

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Fitzpatrick v. Kantorowicz No. COPP 2016-CFP-019	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION
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On May 27, 2016, Steve Fitzpatrick, a resident of Great Falls, Montana, filed a complaint against JC Kantorowicz, also a resident of Great Falls, Montana. Messrs. Fitzpatrick and Kantorowicz were both primary election candidates seeking 2016 election to the Montana legislature from Senate District 10 (SD 10). The Complaint alleges that Candidate Kantorowicz failed to properly report and disclose his 2016 primary election campaign activity.

Foundational Findings of Fact

The following finding of fact is necessary before proceeding to discussion of this Matter:

Finding of Fact No. 1. Steve Fitzpatrick and JC Kantorowicz were June 7, 2016 primary election candidates for Republican Party nomination to the general election to be elected Senator from SD 10. (Montana Secretary of State Website.)

Finding of Fact No. 2. Candidate Fitzpatrick (3,067 votes) prevailed over Candidate Kantorowicz (1,316 votes) in the 2016 Republican primary election. Mr. Fitzpatrick (R) will face Deborah Magin (D) in the 2016 general election from SD 10. (Montana Secretary of State Website.)

Discussion

The Complaint makes allegations that Candidate Kantorowicz failed to report, disclose, account and/or attribute campaign activity associated with ads and articles published in a news-journal style publication called the "Montana Christian Journal." The Complaint allegations include issues that have not previously been addressed by a Commissioner.

1. Late Reporting of A Campaign Expense

The Complaint alleges that the campaign costs (including the cost of a campaign ad placed in the Montana Christian Journal) were not properly or timely reported or disclosed by Candidate Kantorowicz.

Finding of Fact No. 3. The Montana Christian Journal is an arm (dba or doing business as) of the Montana Christian Business Directory, LLC. In turn Montana Christian Business Directory, LLC is a Montana company registered with the Montana Secretary of State, with Douglas Miller listed as registered agent.¹ (Montana Secretary of State, Business Records archive.)

Finding of Fact No. 4. Since April of 2013 the Montana Christian Business Directory has published 13 issues of the Montana Christian Journal, with Volume 3, No. 2 (Issue 3:2) being the last published issue. (Montana Christian Journal Website.)

Finding of Fact No. 5. Issue 3:2 was not dated but was published in advance of the 2016 Montana primary elections. The Issue features a photo of three primary election candidates

¹ The Montana Christian Journal "press kit 2016" states that in 2013 Douglas Miller purchased the Montana Christian Business Journal.

on the front page, bearing the caption “Christians Will Decide the Next Primary Election.” Thirteen of the 32 pages of Issue 3:2 consist, in whole or part, of ads or stories about 2016 Montana candidates or ballot issues. (Montana Christian Journal: Issue 3:2.)

Finding of Fact No. 6. On April 29, 2016 Candidate Kantorowicz was billed (the bill was marked as paid) \$390 for a half page ad in the Montana Christian Journal. (Commissioner’s Records.)

Finding of Fact No. 7. On May 24, 2016 Candidate Kantorowicz filed a pre-primary campaign finance report showing an expenditure of \$25 to the Montana Christian Journal for a “half page ad.” (Commissioner’s Records.)

Finding of Fact No. 8. On June 24, 2016 Candidate Kantorowicz filed a post-election campaign finance report and reported \$1222.00 in “campaign advertising” in the Montana Christian Journal. (Commissioner’s Records.)

The 2016 Montana primary election took place on June 7, 2016. Under Montana law Candidate Kantorowicz was required to file campaign finance reports on the 35th day (May 3, 2016) and 12th day (May 26, 2016) before the primary election. (§13-37-226(2)(a), MCA.) Candidate Kantorowicz’s campaign was required to timely report each expense and contribution. (§13-37-228, MCA.²)

The April 29, 2016 bill from the Montana Christian Journal (FOF No. 6) reflected an expense that should have been, but was not, included in Candidate Kantorowicz’ May 26, 2016 campaign finance report (44.11.502(2-4), ARM).³ Further, even when late reported the \$1222 in “campaign advertising”

² Reporting must include all expenses by and contributions to the campaign that occur more than 5 days before the reporting deadline. §13-37-228(2), MCA.

³ This bill lists an “issue date” of May 1, 2016 making it likely that Issue 3:2 was published on May 1, 2016.

listed in Candidate Kantorowicz' post-election report (FOF No. 8) failed to identify what particular expenses (such as purchase of copies of Issue 3:2) were included in the amount, as required by 44.11.502(7), ARM.

Sufficiency Finding No. 1. The Commissioner determines that there are sufficient facts to show that Candidate Kantorowicz failed to timely and/or fully report campaign expenses associated with ads placed in (and copies purchased) the Montana Christian Journal.

The Commissioner notes that sufficiency findings (failure to electronically file, failure to timely file a Statement of Candidacy) have already been determined concerning Candidate Kantorowicz in a prior Decision by this Office:

Fitzpatrick v. Kantorowicz, COPP 2016-CFP-018. The earlier sufficiency findings have not yet been resolved.

2. The Montana Christian Journal (Self Distribution)

The Complaint implicitly questions the campaign status of the Montana Christian Journal.

Finding of Fact No. 9. The Montana Christian Journal is not registered with the COPP as a political committee and therefore reports no campaign expenditures or contributions. (Commissioner's Records.)

Setting aside ads paid for by candidates, Issue 3:2 of the Montana Christian Journal is replete with articles favoring, including endorsements of, certain candidates running in 2016 contested primary elections. (FOF No. 5.) Further, Issue 3:2 was published in advance of the 2016 primary election and has the proclamation that "Christians Will Decide the Next Primary Election" on the cover page. Unless an exception applies, there can be no doubt but that Issue 3:2 supports a candidate such that a portion of the cost of the Issue is a

reportable campaign expenditure under Montana law. §13-1-101(17)(a)(i), MCA. There is, however, an exception (the press exemption) that does apply.

The U.S. Congress “first enacted a press exemption to campaign finance law in 1974.”⁴ Montana law followed with a similar exemption enacted in the mid-1970s.⁵ At present Montana excludes as a campaign expenditure “the cost of any bona fide news story, commentary, blog, or editorial distributed through the facilities of any broadcast station, newspaper, magazine or other periodical publication of general circulation.” §13-1-101(17)(b)(iii), MCA.

Application of the press exemption in Montana law has been acknowledged, without discussion, by past Commissioners.⁶ Commissioner Unsworth used the press exemption to dismiss, without comment, a complaint alleging unreported campaign activity stemming from the video-taping and subsequent showing of election related candidate interviews. *Raffiani v. Montana Shrugged*, November 19, 2000 dismissal letter (Commissioner Unsworth).

There being no definite guidance in Montana law interpreting statutory language, the Commissioner next examines Federal Election Commission and federal court interpretation of the comparable federal press exemption. The applicable federal interpretations of the press exemption are summarized in the 2016 Harvard Law Review article referenced in Note 3 of this Decision. As

⁴ *Harvard Law Review* “Defining the Press Exemption” Vol. 129, p. 1384, 1389 (2016).

⁵ The Montana press exemption law is defined as an exemption to the definition of “expenditure” set out in Chapter 1 of Title 13 of the Montana Code.

⁶ It was raised by complaint but not addressed in the Decision in *Harrington v. 400% Is Too High*, July 3, 2012 (Commissioner Murry). It was referenced but not defined in *Huntley v. Paxinos*, May 11, 2000 (Commissioner Vaughey).

applied to this Matter, the Commissioner considers the factors summarized in the law review article and determines that: the Montana Christian Journal has been periodically published for the past three years;⁷ the Montana Christian Journal derives revenues from advertising;⁸ the self-distributed copies Montana Christian Journal were not “paid-for” by a candidate or political party;⁹ and the Montana Christian Journal is distributed through its own network of churches and other outlets.¹⁰

With the above considerations in mind, the Commissioner determines that Issue 3:2 of the Montana Christian Journal qualifies as a periodical publication of general circulation that is exempted from consideration as a campaign expenditure under Montana law. §13-1-101(17)(a)(i), MCA. The Commissioner, having provided some guidance on the press exemption specifically directs interested parties to further review the cases cited and discussed in the law review article listed at Note 3.

3. The Montana Christian Journal (Candidate Distribution)

A separate print run of Volume 3, Issue No. 2 of the Montana Christian Journal was paid for and distributed by candidates.

Finding of Fact No. 10. Montana Senate District 10 includes House Districts 19 and 20. (Records, SOS.)

Finding of Fact No. 11. Lola Sheldon-Galloway, a Republican candidate for nomination from HD 22 paid \$400 for 2500 copies of Issue 3:2, or \$0.16 each. (Commissioner’s Records.)

⁷ A regular periodical, as opposed to a one-time publication indicates a communication that qualifies for the press exemption. Harvard Law Review at p. 1393;

⁸ Id.

⁹ Id., p. 1388.

¹⁰ Id., p. 1402.

Finding of Fact No. 12. Randy Pinocci, a Republican candidate for nomination from HD 19 paid \$320 for 2000 copies of Issue 3:2, or \$0.16 each. (Commissioner's Records.)

Finding of Fact No. 13. A May 7, 2016 Montana Christian Journal invoice No. 778 (to Randy Pinocci) states that "additional copies [of Issue 3:2] may be requested and sold at a rate of \$0.16 each in sets of 2000, full price." (Commissioner's Records.)

Finding of Fact No. 14. Candidate Kantorowicz bought an unspecified number of copies of Issue 3:2, reporting the cost as part of the \$1,222 in "campaign advertising" paid Montana Christian Journal (FOF No. 8). By mathematical deduction, taking into consideration the cost of the Kantorowicz ad, the Commissioner determines that Candidate Kantorowicz paid \$0.16 each for 5,000 copies of Issue 3:2. (Commissioner's Records.)

Finding of Fact No. 15. A bill to Candidate Pinocci shows that it cost \$0.4226 (\$0.2626 postage plus \$0.16 label and address) to attribute, address, permit and mail each copy of Issue 3:2. Candidate Kantorowicz used the same mail house as Candidate Pinocci; with the amount Candidate Kantorowicz paid to the mail house (\$2076.70) showing he covered the cost of distributing about 5,000 copies of Issue 3:2 to voters in SD10.

There is no press exception for copies of Issue 3:2 that are purchased by or distributed by a candidate's committee, as opposed to self-delivery of copies by the Montana Christian Journal (see above discussion, at 2). The Montana Christian Journal and the several candidates explicitly recognized this fact and established an amount (\$0.16 per copy) that was paid and reported by the candidate as a campaign expense (FOF Nos. 11-13).

Candidate Kantorowicz has not disclosed his purchase of copies of Issue No. 2 with the same required detail, as did Candidates Sheldon-Galloway and

Pinocci. Nevertheless, given the \$0.16 per issue amount reported by Candidate Sheldon-Galloway, Candidate Pinocci and the Montana Christian Journal, the Commissioner determines that Candidate Kantorowicz also paid \$0.16 per copy of Issue No. 3:2 (FOF No. 14).

The Complaint challenges the amount paid by Candidate Kantorowicz asserting that the cost does not cover the costs of “printing or layout” of Issue 3:2. The Complaint offers no data or other information that would show another cost basis for purchase of Issue 3:2. The Commissioner’s investigator determined that the price charged of \$0.16 per copy of Issue 3:2 is within the range of a “volunteer enhanced” fair market value cost, taking into consideration the fact that Montana Christian Journal has one paid staff person and limited overhead cost.¹¹

Consequently, the Commissioner does not find sufficient facts to support a determination that Candidate Kantorowicz reported improperly as to the cost of and distribution of the copies he purchased of Issue 3:2. The Commissioner, however, does conclude that the amount reported was late reported and without sufficient expense detail. This determination was included in Sufficiency Finding No. 1.

4. Campaign Contributions to Other Candidates

Volume 3, Issue No. 2 was 32 pages in length of which 13 pages contained articles or ads advocating, at least in part, the primary election of candidates. (FOF No. 5). Candidate Kantorowicz paid to deliver Issue 3:2 to approximately

¹¹ Investigator’s interview with D. Miller, publisher of Montana Christian Journal.

5,000 voter addresses in SD 10 (FOF No. 15).

Finding of Fact No. 16. Issue No. 3:2 contains ads advocating a 2016 primary election vote for: Greg Gianforte (full page, Governor); Kristen Juras (full page, Supreme Court); as well as multiple ads advocating a vote for legislative candidates Lola Sheldon-Galloway, Sheridan Buck, Randy Pinocci and JC Kantorowicz. (Commissioner's records.)

The Complaint asserts that Candidate Kantorowicz failed to properly report and disclose the value of campaign funds spent on behalf of other candidates for 2016 primary election to Montana public offices. This value came about because Issue 3:2, paid for and delivered to thousands of SD 10 voter addresses, advocated a vote FOR Candidate Kantorowicz and also advocated a vote FOR candidates Sheldon-Galloway, Buck, Pinocci, Juras and Gianforte (FOF No. 16).

Under Montana law a candidate's committee is a "person" for reporting and disclosure purposes. §13-1-101(28), MCA. In turn, "a person making an independent expenditure shall report the name of the candidate...the independent expenditure was intended to benefit." 44.11.502(8)(b), ARM.¹² Candidate Kantorowicz failed this requirement when he reported the entire amount spent on Issue 3:2 as an expense to his campaign and did not apportion the amount between his campaign and the campaigns of the other

¹² The Commissioner notes that Candidates Pinocci and Kantorowicz worked together (even sharing an attribution on mailings to HD 19 voter addresses) to the point that cooperation in the form of coordination existed between those two candidates. A coordinated contribution is not independent and is subject to contribution limits. *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Clark v. Bannan*, COPP 2010-CFP-023; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; *Bonogofsky v. Wittich*, COPP-2010-CFP-031; *Madin v. Sales*, COPP-2010-CFP-029; *Bonogofsky v. Prouse*, COPP-2010-CFP-033, and *Bonogofsky v. Wagman*, COPP-2010-CFP-035.

candidates whose campaigns were advocated by Issue 3:2.

Sufficiency Finding No. 2. The Commissioner determines that there are sufficient facts to show that Candidate Kantorowicz failed to report and disclose independent expenditures made on behalf of Candidates Buck, Gianforte and Juras. Further, there are sufficient facts to show that Candidate Kantorowicz failed to report and disclose coordinated expenditures that became contributions to the campaign of Candidate Pinocci.

There is, however, no independent expenditure in regard to Candidate Sheldon-Galloway because SD 10 did not include House District 22, the district that Sheldon-Galloway was running in. Thus, Candidate Kantorowicz's delivery of copies of Issue 3:2 to SD 10 voter addresses did not benefit Sheldon-Galloway's campaign.¹³

5. Attribution

Candidate Kantorowicz purchased and mailed 5,000 copies of the 32 page Issue 3:2 to the addresses of SD 10 voters (FOF No. 15). The Complaint asserts that Candidate Kantorowicz failed to properly attribute his role in paying for delivery of Issue 3:2 to SD 10 voters.

Finding of Fact No. 17. Issue 3:2 was attributed at the top of page 32, in the ¼ page blank space provided for use in mailing. The attribution language read "Paid for by JC Kantorowicz (SIC) for SD 10, Tammie Lynn Smith, Treasurer, PO Box 7504, Great Falls, MT." (Commissioner's records.)

Under Montana law "all election communications...must clearly and conspicuously include the attribution 'paid for by' followed by the name and

¹³ Candidates Juras and Gianforte were statewide candidates and therefore benefited from the delivery of copies of Issue 3:2 to SD 10 voters. HD 19 and HD 20 voters are part of the SD 10 voters so Candidates Pinocci and Buck also benefited from delivery of Issue 3:2 to SD 10 voters.

address of the person who made or financed the expenditure for the communication.” §13-35-225(1), MCA. Stated another way, under Montana law “all election communications...must clearly and conspicuously include the attribution” language set out in FOF No. 17. The key words in this Matter are “clearly and conspicuously.”

Commissioner Unsworth considered “clearly and conspicuously” in *Campbell v. Brown* (May 9, 2008), defining the phrase as follows:

1. The reader or observer should have no difficulty locating and reading the attribution language.
2. The attribution language should be of sufficient type size to be clearly readable by the recipient or reader of the communication.
3. The language should be contained in a printed area or segment set apart from the other contents of the communication.
4. The language should be printed with a reasonable degree of color contrast between the background and the printed statement.
5. In the case of yard signs and other campaign signs, the language should appear on whichever side or sides of the sign contain the campaign message.¹⁴

The Commissioner applies the foregoing *Campbell* standards to the Issue 3:2 attribution used by Candidate Kantorowicz and determines that a sufficient attribution was used by Candidate Kantorowicz. While it would have been more clear and conspicuous to place a sticker on the front page of Issue 3:2, the Commissioner recognizes that direct mail political advertising is now commonplace in the mailboxes of Montanans. With that in mind, a plain stated attribution on the mail label page is sufficient as that is a page a Montanan would examine to find the attribution.

¹⁴ The COPP has adopted the *Campbell* standards at 44.11.601(3), ARM.

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 Candidate Kantorowicz’s 2016 SD 10 campaign violated Montana’s campaign practice laws, including, but not limited to the laws set out in the Decision. 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 failures to fully and timely report and disclose and to properly attribute cannot generally 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, 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 all sufficiency findings, civil/criminal 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 Candidate Kantorowicz. Because of the nature of the violations (the failure to 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.

While it is expected that a fine amount can be negotiated and paid, 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 identified in this Decision. 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 13th day of September, 2016.

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

Jonathan R. Motl
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