

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Kary v. Montana Democratic Party No. COPP 2014-CFP-059	Finding of Sufficient Facts to Show a Campaign Practice Violation
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On November 14, 2014, Doug Kary, a resident of Billings, Montana filed a complaint against the Montana Democratic Party (MDP) alleging a campaign practice violation. Mr. Kary was a 2014 Republican Party candidate for election to the Montana Legislature from Senate District 22 (SD 22).

Mr. Kary's complaint alleges that flyers attacking his candidacy (*see* attachments to Complaint) were received by SD 22 voters on or after October 27, 2014. Mr. Kary's complaint states he received no advance notice of the flyers and cites to the provisions of Montana's "Clean Campaign Act", requiring notice for any campaign related Flyers delivered in 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: Doug Kary (R) and Steven Fugate (D) were the 2014 candidates for election to the Montana legislature representing SD 22, Yellowstone County. (Secretary of State (SOS) website).

Finding of Fact No. 2: Mr. Kary defeated Mr. Fugate by a vote of 4,106 to 2,280 and is currently a Senator for SD 22. (SOS website).

DISCUSSION

The flyers complained of in this Matter were prepared and mailed by the Democratic Party as a third party independent expenditure. Before the 2014 general elections the COPP engaged in minimal discussion of the overall reporting and disclosure requirements for entities making independent expenditures in Montana elections.¹ Instead, independent expenditure discussion has 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 U.S. Supreme Court. Independent expenditures are generally carried out in the form of an election communication (in Candidate Kary’s case, a flyer) issued by a third party (MDP, in Candidate Kary’s case) attacking a candidate (Kary).

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

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 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 seven complaints filed over 2014 independent expenditure activity, including the complaint in this matter.⁴

As explained in this Decision, entities involved in independent expenditures 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).

⁴ The six 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; *Gibson v. MDP*, COPP-2014-CFP-053; *Gibson v. MDP*, COPP-2014-CFP-062; and *Gibson v. Montana League of Rural Voters*, COPP-2014-CFP-064.

The following findings of fact apply:

Finding of Fact No. 3: The complaint alleges that there were four MDP flyers mailed that attacked Candidate Kary on “Montana families”, “corporate tax giveaways”, “corporate profits” and “blocked access to hunting and fishing.” The four flyers accompanying the complaint were all mailed by the MDP. (Commissioner’s records, Complaint).

Finding of Fact No. 4: The MDP “Montana Families” flyer was “dropped” or mailed once on October 29, 2014. (Commissioner’s records, Investigator’s records).

Finding of Fact No. 5: The MDP “tax giveaways” flyer was “dropped” or mailed once on October 29, 2014. (Commissioner’s records, Investigator’s records).

Finding of Fact No. 6: The mailing house was unable to determine the mailing or drop date for the MDP “corporate profits” flyer. Candidate Kary’s complaint, however, pegs November 1, 2014 as the date that the flyers were received. (Commissioner’s records, Investigator’s records).

Finding of Fact No. 7: The MDP “blocked access” flyer was “dropped” or mailed once on October 24, 2014. (Commissioner’s records, Investigator’s records).

Finding of Fact No. 8: There was no postmark date on any of the MDP 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 MDP attack flyers (FOF No. 8). The Commissioner therefore determines that the date mailed or

“dropped”, as reported by the mail house, is the equivalent of the postmark date.⁵ The Commissioner determines that the MDP “Montana Families” and “Tax Giveaway” attack flyers were mailed on October 29, 2014 (FOF Nos. 4 and 5), a time period within the last 10 days of an election and therefore triggering the notice provisions of §13-35-402(1) MCA. The Commissioner further determines and also applies that October 29 date to the “corporate profits” flyer. (FOF No. 6).

The October 29, 2014 date is a date of importance because this is the date that a 2014 general election notice complaint was first filed against the Democratic Party. *Buttrey v. Montana Democratic Party*, No. COPP-2014-CFP-050. Because the general election date was close, the COPP issued a “Partial Decision” in response to the Buttrey complaint on October 30, 2014, with a final Decision issued on November 25, 2014. At some point on or after October 29, 2014 the Democratic Party, now aware of the notice requirements, issued electronic copies of some (and perhaps all) the attack flyers it was mailing against 2014 general election candidates (Commissioner’s investigation notes). A notice, provided electronically or hard copy, meets the requirements of law so long as it is on or before the date of mailing. Section 13-35-402 MCA as interpreted in *Buttrey v. Montana Democratic Party*.

The Commissioner determines that the facts are not sufficient to support a finding of a notice violation as to the flyers mailed by the MDP against Candidate Kary. The MDP provided notice on October 29, 2014 to Candidate

⁵ The Commissioner’s Investigator confirmed the mailing dates with the mail house handling the Flyer.

Kary of the three Flyers mailed on October 29, 2014.⁶ The Commissioner further determines that the MDP “Blocked Access” attack flyer were mailed once on October 24, 2014 (FOF No. 7), a time period outside of the last 10 days of an election and therefore not triggering the notice provisions of §13-35-402(1) MCA). With the above discussion in mind, there are no notice violations as to the four Candidate Kary attack flyers.

2. There Are Reporting and Disclosure Violations

The Commissioner herein incorporates the substance of the Decisions listed in FN 4 to find that sufficient facts exist in regard to Candidate Kary’s election to support a finding against the MDP for reporting and disclosure violations associated with attack flyers such as those involved in this Matter. There is no need to repeat those findings in this Matter and the Commissioner chooses not to do so. However, the Commissioner takes administrative Notice that such reporting and sufficiency findings lie in regard to the flyers in this Matter. The Finding of Sufficient Facts applies solely to these reporting and disclosure violations.

Lastly, the Commissioner notes that the warning to “other entities” involved in similar acts of incomplete reporting of independent expenditures in Montana’s 2014 elections stands as expressed in the earlier Decisions.

⁶ Candidate Kary states in his complaint that the notices were first provided to him on October 29, 2014. The October 29 date is consistent with the October 29, 2014 email evidence provided by Candidate Gibson in *Gibson v. MDP*, COPP-2014-CFP-062.

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 MDP 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.

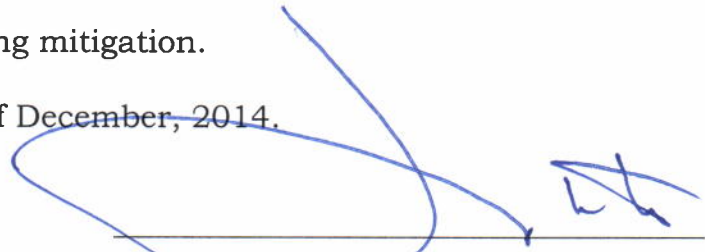
Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil/criminal prosecution and/or a civil fine is justified (See §13-37-124 MCA). The Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and 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 §13-35-402 MCA and §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 MDP showed complete cooperation and willingness to explain the oversight in a manner that accepted responsibility. That cooperation, along with the first time nature of this Decision, will be recognized as a factor supporting mitigation.

DATED this 18th day of December, 2014.



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