

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

<p>Graybill and Van Hyning v. Parent Coalition for Accountability in Schools Nos. COPP 2014-CFP-018 and CFP-019</p>	<p>Finding of Sufficient Facts to Show a Violation of Montana Campaign Practice Laws</p>
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Cyndi Baker is a resident of Great Falls, Montana and a 2014 candidate for Trustee, School District #1, Great Falls public schools. On April 24 and April 29, 2014 Great Falls residents Benjamin Graybill and Dyrck Van Hyning filed respective complaints concerning certain election activities of something identified as Parent Coalition for Accountability in Schools. For the reasons set out below the Commissioner determines that this name is related to Ms. Baker's candidate campaign.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: applicability of Montana's campaign practice act to school district trustee elections; campaign expense reporting; and attribution.

SUMMARY OF RELEVANT FACTS

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: The Great Falls School District #1 is classified as a first class (based on population) school district. See § 20-6-201 MCA; (Records Office of Public Instruction, State of Montana).

Finding of Fact No. 2: The Great Falls School District No. 1 election of Trustee, as well as a school levy vote, is a mail ballot election. (Cascade County Elections Department).

Finding of Fact No. 3: Cyndi Baker of Great Falls is a candidate for the position of Trustee of School District # 1. (Commissioner's records).

Finding of Fact No. 4: The mail ballot election began on April 21, 2014 and will end on May 6, 2014. (Cascade County Elections Department).

INTRODUCTION

Great Falls School District No. 1 is a first class school district located in a County with a population greater than 15,000. The exceptions of §13-37-206 MCA do not apply to such first class school district elections. The Trustee election at issue in this Matter is subject to the full reach of Title 13, Chapters 35 and 37 of Montana law.

THE COMPLAINTS

The Graybill and Van Hyning complaints addressed three documents distributed in the Great Falls community, two as inserts into delivered copies of the Great Falls Tribune newspaper. These insert documents were a two page flyer addressing the school levy and a two page flyer "Baker for School Board". The third document was a one page flyer, hand-delivered to homes in the Great Falls area, and titled "Vote No on the School Levy." The first two documents

were attributed as “Paid for by Parent Coalition for Accountability in Schools, Chuck Henry Treasurer, PO Box 6126, Great Falls, MT 59406.” The latter document was not attributed.

The Complaints allege that the “Parent Coalition for Accountability in Schools” violated several of Montana’s campaign practice laws requiring registration, reporting and disclosure.

DISCUSSION

This Matter presents alternative scenarios for analysis, both of which involve a particular candidate campaign for Trustee of the Great Falls School Board. The scenarios involve a 2014 Great Falls School District Trustee candidate, Cyndi Baker.

On April 4, 2014 Ms. Baker filed the required form (Form C-1- A) allowing her candidacy for Trustee of School District #1. That form lists her campaign treasurer as “Chuck Henry, PO Box 6126, Great Falls, MT.” On April 24, 2014 Candidate Baker filed the required C-5 campaign finance report showing \$2,122 in contributions, but listing no expenditures and no outstanding debts. (Commissioner’s records). The campaign finance reporting period was to be current through April 18, 2014.

The complaint in this Matter addresses two publications¹, one directly supporting Candidate Baker’s campaign, both attributed as paid by “Parent Coalition for Accountability in Schools.” The Commissioner’s investigator, through interviews and document review, has determined the following in

¹ The third anonymous publication is not addressed by this Decision.

regard to the two attributed documents described above²:

Finding of Fact No. 5: Candidate Baker arranged to place both documents as inserts into the Great Falls Tribune newspaper. (Investigative notes).

Finding of Fact No. 6: Candidate Baker delivered instructions for production of the levy flyer on March 25, 2014 and the document was sent to the printer on April 8, 2014. (Investigative notes).

Finding of Fact No. 7: Candidate Baker delivered instructions for production of her candidate flyer on March 28, 2014 and the document was sent to the printer on April 8, 2014. (Investigative notes).

Finding of Fact No. 8: Candidate Baker arranged for the two documents to be inserted twice into differing Great Falls Tribune circulation bases between April 22 and April 24. (Investigative notes).

Finding of Fact No. 9: Candidate Baker arranged for the inserts using a "political account" under her name and paid \$2,084.84 as insert costs, using a personal credit card. Payment was made on April 21, 2014. (Investigative notes).

Finding of Fact No. 10. There is no entity called Parent Coalition for Accountability in Schools registered as a political committee or otherwise disclosed as a name on reports or statements filed with the Commissioner of Political Practices.

There are two interpretations possible for the above facts, each leading to campaign practice violations by Candidate Baker. First, it is possible that

² The investigation was conducted via administrative subpoena issued by the Commissioner to the Great Falls Tribune.

Candidate Baker orchestrated campaign expenditures by an unregistered political committee called “Parent Coalition for Accountability in Schools.” That orchestration, if it occurred, would result in substantial campaign practice violations. This would happen because orchestrating the expenditures would mean that Candidate Baker turned the same into in-kind contributions to her campaign.³ Because Candidate Baker cannot accept more than \$170 from any single political committee (§13-37-216 MCA) any such action would result in acceptance of over the limit contributions.

The Commissioner believes it unlikely that Candidate Baker did anything so foolish as to orchestrate unregistered political committee third party expenditures.⁴ Instead, the Commissioner poses and accepts a second possibility, that being that Candidate Baker has, without announcement, adopted use of “Parent Coalition for Accountability in Schools” as the “stealth” name of her candidate campaign. The Commissioner believes this to be the case because the treasurer and address listed in her C-1 candidacy form are the same as those listed in the attribution made for the “Parent Coalition for Accountability in Schools” documents at issue in this Matter.

Making the stealth campaign name assumption creates a better position for Candidate Baker under law but it still leads to campaign practice violations.

³ *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.

⁴ The Commissioner notes that Candidate Baker understands the COPP process, having filed a school board related complaint herself. *Baker v. KEY*, COPP-2011-CFP-032. Further, the actions taken in this Matter were planned actions as they were timed to start on April 22, 2014, the day after mail ballots were sent out to voters.

Candidate Baker filed her pre-election campaign finance report through the time period of April 18, 2014.⁵ Candidate Baker listed no expenses or debt in that report.

Candidate Baker's failure to report debt incurred through April 18, 2014 does not comport to the requirements of Montana law. Baker paid \$2,084.84 for the production of and insertion of the two documents in the Great Falls Tribune on April 21, 2014. FOF Nos. 8 and 9. The payment date, however, is not determinant of the date of reporting as, if that were the case, candidates would pay late and disclose activity after the fact, thereby depriving the opposing candidate and the public of the transparency that is required by reporting and disclosure laws. Instead, Montana statutes (§13-37-230(1)(f) MCA) require the reporting and disclosure of "the amount and nature of debts and obligations owed...". Montana regulations, at 44.10.535 ARM, add that "[i]f the exact amount of a debt or obligation is not known, the estimated amount owed shall be reported."

Past Commissioners have rigorously applied these laws requiring that campaigns "estimate their debts when they are incurred", not after an election. *Akey v. Clark*, March 26, 1999 (Commissioner Vaughey); because "the public has a right to full disclosure of all debts and estimated debts incurred by a candidate during the appropriate reporting periods." *Ream v. Bankhead*, September 10, 1999 (Commissioner Vaughey). This reporting of debt covers services, advertisements campaign expenses in general [*Wilcox v. Raser*, May

⁵ The report received a disclosure of all transactions that occurred between the date of the first contribution or expenditure, current through April 18, 2014.

26, 2010 (Commissioner Unsworth)] and even the expenses owed musicians (*Hardin v. Ringling* 5, December 17, 2012 (Commissioner Murry)].

In this Matter Candidate Baker engaged in a month-plus process of producing two campaign documents and sent the documents to the printer April 8, 2014, ten days before the April 18, 2014 reporting deadline. FOF Nos. 5, 6 and 7. The Commissioner determines that Candidate Baker was required to include the actual or estimated amount of the debt she had incurred for this project in her April 18, 2014 candidate campaign finance report. §13-37-230(1)(f) MCA, 44.10.535 ARM, *Akey v. Clark*, *Ream v Bankhead*, *Wilcox v. Raser*, *Hardin v. Ringling* 5. There are sufficient facts to show that Candidate Baker failed to report such debt and therefore is in violation of §13-37-230(1)(f)MCA.

The Commissioner further finds that the Candidate Baker failed to properly attribute the two documents inserted into the Great Falls Tribune. Montana's attribution law is a common sense law designed to promote transparency. Accordingly it requires that a campaign document be attributed with "paid for by" followed by the name and address of the person who made or financed the expenditure for the communication." §13-35-225(1) MCA. While the following subsection of law (§13-35-225(1)(a) MCA) does state "for election material financed by a candidate or a candidate's campaign finances, the name and address of the candidate or the candidate's campaign", that subsection has to be read with the purpose of the statute in mind.

Here, Candidate Baker's use of a name that did not readily associate as the

name of Candidate Baker's campaign was confusing enough to trigger immediate complaints. (See, FOF No. 10) Indeed, the name suggests that a third party entity is supporting Candidate Baker and engaging in electioneering for the benefit of her candidacy. Under this "stealth campaign name" approach, the Commissioner finds that sufficient facts exist to show that Candidate Baker's attribution does not comport to but violates the transparency and disclosure requirements of Montana law.

Lastly, the Commissioner reserves consideration on the anonymous flyer. The flyer sets out much the same text as the two attributed flyers. It is likely the identity and circumstances of this flyer will emerge during any enforcement action.

ADJUDICATION

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.

This Commissioner, having been charged to investigate and decide, hereby determines that sufficient evidence exists to show that the Candidate Baker violated Montana's campaign practice laws, including but not limited to

§§13-35-225 and 13-37-225, 226, 230 MCA. Having determined that there is sufficient evidence to show a campaign practice violation has occurred, 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.

Candidate Baker's decision to act was by choice and deliberate. Excusable neglect cannot be applied to the failures in this Matter. *See* discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. Likewise, the actions are too significant to be excused as *de minimis*. *See* discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-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 sufficiency finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil adjudication and/or a civil fine is justified (see §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") the Cascade County attorney for his review for appropriate civil action. *See* §13-37-124(1) MCA.⁶ Should the County Attorney waive the right to adjudicate (§13-37-124(2) MCA) or fail to prosecute within 30 days (§13-37-124(1) MCA) this Matter returns to

⁶ Notification is to "...the county attorney in which the alleged violation occurred..." §13-37-124(1) MCA. The failure to report occurred in Lewis and Clark County and the failure to attribute occurred in Cascade County. Normally this Commissioner chooses to Notice a campaign practice Decision to the county attorney in Lewis and Clark County, but because this is a purely local race and the infractions are not connected to a group engaged in a statewide pattern of activity this Matter is referred to Cascade County.

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 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 §13-37-226. (*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 Commissioner notes that the timing and manner of issuance of this Decision demonstrate the flexible role that the Commissioner’s Office plays in election matters. The Commissioner is tasked with several functions designed to address and remedy campaign practice acts. The Commissioner: inspects campaign finance reports for the purposes of immediate, informal correction (§13-37-121 MCA); is provided authority to issue Orders of non-compliance to address issues of non-cooperation (§13-37-115, MCA); is provided post-election examination authority as to campaign reports (§13-37-123 MCA; is provided

authority to remove a candidate's name from the ballot for failing to file required reports (§13-37-126); and is tasked with investigating/deciding/enforcing campaign practice complaints. In turn, a Commissioner's complaint Decision is itself just a step in the larger system of justice. A Decision finding sufficient facts to show a campaign practice violation creates a platform for judicial enforcement leading to the full due process protection afforded by Court.

It is noted that in the event that litigation ensues to enforce this Complaint further investigation may determine the campaign practice violations to be more extensive than those addressed by this Decision. While in most circumstances this Office is reluctant to step into the last days of an election cycle, in this instance justice and public trust are best served by a prompt pre-election Decision.⁷

CONCLUSION

Based on the preceding discussion as Commissioner, I find and decide that there is sufficient evidence to show that Candidate Baker violated Montana's campaign practices laws, as set out above, and that a civil penalty action, including the possible invocation of office ineligibility under §13-35-106

⁷ The Commissioner notes that this Matter began as a complaint against a supposed entity called Parent Coalition for Accountability in Schools and ends as a Decision against Candidate Baker. In that vein, the respondent letter was mailed to Parent Coalition for Accountability in Schools, not Candidate Baker. Nevertheless, the ensuing investigation produced facts showing that the actions were taken by Candidate Baker, with the Commissioner determining that the evidence inescapably led to sufficient facts to issue this Decision. There being sufficient facts the Decision was issued, taking the scenario most favorable to Candidate Baker.

MCA is warranted. This matter is hereby submitted to [or "noticed to"] the Cascade County Attorney for his review for appropriate civil action.

DATED this 1st day of May, 2014.


Jonathan R. Motl
Commissioner of Political Practices