

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

Matter of Vincent Complaint
COPP-2013-CFP-006, and
Matter of Hendry Complaint
COPP-2013-CFP-009

SUMMARY OF FACTS

STATEMENT OF FINDING OF
SUFFICIENT EVIDENCE TO
SHOW A VIOLATION OF TITLE
13, CHAPTERS 35 OR 37

John Vincent was a candidate for the Montana Public Service District 3, in the 2012 elections. On February 5, 2013, Mr. Vincent late filed a required campaign finance report, simultaneously filing a complaint against himself for doing so. On February 22, 2013 a Bozeman resident, Marilyn Hendry, also filed a complaint against Vincent based on the late filing of campaign finance reports. This Finding and Decision resolves both complaints.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: 1) Timely reporting of contributions to and expenditures by a candidate; 2) De minimis and/or excusable neglect theories as applied to late filing; and, 3) Mitigation of the amount of civil fine.

SUMMARY OF RELEVANT FACTS

Mr. Vincent has provided and admitted the facts on which to base this decision. The facts provided and admitted relative to the campaign practices violation are: 1) Mr. Vincent was a candidate for a particular public office in Montana; and, 2) Mr. Vincent did not timely file the post-election general campaign finance report required of a candidate for the Public Service Commission. These facts are discussed further below.

Additional facts related to *de minimis*, excusable neglect and mitigation theories are addressed in the discussion, below.

DISCUSSION

Montana's campaign related laws require full and timely disclosure of campaign contributions and expenditures. A candidate is required to timely file a certification [§13-37-201 MCA], timely keep and maintain accounts of contributions and expenditures [§13-37-208 MCA] and timely file reports to the Commissioner's office of such contributions and expenditures [§13-37-226]. The reports, once filed, are available for review by the public, thereby providing transparency and shared access to this information.

Mr. Vincent was a candidate in the 2012 general election for the Montana Public Service Commission, District 3. The general election took place on Tuesday, November 6, 2012. As a candidate for the Public Service Commission Mr. Vincent's post-election report was due "not more than 20 days after the date of the election" [§13-37-226(3)(c) MCA], or by November 26, 2012. Mr. Vincent filed his report on February 5, 2013. The report was, therefore, filed

71 days late. The report listed \$4,562.75 in contributions or expenses.

FACTUAL FINDINGS ESTABLISHING CAMPAIGN PRACTICE VIOLATION

The uncontested facts show that Mr. Vincent late filed, by 71 days, the campaign finance report due November 26, 2012.

DE MINIMIS, EXCUSABLE NEGLIGENCE, AND PROSECUTORIAL DISCRETION

Mr. Vincent explained to the Commissioner's Office that his late filing was due to family emergencies, which he attended to while knowing the entire time that he was out of compliance with campaign reporting requirements. Mr. Vincent also stated that he expected to be held accountable to the full extent of law. Mr. Vincent's candor and acceptance of responsibility are noted with appreciation.

Mr. Vincent's explanation, coupled with the distinct nature of the violation (a 71 day delay in filing a report) necessitate a review of the authority, including discretion in civil prosecution, of the Commissioner when responding to an established campaign practice violation.

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 prosecution.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. In this matter Montana's campaign finance report filing requirements are mandatory: "shall file" [**See** §13-37-226 MCA]. The filing date requirements are date certain. Therefore, any failure to meet a mandatory, date-certain filing date is a violation of §13-37-226 MCA.

This Commissioner, having been charged to investigate and decide, hereby determines that Mr. Vincent has, as a matter of law, violated Montana's campaign practice laws, including § 13-37-226, MCA. Having determined that a campaign practice violation has occurred, 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.

A Commissioner is given discretion ["may", **See** §13-37-124(1) MCA] in regard to prosecution of a violation. Mr. Vincent has offered an explanation for the late filing based on the need, during the period of late reporting, to devote his full time to deal with significant grieving and health needs of family members. Mr. Vincent's explanation implicates several past decisions by this Office involving the legal concepts of *de minimus* or excusable neglect.

The concept of a *de minimis* exception to civil enforcement of a violation of Montana's campaign practice law is set out and defined by the 9th circuit court of appeals in *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v Unsworth* 556 F. 3d 1021, 1028-29 (9th Cir. 2009). In *Canyon Ferry* the 9th circuit prohibited

civil enforcement of Montana's campaign finance disclosure requirements, as applied to limited ballot issue activity (limited photocopying, limited staff use and limited use of church property) carried out in support of a ballot initiative. The Court found that these ballot issue services, while technically having some value, could not be subjected to civil enforcement as a violation Montana's campaign practices law because the "conduct neither causes an economic detriment to the Church nor carries an ascertainable market value." *Id.* at 1030. The *de minimus* concept, as applied by the 9th circuit to ballot issue related actions, is that this type of limited conduct has such limited and indefinite value that it is excepted from civil enforcement as a violation of campaign practices.

The *de minimus* actions in *Canyon Ferry* were taken by a party involved in a ballot issue campaign. This Office has also, based on certain facts, declined prosecution of a candidate activity, after finding a violation of law based on failure of a candidate to properly label and disclose on a website. **See *In the Matter of the Fitzpatrick Complaint*, COPP- CFP-2011- 014.** While the *Fitzpatrick* decision did not specify the legal basis for declining prosecution, it did define the campaign practices violation as that of lack of proper attribution of a candidate website and noted that the candidate immediately corrected the website attribution error. There were no campaign violations, other than the website attribution violation, alleged by the Complaint. This Commissioner determines that *Fitzpatrick* decision was based on a decision not to pursue civil prosecution because of the *de minimis* harm associated with the website

attribution error.

In this Matter an entire campaign report was filed 71 days late. That length of time and the nature of the violation means that the violation in this Matter cannot be construed to be *de minimis*. The principle of a *de minimis* cannot be applied and prosecution cannot be declined on that basis.

This Office has, however, based on certain facts declined prosecution based on late filing by a period of 11 days [See *In the Matter of the Washborn Complaint. COPP-CFP-2013-002*] and by a period of 17 days [See *In the Matter of the Complaint Against CMRG*, decided February 21, 2002]. Again, the legal basis for declining prosecution was not specified in those Decisions but, upon review of those Matters, this Commissioner determines that those decisions to decline prosecution were based on an excusable neglect theory stemming from the Commissioner's determination of genuine confusion among multiple parties over who was to file what and when.

In making any such excusable neglect determination it is noted that intent and motive of those filing reports on behalf of the candidate is not involved, as a lack of knowledge of the filing requirements cannot be a factor, since ignorance of the law provides no excuse for its violation. *Wiard v. Liberty N.W. Ins. Corp.*, 2003 MT 295, ¶ 32, 318 Mont. 132, ¶ 32, 79 P.3d 281, ¶ 32. To the extent that intent and motive was considered as a factor in the above listed prior choice of prosecution Decisions by a Commissioner, the same factors are disavowed and will not be used as factors in this and any future excusable neglect consideration.

For the purposes of future matters it is also noted that a showing of excusable neglect generally requires justification for error beyond mere carelessness or ignorance of the law. *Empire Lath & Plaster, Inc. v. American Casualty Co.*, 256 Mont. 413, 417, 847 P.2d 276, 278 (1993). Neglect that is "due to forgetfulness and the press of other, more important business is not sufficient to establish excusable neglect." *Foster Apiaries, Inc. v. Hubbard Apiaries, Inc.*, 193 Mont. 156, 161, 630 P.2d 1213, 1216 (1981). A party's busy schedule or inattentiveness to the matter does not constitute excusable neglect. *Matthews v. Don K. Chevrolet*, 2005 MT 164, ¶¶13-15, 327 Mont. 456, ¶¶13-15, 115 P.3d 201, ¶¶ 13-15.

With the above analysis in mind, this Matter is also not appropriate for application of an excusable neglect theory. Mr. Vincent candidly admitted that he knew of the date certain legal requirement but chose, for understandable reasons, to first carry out other actions. This is a matter of choice of inaction, with an understanding of consequences of inaction, not a matter of excusable neglect.

Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil prosecution and/or a civil fine is justified [**See** §13-37-124 MCA]. This leads to the final consideration in this matter, that of mitigation.

Mitigation

This Commissioner has, through this decision, issued a "sufficient evidence" Finding and Decision justifying civil prosecution under §13-37-124

MCA. This matter will now be submitted to [or “noticed to”] the Lewis and Clark County attorney for his review for appropriate civil action. **See** §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 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 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*.

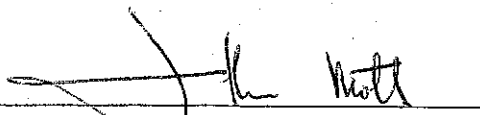
In regard to any such a fine the Commissioner has discretion to determine if mitigation is appropriate to reduce a fine based on the explanation of why a violation occurred or circumstances of payment. **See** *In the Matter of the Complaint of MacLaren*, COPP-2011-CFP-12 . Mitigation means “abatement or diminution of a penalty or punishment imposed by law.” *Black’s Law Dictionary, Revised 4th Addition*.

In this Matter Mr. Vincent provided an explanation for the late filing based on the need, during the period of late reporting, to devote his full time to deal with significant grieving and health needs of family members. The explanation was verified by the Commissioner's staff and accepted by this Commissioner. The certain facts of this Matter establish that mitigation is appropriate and will be applied to the amount of fine negotiated in this Matter, should Mr. Vincent choose to settle this Matter with a negotiated fine.

CONCLUSION

Based on the preceding Discussion as Commissioner I find and decide that there is sufficient evidence to show that Mr. Vincent violated Montana's campaign practices laws, including § 13-37-226, MCA, and that a civil penalty action under § 13-37-128, MCA is warranted. This matter is hereby submitted to [or "noticed to"] the Lewis and Clark County Attorney for his review for appropriate civil action under section 13-37-124(1) MCA. Upon return to the Commissioner of this Matter by the County Attorney, a mitigation factor will be applied by this Commissioner in assessing the amount of civil penalty, should Mr. Vincent choose to settle this Matter with a negotiated fine .

DATED this 26th day of June, 2013.


Jonathan R. Motl
Commissioner of Political Practices