

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Jeff Essmann v. Patients for Reform – Not Repeal	Dismissal of Portion of Complaint and Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act
No. COPP 2012-CPP-034	

On October 25, 2012, Senator Jeff Essmann filed a complaint with the Commissioner of Political Practices (COPP) against Patients for Reform – Not Repeal (Patients for Reform), a political committee, and its treasurer, Sarah Baugh.¹ The complaint alleges that Patients for Reform ran radio ads in October, 2012, that contained false statements, in violation of § 13-37-131(1), MCA. The complaint also alleges that Patients for Reform failed to file complete and timely campaign finance reports, in violation of Montana laws.

¹ This Decision was drafted by Jim Schier, the Deputy Attorney General assigned to provide legal advice to the COPP. The draft Decision was vetted through the COPP review process (Jaime MacNaughton, Mary Baker, Vanessa Sanddal and Jonathan Motl reviewed) and then signed, after review, by Jonathan Motl, as Commissioner.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: 1) enforcement of § 13-37-131(1), MCA; 2) full disclosure under § 13-37-229(9), MCA and dismissal based on the concept of *de minimis*; and 3) the requirement that political committees timely file reports with COPP.

ENFORCEMENT OF § 13-37-131(1), MCA

The complaint alleges that Patients for Reform violated Montana's political civil libel statute, § 13-37-131, MCA, when it ran radio ads in October, 2012 that supported the repeal of Senate Bill (SB) 423 through Initiative Referendum 124 (IR-124). The complaint alleges the radio ads misrepresented or contained false statements with respect to a "matter that is relevant to the issues of the campaign." The facts relevant to a determination of this issue are as follows:

Finding of Fact No. 1: In 2004 the voters in Montana approved Initiative 148, which created the Medical Marijuana Act, a medical marijuana program for patients with debilitating medical conditions. (Secretary of State (SOS) website).

Finding of Fact No. 2: SB 423, passed by the 2011 Montana Legislature, took effect on July 1, 2011. The law repealed the Medical Marijuana Act, and enacted a new medical marijuana program in Montana. Senator Jeff Essmann, the complainant herein, was the primary sponsor of SB 423. (Montana Legislative website).

Finding of Fact No. 3: After the passage of SB 423, sufficient signatures were gathered to place IR-124 on the 2012 general election ballot. IR-124 asked the voters to either approve or reject SB 423. A vote for IR-124 was in a vote favor of the provisions of SB 423, while a vote against IR-124 was a vote in opposition to the provisions of SB 423. (SOS website).

Finding of Fact No. 4: Patients for Reform filed a C-2 Statement of Organization on June 29, 2011, registering with COPP as a ballot issue committee opposed to IR-124. Sarah Baugh was designated as the treasurer. (COPP records).

Finding of Fact No. 5: Patients for Reform paid for radio ads that ran from October 8 through October 15, 2012, urging a “no” vote on IR-124. The ads included this claim: “Even the sponsor, Jeff Essmann knows the bill must be changed.” (COPP records, complaint).

Finding of Fact No. 6: Sen. Essmann in his complaint alleges that the ad contained a false statement regarding a matter that is relevant to the issues in the campaign, and that this constitutes a violation of § 13-37-131, MCA. (COPP records, complaint).

In *Lair v. Murray*, 871 F. Supp. 2d 1058 (D. Mont. 2012), U.S. District Judge Charles Lovell found that the language “or any other matter relevant to the issues of the campaign” rendered § 13-37-131, MCA unconstitutional on First Amendment vagueness grounds. In his Order, issued on May 16, 2012, Judge Lovell permanently enjoined the COPP from enforcing the statute. The State of Montana did not appeal that portion of Judge Lovell’s ruling. In 2013 the Montana Legislature passed House Bill 129, which amended the language that Judge Lovell found to be unconstitutional out of the statute. The effect is that now § 13-37-131, MCA only prohibits misrepresentation of a candidate’s public voting record. The portion of the complaint alleging that Patients for Reform’s radio ads contained false statements does not allege a misrepresentation of a candidate’s public voting record. Because § 13-37-131, MCA, as amended, does not provide for such a generic false statement complaint, the same is dismissed.

ADDITIONAL FINDINGS OF FACT AND DISCUSSION

The facts relevant to the content of the campaign finance reports filed by Patients for Reform are as follows:

Finding of Fact No. 7: A general election was held on November 6, 2012.

After Patients for Reform filed its C-2 on June 29, 2011 (see FOF 4), COPP processed the C-2 on July 13, 2011. COPP also emailed to treasurer Sarah Baugh necessary information for Patients for Reform to file its reports, including a reporting calendar for Statewide ballot issue committees such as Patients for Reform. (SOS website, COPP records).

Finding of Fact No. 8: Patients for Reform's initial campaign finance report was due October 5, 2011. Patients for Reform filed its report on that date. The report covered the period from June 29 to September 30, 2011. An inspection of the report disclosed that 17 of the 41 reported contributors did not include occupation and employer information. In addition, the complete mailing address was missing from 5 contributors. (COPP records).

Finding of Fact No. 9: Patients for Reform filed an amended report on January 5, 2012, adding more detail and providing additional information regarding expenditures and expenses. In addition, Sarah Baugh provided COPP with some, but not all, of the missing occupation and employer information. (COPP records).

§ 13-37-229(2), MCA requires that campaign finance reports disclose, for aggregate contributions of \$35 or more, "the full name, mailing address, occupation, and employer" of the contributor. Patients for Reform failed to provide some of that information for its contributors listed in its report filed on October 5, 2011. The Commissioner hereby determines that the above facts are sufficient to support the following finding:

Sufficiency Finding No. 1: Patients for Reform failed to disclose all required information regarding contributions it received, as required by § 13-37-229(2), MCA, and all associated ARMs.

The facts relevant to the timeliness of the reports filed by Patients for Reform are as follows:

Finding of Fact no. 10: The next report was due January 5, 2012. Patients for Reform filed its report on that date. (COPP records).

Finding of Fact No. 11: The next report was due March 12, 2012. Patients for Reform filed its report on March 12, 2012, two days late. (COPP records).

Finding of Fact No. 12: The next report was due April 10, 2012. Patients for Reform did not file a report on that date. Patients for Reform filed the report on May 14, 2012, which was 33 days late. (COPP records).

Finding of Fact No. 13: The next report was due May 21, 2012. The report was timely filed, and no errors were identified during inspection of the report by COPP staff. (COPP records).

Finding of Fact No. 14: The next report was due May 31, 2012. The report was timely filed. (COPP records).

Finding of Fact No. 15: The next two reports were due on June 25, 2012, and July 10, 2012. Neither report was timely filed. On July 16, 2012 COPP staff emailed Sarah Baugh reminding her that the reports were overdue. (COPP records).

Finding of Fact No. 16: On August 8, 2012 Sarah Baugh hand delivered a report to COPP that covered the period from June 1, 2012 to August 5, 2012. The only apparent error in the report was its failure to include an amount contributed to date by the Foundation for Constitutional Protection. To the extent this report could be construed as the report due June 25, 2012, it was filed 45 days late. To the extent this report could be construed as the report due July 10, 2012, it was filed 28 days late. (COPP records).

Finding of Fact No. 17: On September 24, 2012 Tom Daubert telephoned the COPP office and advised that Sarah Baugh was experiencing some medical issues. Mr. Daubert stated that he would try to file the next three reports, which were due August 10, 2012, September 10, 2012, and October 22, 2012. (COPP records).

Finding of Fact No. 18: Patients for Reform did not file a report by the August 10, 2012 due date. (COPP records).

Finding of Fact No. 19: Patients for Reform filed an amended C-2 Statement of Organization on October 22, 2012. The C-2 named Barb Trego as a deputy treasurer to provide assistance to Sarah Baugh, who continued to experience medical issues. (COPP records).

Finding of Fact No. 20: The next report was due October 22, 2012. Patients for Reform filed two reports on that date – one for the period from August 6 to September 5, 2012; and one for the period from September 6 to October 17, 2012. To the extent the first report could be construed as the report due August 10, 2012, it was filed 72 days late. To the extent the other report could be construed as the report due September 10, 2012, it

was filed 41 days late. Both reports failed to include total to date amounts for contributions from incidental committees. (COPP records).

Finding of Fact No. 21: The next two reports were due on November 1, 2012, and November 26, 2012. Neither report was timely filed. On March 29, 2013 COPP staff emailed Barb Trego reminding her that the reports were overdue and requesting that Patients for Reform file a closing report. (COPP records).

Finding of Fact No. 22: On June 7, 2013 Patients for Reform filed a report that covered the period from October 27, 2012 to March 10, 2013. To the extent this report could be construed as the report due November 1, 2012, it was filed 218 days late. To the extent this report could be construed as the report due November 26, 2012, it was filed 192 days late. (COPP records).

Finding of Fact No. 23: The report filed on June 7, 2013 was also designated as Patients for Reform's closing report. (COPP records).

§ 13-37-226, MCA establishes specific filing dates for candidates and political committees. Patients for Reform filed a number of its reports after the filing deadline, some of them many weeks after the deadline. The Commissioner hereby determines that the above facts are sufficient to support the following finding:

Sufficiency Finding No. 2: Patients for Reform late filed its campaign finance reports on eight occasions, in violation of §§ 13-37-226 and 228, MCA, and all associated ARMs. *See* FOF 11 (2 days late); FOF 12 (33 days late); FOF 15 and 16 (45 and 28 days late); FOF 18 and 20 (72 and 41 days late); and FOF 21 and 22 (218 and 192 days late).

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 act on, an alleged campaign practice violation 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 prosecution.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. As noted in Sufficiency Finding No. 1, the first report filed by Patients for Reform failed to include all information related to contributions it received that is required by § 13-37-229(2), MCA (e.g., mailing address, occupation, and employer). Patients for Reform made a good faith effort to correct the deficiencies (*see* FOF No. 9), but was unable to provide all information for all contributors on that report. The Decision in *Montana Republican Party v. Wright*, COPP-2012-CFP-001 noted, at page 4:

The general policy of the COPP is that any complaint based solely on a failure(s) to fully report/disclose in compliance with § 13-37-229(2) will be dismissed as a complaint based on a *de minimis* violation. This general policy has its basis in the purpose of disclosure/reporting. That is, the reporting/disclosure law serves the public’s (and opposing candidate/PAC) need for access to information. In contrast, the law is not a platform for an opposing political party or opposing interest to scour campaign finance reports searching for technical violations so as to embarrass or attack an opponent.

Based on the general policy stated above, and in consideration of Patients for Reform’s good faith effort to provide the missing information, the Commissioner hereby dismisses the violation found in Sufficiency Finding No. 1 as a *de minimis* violation.

However, this Commissioner, having been charged to investigate and

decide, hereby determines that there is sufficient evidence to show that Patients for Reform violated §§ 13-37-226 and 228, MCA, and all associated ARMs when it late filed multiple reports (see Sufficiency Finding No. 2, as set out in this Decision). Montana's campaign finance report filing requirements are mandatory, and the filing date requirements are date certain. Therefore, any failure to meet a mandatory, date-certain filing deadline is a violation of §13-37-226, 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 prosecution of the violation and/or the amount of the fine.

The failure to timely file cannot be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law. *See* discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

Likewise, the Commissioner does not accept that failures to file or report can normally be excused as *de minimis*. *See* discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. In particular, the Commissioner has limited discretion to apply *de minimis* to untimely reporting. Reporting is only valid when it is timely accomplished and any delay demonstrates harm. The number of late reporting violations in this case also militates against a *de minimis* finding.

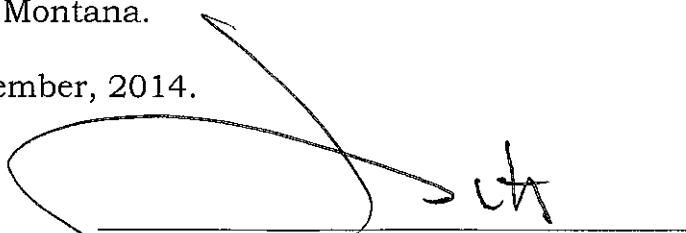
Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil/criminal prosecution

and/or a civil fine is justified (See §13-37-124, MCA). The Commissioner hereby, through this Decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution of Patients for Reform for late filing. Because of the nature of the violations (the failure to timely report and disclose 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. In setting that fine the Commissioner will consider matters affecting mitigation, if any. 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 law, including those of §§ 13-37-226 and 228, 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*.

Should this Matter not settle the Commissioner reserves his right, upon return of the Finding by the County Attorney, to instigate an enforcement action on behalf of the people of Montana.

DATED this 20th day of November, 2014.



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