Safe Montana*, COPP-2016-CFP-028.

ENFORCEMENT OF SUFFICIENCY FINDINGS

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner “shall investigate” any alleged violation of campaign practices law. §13-37-111(2)(a), MCA. The mandate to investigate is followed by a mandate to take action as the law requires that if there is “sufficient evidence” of a violation the Commissioner must (“shall notify,” *see* §13-37-124, MCA) initiate consideration for prosecution.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence, as set out in this Decision, to show that for a period of time MEJ’s name use violated Montana’s campaign practice laws, including, but not limited to the laws set out in the Decision.

Complainant, Jake Eaton has organized a competing 2016 political committee called stopsetemfreesandefur.com committee. That committee has filed one campaign finance report disclosing \$93,085 in contributions from three contributors. One contributor, the Republican State Leadership Committee, contributed \$93,000 while two individuals (one of whom as Jake Eaton) contributed \$85. The two individuals are a majority of contributors allowing a committee name other than the Republican State Leadership Committee.

⁷ MEJ will still need to accept responsibility, in the form of payment of a fine, for the period of time in which it improperly used a name that lacked the word “lawyer” reflecting the economic interest of a majority of contributors.

Having determined that sufficient evidence of a campaign practice violation exists, the next step is to determine whether there are circumstances or explanations that may affect prosecution of the violation and/or the amount of the fine.

The failure to fully and timely report and disclose cannot generally be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law as it relates to failures to file and report. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009. Likewise, the Commissioner does not normally accept that failures to file or report be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009.

Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to these certain Sufficiency Findings, civil prosecution and/or a civil fine is justified. §13-37-124, MCA. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying civil prosecution of MEJ. Because of the nature of the violations (the failure to file a C-2 form with a proper name occurred in Lewis and Clark County), this matter is referred to the County Attorney of Lewis and Clark County for his consideration as to prosecution. §13-37-124(1), MCA. Should the County Attorney waive the right to prosecute (§13-37-124(2), MCA) or fail to prosecute within 30 days (§13-37-124(1), MCA) this Matter returns to this Commissioner for possible prosecution. *Id.*

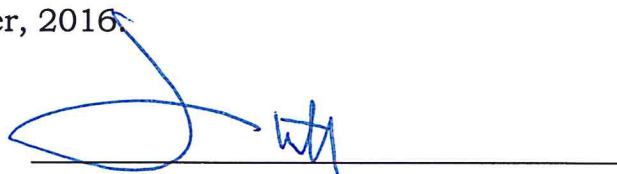
Most of the Matters decided by a Commissioner and referred to the County

Attorney are waived back to the Commissioner for his further consideration. Assuming that this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil or criminal prosecution as the Commissioner has discretion (“may then initiate” see §13-37-124(1), MCA) in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine.

While it is expected that a mitigated fine amount will be negotiated and paid in this Matter, in the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of campaign practice law, including those of §13-37-226 MCA. (See §13-37-128, MCA.) Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

This Decision is simultaneously released to the press, public and the parties. Montanans are already voting on the judicial candidacy involved with the political committee activity addressed in this Decision requiring a full release at the earliest possible date.

DATED this 17th day of October, 2016.



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