

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

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| Marbut v. Dudik<br>No. COPP 2014-CFP-061 | Finding of Sufficient Facts to Show a<br>Violation of Montana's Campaign<br>Practice Act |
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On December 3, 2014, Gary Marbut, a resident of Missoula, MT and 2014 candidate for House District 94 (HD 94), Missoula County, filed a complaint against Kimberly Dudik, the elected Representative for House District 94 and a resident of Missoula, MT. Mr. Marbut alleged in his complaint that Ms. Dudik violated campaign practice laws by failing to report the cost of some campaign flyers.

**FOUNDATIONAL FACT**

The foundational fact necessary for this Decision is as follows:

Finding of Fact No. 1: Kimberly Dudik (Democrat) and Gary Marbut (Independent) were candidates in the 2014 general election for election to the Montana legislature from House District 94. Ms. Dudik defeated Mr. Marbut in the 2014 general election by a vote of 1748 to 1700 and thereby became the Representative Elect from HD 94. (Secretary of State's Website, Commissioner's records).

## DISCUSSION

Montana law required that Candidate Dudik file campaign finance reports “on the 12<sup>th</sup> day preceding the date on which an election is held...” and on 20<sup>th</sup> day after the election (§13-37-226(3) MCA). In 2014 the 12<sup>th</sup> day preceding the November 4, 2014 general election was October 23, 2014 and the 20<sup>th</sup> day after the election was November 24, 2014. (Commissioner’s 2014 filing schedule).

Candidate Dudik’s campaign finance reports must include “all contributions received and all expenditures made...” (§13-37-208 MCA) within the reporting period. This system, if followed, provides transparency and fairness to the public, voters and the opposing candidate.

Candidate Marbut complains that Candidate Dudik failed to report the printing and design costs of a campaign flyer mailed late in the 2014 HD 94 election. The Commissioner’s investigator presented the complaint allegations to Candidate Dudik. Candidate Dudik reviewed her receipts and discovered that that she had failed to report a printing bill in the amount of \$900 to Mike’s Print Shop. On December 5, 2014 Candidate Dudik filed an amended campaign finance report acknowledging and reporting the omitted amount.

Sufficiency Finding No. 1: The Commissioner determines that sufficient facts exist to show that the Candidate Dudik failed to timely disclose and report \$900 in general election contributions/expenses as required by Montana law.

Dudik’s response to the complaint admits and accepts responsibility for her campaign practice error. Candidate Dudik, through the Commissioner,

apologizes to the people of Montana (and particularly to the people of HD 94) for her campaign practice error.

1. The Effect of the Campaign Practice Error

Given Candidate Dudik's frank response, there is no need for a review of comparable Decisions. Candidate Marbut's complaint, however, requests an explanation of "what will you [the COPP] do about" a campaign practice error. Given that request the Commissioner makes the following analysis.

Candidate Dudik explained in an interview in response to the Complaint in this Matter that she adopted a face-to-face approach to campaigning, doing the bulk of her campaigning by going door to door or meeting with groups of people in HD 94.<sup>1</sup> Candidate Dudik explained that she chose this approach because she had and has personal ties to many people living in HD 94, having grown up in Frenchtown, graduating from Frenchtown high school in 1993.<sup>2</sup> Dudik thought her personal contacts with many people living in HD 94 were her strongest campaign asset and she campaigned accordingly.<sup>3</sup>

The Commissioner makes this observation of Candidate Dudik's campaign approach because it is the foundation for answering Candidate Marbut's question as to what the Commissioner "will do" with this Matter. The COPP accepts most complaints filed, with Commissioners issuing Decisions

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<sup>1</sup> Candidate Dudik reported about \$2,500 in expenditures, primarily for printing or mailing, including "walkcards" used in door to door campaigning.

<sup>2</sup> Candidate Dudik's home is, because of redistricting, now located outside of HD 94 boundaries. Dudik's parents still live in HD 94 in the same Frenchtown home Dudik grew up in and Dudik's sister and family live in HD 94.

<sup>3</sup> Candidate Marbut adopted a more "modern" campaign approach raising and spending much more funds than did Candidate Dudik. (Approximately \$17,500 for Marbut and \$2,500 for Dudik).

dismissing complaints slightly more frequently than they issue sufficiency Decisions.<sup>4</sup> This is the second complaint Candidate Marbut has filed against Candidate Dudik during the 2014 election cycle. The earlier complaint was dismissed (*Marbut v. Dudik*, COPP-2014-CFP-042), while this complaint resulted in this sufficiency Decision.

A sufficiency Decision, such as the one in this Matter, identifies the facts and law that show sufficient cause to believe a campaign practice violation has occurred. Once the sufficiency Decision is published, the COPP and the applicable candidate or committee negotiate and generally settle the campaign practice violation identified in the sufficiency Decision through assessment and payment of a fine, coupled with equitable actions such as filing a corrected campaign finance report.<sup>5</sup> On occasion the campaign practice violation is so large, or is contested by the candidate or committee, such that the Commissioner must enforce the violation through the filing of a civil action in district court.<sup>6</sup>

The Commissioner, as the gatekeeper, decides whether or not a sufficiency Decision is transformed into a district court civil action, triggering thereby the powers afforded a district court judge. §13-37-124 MCA.<sup>7</sup> A sufficiency Decision is then transformed to a judicial action through a civil complaint filed

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<sup>4</sup> See chart, COPP website at the top of “Docket of Complaints.”

<sup>5</sup> See FN 4. All settlement agreements are posted to the COPP website (where they are available for public review) under the name of the Decision that is settled.

<sup>6</sup> Again, see FN 4. The citation to the enforcement action of any such enforcement litigation is listed on the COPP website under the name of the Decision that has been transformed to a civil complaint enforced judicially.

<sup>7</sup> A sufficiency Decision is first sent to the appropriate County Attorney for enforcement. The County Attorney (in the experience of this Commissioner) returns the sufficiency Decision to the Commissioner thereby placing enforcement responsibility with the Commissioner.

in a district court by the Commissioner.<sup>8</sup> A district court complaint is filed by the Commissioner on behalf of (and is enforced on behalf of) the people of Montana, not the person who filed with the complaint with the COPP.<sup>9</sup>

With the above in mind, the Commissioner hereby states that the public's interest in resolution of this Matter will be best served through payment of a fine.<sup>10</sup> Candidate Dudik does not contest application of Montana's campaign practice laws but has instead cooperated fully, admitting the reporting error, accepting responsibility and apologizing. There are therefore no policy reasons for the COPP to pursue litigation and the \$900 reporting error, measured against the type of campaign engaged in by Candidate Dudik, is not a magnitude that independently prescribes consideration by a judge.<sup>11</sup>

### **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

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<sup>8</sup> In a judicial action the Commissioner, on behalf of the people of Montana, presents evidence to the Court as to the campaign practice violation. It is the Court that makes the determination as to the consequences of any proven campaign practice violation. §§13-37-128,129 MCA. A Court may consider removal of an individual from elected office as part of its determination. §13-35-106 MCA.

<sup>9</sup> *Doty v. Montana Comm. Of Political Practices*, 207 MT 341, 340 Mont. 276.

<sup>10</sup> This assumes that Candidate Dudik and the COPP can agree on the amount of the fine. If no agreement as to a fine is reached the sufficiency Decision could progress to an enforcement action in district court.

<sup>11</sup> For comparison to an offense of greater magnitude, please see a sufficiency Decision dealing with the masking of the entire direct mail campaign approach. *Williams v. Andersen*, COPP-2014CFP-035.

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 Dudik 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.

Candidate Dudik was directly engaged in the campaign expenditures. Excusable neglect cannot be applied to such choices. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. Likewise, the failure to timely report 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]. This Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution under §13-37-124 MCA. Because of

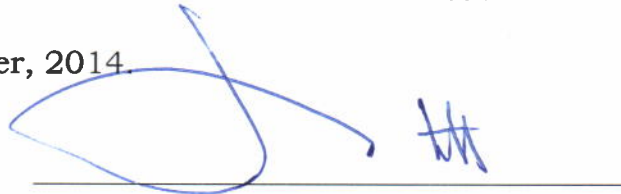
nature of violations (the failure to report occurred at the COPP offices in Lewis and Clark County) this matter is referred to the County Attorney of Lewis and Clark County for his consideration as to prosecution. §13-37-124(1) MCA. Should the County Attorney waive the right to prosecute [§13-37-124(2) 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 §13-35-225(1) 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 for negotiation of the fine or for litigation, mitigation principles will be considered. The forthright acknowledgment of error by Candidate Dudik is appreciated. Candidate Dudik’s actions in promptly filing an amended report will be a factor

considered as part of any mitigation discussion. See discussion of mitigation principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

DATED this 11<sup>th</sup> day of December, 2014.

A handwritten signature in blue ink, consisting of a large, stylized loop followed by a few vertical strokes, positioned above a horizontal line.

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