BEFORE THE COMMISSIONER
OF POLITICAL PRACTICES OF THE STATE OF MONTANA

Esp v. Montana Citizens for Right to Work No. COPP-2010-CFP-026	Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act

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 Montana Citizens for Right to Work (MCRTW) based on its electioneering activities in the HD 61 2010 primary election. The complaint asserted campaign violations associated with illegal corporate contributions by MCRTW.

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. Assembly Action Fund*, No. COPP-2010-CFP-025; *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.[1] (SOS website).

Esp filed his post-election complaint against MCRTW because he believed that MCRTW made unallowed, unreported, and undisclosed 2010 HD 61 election expenditures. Esp complained that the MCRTW 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 of election expense. 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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[1] 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 *Bonogofsky v. Boniek* Decision determined that the MCRTW expenses are election expenses. The *Bonogofsky v. Boniek* Decision has further determined that the WTP expenses are an in-kind contribution to Candidate Boniek, through coordination.

The *Bonogofsky v. Boniek* decision means that it is not necessary to determine if the MCRTW election expenses fall into one of the remaining two types of election expense; that is, whether the MCRTW 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 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.[2]

[2] 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.

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. The *Bonogofsky v. Boniek* Decision determined that certain election expenses made by or orchestrated by Western Tradition Partnership (WTP) were coordinated with Candidate Boniek such they became in-kind election contributions to Candidate Boniek.

The basis for a finding of Coordination, as explained by *Bonogofsky v. Boniek*, is that Candidate Boniek and MCRTW acted together such that in-kind election expenses made by MCRTW became in-kind election contributions to Candidate Boniek. *Bongofsky v. Boniek* identified two MCRTW issue attack letters sent in the 2010 HD 61 primary election as coordinated election expenses made by MCRTW acting with or under the direction of WTP.

Coordination is a two way street. *Bonogofsky v. Boniek* found sufficient evidence that Candidate Boniek coordinated illegal MCRTW corporate election expenses as an in-kind contribution to his campaign. This companion Decision finds sufficient evidence that MCRTW, as the other part of the coordinated expense, made an illegal coordinated corporate election expense on behalf of Candidate Boniek.

IV. FINDINGS

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

In this Matter the Commissioner further finds that it is likely MCRTW and its parent organization, the National Right to Work Committee, played a larger role than that of 2 attack letters identified in Candidate Boniek's election and in other 2010 elections in Montana. Dennis Fusaro, a former NRTWC employee, prepared a letter dated November 21, 2013 that indicates that Right to Work employees on a national and state level were involved in wide-scale drafting of candidate and third party letters. (*See* Exhibit 1, this Decision). Montana had a ready connection for this sort of letter writing activity as Christian LeFer, the leader of WTP, was also an employee within the Right to Work network. The fact is, someone wrote the candidate letters used in the 2010 Montana elections (Candidate Boniek says he never saw the letters he signed) and Right To Work employees are a logical, but illegal, source of that work. The Commissioner reserves his right to expand this claim against MCRTW, should adjudication of this Matter take place.

V. SUMMARY OF CAMPAIGN PRACTICE VIOLATIONS

The Commissioner finds there is sufficient evidence to show that MCRTW 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 MCRTW violated subsection one, the prohibition on a corporation making such an election contribution.

Because MCRTW's election contribution was prohibited in any amount, MCRTW could not cure the contribution by attribution, registration, reporting or disclosure. There is no involvement of these additional provisions of Montana Campaign Practices Act. 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 MCRTW 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 MCRTW in this matter were choices. Excusable neglect cannot be applied to such choices. *See* discussion of excusable neglect principles in *Matters of Vincent*, Nos. CPP-2013-CFP-0006 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 and for an illegal contribution 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*, Nos. CPP-2013-CFP-0006 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")[3] 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 Decision in this Matter does not necessarily lead to civil adjudication as the

[3] Notification is to "...the county attorney in which the alleged violation occurred..." §13-37-124(1) MCA. The failure of law 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.

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*.

The possibility of settlement having been raised it is noted that campaign practice violations, of the nature and scope encountered in this Matter, are new to the modern era Montana politics.[4] Montana's second Commissioner, Peg Krivec, served her entire 6 year term (1981-1986) without issuing a Decision. Subsequent Commissioners Colberg, Vaughey, and Argenbright issued decisions that generally provided a platform for earnest political participants to pay a fine for the infraction and adjust future election activity to conform with rulings.

The depth and breadth of current challenges to Montana's election culture are shown by this and the companion Decisions. These Decisions show that the Commissioner determined that MCRTW, to date, has been unwilling to accept or adjust to Montana's expectations of appropriate election behavior. Instead, MCRTW and its ally WTP have aggressively pursued a self-determined

[4] These sorts of violations, however, in Montana's past gave rise to many of Montana's current campaign practice laws.

approach to involvement in Montana elections.

It is expected that MCRTW will defend and explain its actions, now that this Decision has been issued and venue will likely be lodged in a Montana district court. It is only fair and logical that MCRTW will take this responsibility rather than leave its chosen candidates alone to explain MCRTW actions.

VII. CONCLUSION

Based on the preceding discussion, as Commissioner, I find and decide that there is sufficient evidence to show that MCRTW 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
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November 21, 2013

NRTWC BOD Members
8001 Braddock Road, 5th Floor
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VIA Email

Dear NRTWC Board Members and Officer:

Events in Montana involving the shenanigans of Christian LeFer and former NRTWC Director of Government Affairs Dimitri Kesari have led me to communicate to you. The irresponsible actions of President Mark Mix and his unwillingness to take responsibility for his actions have put me in a difficult position. When I got into politics and public policy in the late 1980s, I did not agree to join some sort of white-collar Cosa Nostra, nor will I accept some sort of claim that I am bound by a NRTWC Omerta.

The ends do not justify the means. And Jesus Christ is the standard, not the whims and arbitrary ethics of someone like Huck Walther and his protégé Mike Rothfeld. Politics is not simply the adjudication of power. It is about serving our Lord Jesus Christ. I know I have failed in this. It is time you recognized that your management leadership has done so, too.

We are supposed to be the good guys and gals. We are not supposed to adopt the methods of the Union Bosses.

I urge you to clean up your own house before the bad guys do it for you.

1) In late 2009 Iowa Rep. Kent Sorenson received the gift from a registered lobbyist, Alina Severs (now Alina Waggoner) of an airline ticket to fly to a seminar in Corpus Christi, Texas. I was told the value was roughly $1000. The authorities could verify this by reviewing the passenger lists in late 2009 and determining who paid for the ticket. This ticket was provided by the lobbyist at the instruction of Dimtri Kesari, the lobbyist's employer and at the same time an employee of the National Right to Work Committee. Alina was employed by Mid-America Right to Work Committee, but Dimitri Kesari, an employee of the National Right to Work Committee, had hire and fire authority over her. I brought this to the attention of Mark Mix and Doug Stafford, Dimitri's employers and supervisors at the Committee. I believed at the time, and still do, that this is a violation of the Iowa Ethics Law. Mr. Mix refused to deal with it and told me not to tell him about these sorts of things.
2) In the 2008 and 2010 election cycles several current and past candidates or legislators received contributions to their campaigns that were unreported either completely or in part. These contributions consisted of material goods and labor services. These things of value given to candidates to advance his or her campaign were either not reported, or they were subsidized so that part of the value given can only be understood as an in-kind contribution. These

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contributions were made from a non-profit corporate source in apparent violation of Iowa campaign and election law.

3) I have reason to believe this activity continued in the 2012 election cycle in Iowa. The program is very regular. I believe the officers almost to a man (or woman) have been involved to some extent.
4) The contributions discussed above consisted of the following elements:
    A. "Field staff" paid out of monies belonging to one or more non-profit corporate entities working in election districts on the orders and at the direction of their employers and supervisors to assist with the election of multiple candidates in Iowa, and other states. This is an apparent violation of Iowa (and possibly other states) campaign and election law both as to the source of the money and the fact that the contributions went unreported.
    B. Copy writing services paid out of monies belonging to one or more non-profit corporate entities working on the orders and at the direction of their employers and supervisors to assist with the election of multiple candidates in Iowa, and other states. This is an apparent violation of Iowa (and possibly other states) campaign and election law both as to the source of the money and the fact that the contributions went unreported.
    C. Computer equipment belonging to by one or more non-profit corporate entities used by employees of one or more non-profit corporate entities on the orders and at the direction of the officers and executive staff of these entities to write letter copy to advance the election of multiple state candidates in Iowa, and other states. This is an apparent violation of Iowa (and possibly other states) campaign and election law both as to the source of the money and the fact that the contributions went unreported.
    D. Printing labor services provided and paid out of monies belonging to one or more non-profit corporate entities working on the orders and at the direction of the officers and supervisors to assist with the election of multiple candidates in Iowa, and other states. This is an apparent violation of Iowa (and possibly other states) campaign and election law both as to the source of the money and the fact that the contributions went unreported.
    E. Printing and mail preparation equipment owned, or the use of such equipment subsidized, by one or more non-profit corporate entities and used by employees of one or more non-profit corporate entities on the orders and at the direction of the officers and executive staff of these entities to produce mailings and other election communications to advance the election of multiple state candidates in Iowa, and other states. In some cases campaign volunteers used this corporate equipment to prepare and produce such mailings for the candidates and their campaigns. This is an apparent violation of Iowa (and possibly other states) campaign and election law both as to the source of the money and the fact that the contributions went unreported.

F. Use of office space leased by one or more non-profit corporate entities and used by employees of one or more non-profit corporate entities on the orders and at the direction of the officers and executive staff of these entities to produce mailings and other election communications to advance the election of multiple state candidates in Iowa, and other states. In some cases campaign volunteers used this corporately leased office space to prepare and produce such mailings for the candidates and their campaigns. This is an apparent violation of Iowa (and possibly other states) campaign and election law both as to the source of the money and the fact that the contributions went unreported.

The main printing facility was relocated to Indiana in late September 2010 on the orders of Mark Mix, President, and Doug Stafford, Vice President, at the National Right to Work Committee. These two men supervised and employed Dimitri Kesari in his capacity as Director of Government Affairs.

These actions also appear to be violations of Federal Law (the Internal Revenue Code) in that the expenditures were not reported on IRS Form 990 (2010), Part IV (Checklist of Required Schedules), line 3 which asks, "Did the organization engage in any direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? If 'Yes' complete Schedule C, Part I." I believe this may have occurred over many election cycles in multiple states at the direction of and with the involvement of Dimitri Kesari, Doug Stafford, Mark Mix and many other of the executive staff and employees of the National Right to Work Committee. The NRTWC IRS Form 990 for 2010 was checked with an "X" under the No column. This is the year for which I have direct knowledge and other evidence that such activities did take place.

I believe this same issue is a problem for the Mid-America Right to Work Committee whose Chairman, Cornell Gethmann, resides in Iowa. He is also a board member of the National Right to Work Committee

Sincerely,

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