

BEFORE THE COMMISSIONER  
OF POLITICAL PRACTICES OF THE STATE OF MONTANA

Esp v. Assembly Action Fund No. COPP-2010-CFP-025	Summary of Facts and Finding of Sufficient Evidence To Show a Violation of Montana's Campaign Practices Act
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John Esp of Big Timber was a candidate for the Montana House of Representatives, District 61, (HD 61) in the 2010 Republican primary election. On November 12, 2013 Mr. Esp became a complainant with this Office against Assembly Action Fund (AAF) based on its electioneering activities in the HD 61 2010 primary election. The complaint asserted campaign violations associated with illegal corporate contributions by AAF.

There are four additional complaints related to the HD 61 2010 election. These complaints are: *Bonogofsky v. Boniek*, No. COPP-2010-CFP-027; *Esp v. Montana Citizens for Right to Work* No. COPP-2010-CFP-026; *Esp v. WTP*, No. COPP-2012-CFP-048; and *Esp v. Lair*, No. COPP-2012-CFP-049. The Decisions in the four related complaints are released simultaneously with this Decision.

## I. INTRODUCTION

The 2010 HD 61 primary election involved two candidates, John Esp and Joel Boniek. Candidate Esp defeated Candidate Boniek in the June 8, 2010 primary election by a vote of 1,512 to 1,347. There was no Democratic candidate filed for HD 61 so Candidate Esp went on to win the general election and became a representative to the 2010 Montana legislature from HD 61.<sup>1</sup> (SOS website).

Esp filed his post-election complaint against AAF because he believed that AAF made unallowed, unreported and undisclosed 2010 HD 61 election expenditures. Esp complained that the AAF election expenditures were coordinated with Candidate Boniek such that they became illegal corporate contributions to Candidate Boniek's campaign.

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.

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<sup>1</sup> House District 61, as created by the 2000 redistricting commission, is a solid Republican district. The electoral contest of note is the Republican primary.

The companion *Bongofsky v. Boniek* Decision has determined that the AAF expenses are election expenses. This Decision further determined that the AAF expenses are an in-kind contribution to Candidate Boniek, through coordination. It is noted that the companion Decision of *Esp v. WTP* determines that the AAF election expenses are also attributable to WTP, another corporation.

The *Bongofsky v. Boniek* decision means it is not necessary to determine if the AAF election expenses fall into one of the remaining two types of election expense; that is, whether the AAF expenses are an 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 election expense and therefore is not subject to campaign

practice requirements. Specifically, Montana law does not require that an issue advocacy election expense be attributed, reported or disclosed.<sup>2</sup>

## **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 *Bonogofsky v. Boniek*, No. COPP-2010-CFP-027. This Decision determined that certain election expenses made by or orchestrated by AAF/WTP were coordinated with Candidate Boniek such that they became in-kind contributions to Candidate Boniek. Among these expenditures was the cost of two election Slicks ostensibly paid for by AAF.

The basis for a finding of coordination, as explained by *Bonogofsky v. Boniek*, means that Candidate Boniek and AAF acted together such that in-kind expenses made by AAF became in-kind corporate contributions to Candidate Boniek. Coordination is a two way street. *Bonogofsky v. Boniek* found sufficient evidence that Candidate Boniek accepted an illegal AAF election expense 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 a coordinated illegal election expense.

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<sup>2</sup> The 2012 Montana Legislative session considered several bills that would have required 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.

#### **IV. FINDINGS**

The Commissioner incorporates the *Bonogofsky v. Boniek* findings as to AAF election expenses in the 2010 Montana HD 61 election. These findings include a finding of election expense and coordinated election expenses. In addition *Bonogofsky v. Boniek* found that AAF was a Colorado not-for-profit corporation.

#### **V. SUMMARY OF CAMPAIGN PRACTICE 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 *Bonogofsky v. Boniek* Decision found sufficient evidence to show that Candidate Boniek 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 an AAF election contribution 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.

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.

## **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-006 and

009. 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”)<sup>3</sup> 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 consideration. Assuming that this Matter is waived back, the Finding and

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<sup>3</sup> Notification is to “...the county attorney in which the alleged violation occurred...” §13-37-124(1) MCA. The failure to file and/or report occurred in Lewis and Clark County.

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 §13-35-227 (see 13-37-128 MCA). Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

### 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.

A handwritten signature in black ink, appearing to read 'J. Motl', is written over a horizontal line.

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