

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Gibson v. Montana League of Rural Voters No. COPP 2014-CFP-064	Findings of Sufficient Facts to Show a Campaign Practice Violation
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On December 8, 2014, Steve Gibson, a resident of East Helena, Montana filed a complaint against the Montana League of Rural Voters (MLRV) alleging a campaign practice violation. Mr. Gibson was the Republican nominee for election to the Montana legislature from House District 84 (HD 84). Mr. Gibson was opposed by Mary Ann Dunwell, the Democratic nominee for election to the Montana legislature from HD 84.

Mr. Gibson's complaint alleges that two flyers attacking his candidacy (*see* attachments to Complaint) were received by HD 84 voters in the last days of the 2014 general election. Mr. Gibson's complaint states he received notice of the flyers on October 31, 2014 via an email from MLRV and cites to the provisions of Montana's "Clean Campaign Act", requiring notice for any campaign related Flyers mailed during the 10 days prior to an election.

FOUNDATIONAL FACTS

The facts necessary for determination in this matter are as follows:

Finding of Fact No. 1: Steve Gibson (R) and Mary Ann Dunwell (D) were the 2014 candidates for election to the Montana legislature representing HD 84. (Secretary of State (SOS) website).

Finding of Fact No. 2: Steve Gibson was running for re-election, having served in the Montana House in 2012. Ms. Dunwell defeated Mr. Gibson with 1,885 votes to his 1,862 votes and is currently the representative for HD 84. (SOS website).

DISCUSSION

To date the COPP has engaged in minimal discussion of the overall reporting and disclosure requirements for entities making independent expenditures in Montana elections.¹ Before the bevy of complaints at the end of the 2014 campaign cycle, independent expenditure discussion had focused on whether or not a particular third party election expense advocated for or against a candidate (“express advocacy”) such that it became a reportable election expense.²

Independent expenditures are third party election expenditures that are not coordinated with the candidate.³ Independent expenditures in Montana elections increased following the 2010 *Citizens United* decision by the US Supreme Court. Independent expenditures are generally carried out in the form of an election communication (in Candidate Gibson’s case, two flyers) issued by a third party (MLRV, in Candidate Gibson’s case) attacking a candidate (Gibson).

The 2014 Montana election cycle involved significant independent expenditure activity by multiple entities in multiple elections. The entities making the independent expenditures, as shown by this Decision, did so within

¹ The COPP has discussed narrow issues regarding independent expenditures in Montana elections as early as 2003. See *Haines v. Bianco*, (March 2003, Commissioner Vaughney).

² See *Bonogofsky v. NGOA*, COPP-2010-CFP-008.

³ Independent expenditures are those “not made with, at the request of suggestion of, or the prior consent of a candidate...” 44.10.323(3) ARM

a reporting and disclosure culture that lacked the adherence to transparency that is seen in reporting and disclosure by the campaigns of the candidates themselves. There have been six complaints filed over 2014 independent expenditure activity, including the complaint in this matter.⁴

As explained in this Decision, entities involved in independent expenditures in Montana's 2016 election cycle will need to adapt such that they fully and timely report and disclose independent expenditures, with those independent expenditures listed on a candidate-by-candidate basis. This disclosure, timely made according to candidate, is what Montana law requires and it is what the press, public and the opposing candidate need if there is to be transparency in election expenditures.

1. Notice Laws Were Not Violated

Montana law requires that any entity producing an attack flyer provide notice to the affected candidate of printed material "intended for public distribution in the 10 days prior to an election..." (§13-35-402(1) MCA). The printed material must be provided to the candidate if "...disseminated by direct mail, on the date of the postmark..." (§13-35-402(3)(b) MCA).

The following findings of fact apply:

Finding of Fact No. 3: The MLRV flyers attacked Candidate Gibson's stance on Montana jobs and big oil companies. The MLRV attack flyers were mailed one time. (Commissioner's records).

⁴ The five additional complaints concerning 2014 independent expenditure activity are: *Shellnutt v. Planned Parenthood*, COPP-2014-CFP-058; *Perea v. MDP*, COPP-2014-CFP-055; *Buttrey v. MDP*, COPP-2014-CFP-050, *Kary v. MDP*, COPP-2014-CFP-059 and *Gibson v. MDP*, COPP-2014-CFP-062.

Finding of Fact No. 4: The MLRV Montana jobs attack flyer was “dropped” or mailed on October 23, 2014. The MLRV big oil companies attack flyer was “dropped” or mailed on October 23, 2014. (Commissioner’s records).

Finding of Fact No. 5: There was no postmark date on the MLRV attack flyers. (Commissioner’s records).

The Commissioner notes that the 2014 Montana general election took place on November 4, 2014. Montana law requires that notice be given for any attack flyer “intended for public distribution in the 10 days prior” to the November 4 election. (§13-35-402(1) MCA).

The 10 days prior to the November 4 election was the period of October 25 through November 3, 2014. There were no postmarks on the MLRV attack flyers (FOF No. 5). The Commissioner therefore determines that the date mailed or “dropped”, as reported by the mail house receipt, is the equivalent of the postmark date.⁵ The Commissioner has determined that these mail dates are the dates that will be used to measure the dates of “intended for public distribution” under §13-35-402(1) MCA. *Buttrey v. MDP*, COPP-2014-CFP-050.

With the above in mind, the Commissioner determines that the MLRV attack flyers were mailed October 23, the 13th day before the election. Because this fell outside the 10 days prior to the election, MLRV was not required to provide notice of or copies of the attack flyers to Candidate Gibson. Consequently, there is no violation of the notice provisions of §13-35-402, MCA.

⁵ MLRV appeared unsure about the date of mailing of its attack flyers as it provided notice of the Flyers to Gibson on October 31, 2014 and listed alternate dates of mailing. However, MLRV provided US Post Office receipts for each mailing showing a mailing date of October 23, 2014. Given the lack of a postage stamp on the mailings the date provided by the mail house, the entity that actually did the mailing, is the best evidence of the date of mailing. For the reasons stated in *Buttrey v. MDP*, COPP-2014-CFP-050 the COPP uses the date of mailing by the mail house as a measure of the 10 day period.

2. Reporting and Disclosure Issues

Once a complaint is filed the Commissioner "...shall investigate any other alleged violation ..." (§13-37-111(2)(a) MCA). This investigation authority includes authority to investigate "all statements" and examine "each statement or report" filed with the COPP. §§13-37-111, 123 MCA. The Commissioner is afforded discretion in exercising such investigative authority. *Powell v. Motl*, OP-07111, Supreme Court of Montana, November 6, 2014 Order.

The Gibson complaint, once filed, triggered a review by the Commissioner of the adequacy of the independent expenditure information reported and disclosed by the MLRV. MLRV's organizational existence was that of a political action committee (*see below*), drawing its existence from the form (Form C-2) filed with the COPP. As a PAC, MLRV was required to timely register. The MLRV registration form must, in turn, list "the name...of each candidate whom the committee is supporting or opposing..." (44.10.405(f)ARM). Following registration the MLRV PAC was required to file reports "...of contributions and expenditures made by or on behalf of a candidate...." (§13-37-225(1) MCA); and the reports must be filed on certain schedules, including those defined by §13-37-226 MCA.

A. MLRV Failed to Timely Register

MLRV may participate in Montana elections subject to Montana's reporting and disclosure requirements. While MLRV may make independent expenditures of any size, it must "...file the [C-2] certification ...within 5 days

after it makes an expenditure...” §13-37-201 MCA. MLRV’s own campaign finance report (filed October 23, 2014, see FOF No. 7) discloses expenditures as early as September 23, 2014. Under Montana law MLRV was required to file its C-2 registration form no later than 5 days after that September 23, 2014 expenditure, or no later than September 28, 2014.

Sufficiency Finding No. 1: The Commissioner finds sufficient facts to show that MLRV filed its C-2 registration form at least 25 days later than the time required by §13-37-201 MCA.

Election involvement comes with rights and responsibilities. MLRV registered as a PAC and exercised its right to make independent expenditures but it did not fulfill its responsibility to timely register. Campaign practice filing dates are not abstract requirements of little meaning. The delay in filing meant that for 25 days the public, press and opposing candidate was denied timely access to required election information.

B. MLRV Failed to List the Names of Each Candidate

MLRV filed a Statement of Organization (Form C-2) with the COPP, albeit through a late filing (see FOF No. 7, Sufficiency Finding No. 1). The MLRV registration form must, in turn, list “the name...of each candidate whom the committee is supporting or opposing...” [44.10.405(f)ARM]. The following findings of fact apply as to the MLRV C-2 form.

Finding of Fact No. 6: On October 23, 2014, the MLRV submitted an “original” C-2 Statement of Organization form to the COPP. The MLRV filed as a Political Action Committee (PAC) and listed its opposition to Legislative Initiative 126 and support of 7 candidates running for office. The 7 candidates listed were Virginia Court, Greg Jergeson, Margie

MacDonald, Steve Muggli, Mary McNally, Mary Ann Dunwell and Mitzi Voracheck. (Commissioner's records).

Finding of Fact No. 7: The MLRV PAC filed their first C-6 campaign finance report with the COPP on October 23, 2014, the same day they registered as a PAC and a closing campaign finance report on December 5, 2014. (Commissioner's records).

Finding of Fact No. 8: The MLRV's C-6 Reports disclosed expenditures in support of the 7 candidates and ballot issue listed on the MLRV C-2 Form (see FOF No. 6). In addition the C-6 reports disclosed expenditures in the Strohmaier/Moore legislative election and the Wheat/VanDyke Supreme Court election. (Commissioner's records).

Finding of Fact No. 9: The two MLRV's C-6 Reports disclosed \$83,302.85 in expenditures. The final C-6 Report was filed as a closing report meaning that this was the total amount of expenditures. There were no contributions disclosed by the C-6 Reports. (Commissioner's records).

The failure to fully disclose on the C-2 Form meant that the public, press and opposing candidate had to wait for the C-6 form to be filed before the Moore and VanDyke expenditures were disclosed. In the case of Candidate VanDyke that disclosure came with a C-6 form filed on December 5, 2014, over two months after the C-2 form, if timely filed, would have disclosed MLRV's intent to spend against Candidate VanDyke.

Sufficiency Finding No. 2: The Commissioner finds sufficient facts to show that MLRV failed to list the name of two candidates on its C-2 form, as required by 44.10.405(f)ARM.

C. MLRV Failed to Timely File Its C-6 Campaign Finance Reports.

As a political committee organized to support or oppose a statewide ballot issue and a statewide candidate (See FOF No. 8) MLRV

was required to file its campaign finance reports at the times set out in §13-37-226(1) and (2) MCA. This included requirements of filing C-6 campaign finance reports on the “15th and 5th” days pre-election and not more than “20 days” following the election. *Id.*

MLRV filed two C-6 campaign finance reports, one on October 23, 2014 and one on December 5, 2014 (FOF No 7). The October 23, 2014 report was filed 12 days pre-election while the December 5, 2014 report was filed 31 days post-election.

Sufficiency Finding No. 3: The Commissioner finds sufficient facts to show that MLRV failed to timely file the 15th day pre-election report and the 20th day post-election reported. The Commissioner further finds to sufficient facts to show that MLRV failed to file the 5th day pre-election report at all.

MLRV appears to be genuinely confused as to its reporting responsibilities. The complaint response from MLRV claims it filed as an “incidental committee” but it did not do so, instead filing as a political action committee.⁶ Further, that distinction does not matter as an incidental committee making expenditures in a statewide ballot or candidate race would still need to abide by the §13-37-226(1) and (2) MCA reporting schedules. See 44.10.411(2) ARM.

D. MLRV Adequately Reported and Disclosed The Gibson Expenditure

Under Montana law independent expenditures “must be reported in accordance with the procedure for reporting other expenditures”. *Hanes v. Bianco*, ARM 44.10.323(3) and ARM 44.10.531(4). Section 13-37-225 MCA

⁶ The COPP program supervisor contacted MLRV on December 3, 2014, seeking to clarify its status (incidental committee vs. PAC), before Mr. Gibson filed his complaint. MLRV did not respond and did not change its filing status from that of a political action committee.

requires that the MLRV file “periodic reports of ... expenditures made ...on behalf of a candidate...” (Emphasis added). The reports must include “debts and obligations owed” by the MLRV. §13-37-230(1)(g) MCA. Independent expenditure reporting requires “reporting of the name of the candidate...the independent expenditure was intended to benefit...” ARM 44.10.531(4).

The Commissioner determines that the MLRV campaign finance reports did meet these requirements as to the Gibson expenditure. The MLRV filed a campaign finance report (Form C-6) on October 23, 2014 disclosing an expenditure of \$5,501.44 incurred on October 18, 2014 in support of Mary Ann Dunwell. Setting aside, at this point, this issue of the date of reporting this disclosure meets the requirements of Montana’s independent expenditure law: “shall report the name of the candidate”. ARM 44.10.531(4).

E. MLRV Failed to Disclose Its Contributors.

The MLRV confusion was most apparent in the way it dealt with contributions. The MLRV filed as a PAC (FOF No. 6) and reported on a C-6 PAC campaign finance reporting form. (FOF No. 8). Yet MLRV inexplicably left off Schedule A (contributions) from the C-6 form and reported only Schedule B (expenditures).

There is a long-standing COPP reporting exception that allows incidental committees to report only expenditures without reporting contributions, other than earmarked contributions. This exception draws legal authority from 44.10.411(5) ARM.

The basis for this exception to contribution reporting lies in the definition

of an incidental committee in that such a committee has another primary purpose for existence but only "...incidentally becomes a political committee by making a contribution or expenditure to support or oppose a candidate and/or issue." 44.10.327(2)(c) ARM. Thus an entity with a separate corporate existence and a clear business or other dominant activity would be an incidental committee when it chose to make an independent expenditure in a Montana election.⁷

Sufficiency Finding No. 4: The Commissioner finds sufficient facts to show that MLRV was required to but failed to disclose the source of the \$83,302.85 of contributions that provided funding for that amount of independent expenditures.

MLRV is likely to argue that it is actually an incidental committee that mistakenly registered as a PAC.⁸

Putting aside the fact that MLRV is registered as a PAC, it is not readily apparent that MLRV could ever qualify as an incidental committee. The website for MLRV reflects only election activity of a type that is consistent with a political action committee, not an "other purpose" organization that would qualify as an incidental committee. Further, while there are corporate records at the Montana Secretary of State those records do not necessarily reflect a separate corporate presence for MLRV. Accordingly, the Commissioner

⁷ Orvis Corporation, for example, was an incidental committee when it spent corporate funds in support of a Montana initiative. *Daubert v. Montanans for Clean Water* (February 27, 1997, Commissioner Argenbright).

⁸ MLRV registered as a PAC and its registration form (C-2) listed a broad purpose ("[t]o promote the interests of rural Montana voters through the civic process") and further lists 8 elections (one ballot issue and 7 candidates) in which it intends involvement. Under 44.10.329 ARM the COPP is required ("shall") to classify a political committee based on this information and this information places MLRV as an independent committee and PAC under ARM 44.10.327((2)(b)).

determines that the MLRV PAC filing (as opposed to incidental committee filing) is intended and accurate. *See* FN 8.

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. 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 the MLRV has, as a matter of law, violated Montana’s campaign practice laws, including, but not limited to §13-37-226 MCA and all associated ARMs. 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 properly and timely file was due to oversight. Excusable neglect cannot be applied to oversight. *See* discussion of excusable neglect

principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

Likewise independent expenditures are emerging as an important component of spending in candidate races such that issues dealing with independent expenditures cannot be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

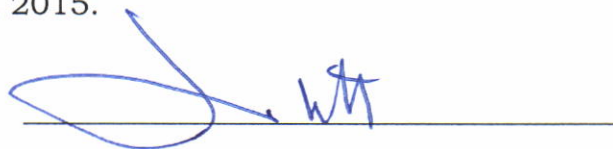
Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil/criminal prosecution and/or a civil fine is justified (See §13-37-124 MCA). The Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution under §13-37-124 MCA. Because of the nature of violations (the failure to timely report 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 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 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*.

At the point this Matter is returned to the COPP for negotiation of the fine or for litigation, mitigation principles will be considered. See discussion of mitigation principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. The Commissioner notes that MLRV, while failing to meet the requirements of law, is likely acting with responsibility comparable to that of most corporations, political committees or other entities making independent expenditures in Montana's 2014 elections. The Commissioner hereby directs MLRV to file a supplemental campaign finance report disclosing the source of contributions to the PAC. The filing of that report, along with the first time nature of this Decision, will be recognized as factors supporting mitigation.

DATED this 13th day of May, 2015.



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