

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

O'Hara v. Erb No. COPP 2016-CFP-012	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION
--	--

On May 16, 2016, Jesse O'Hara of Lakeland, Florida filed a complaint against Brooke Erb of Dillon, Montana for failing to properly report and disclose certain campaign contribution information.¹

Discussion

The Complaint alleges that Ms. Erb, as a 2014 Candidate for public office in Montana, failed to properly report and disclose the occupation and employer of contributors to her campaign.

Finding of Fact No. 1: Brooke Erb and Jeff Welborn were candidates for 2014 election as the Republican nominee for election from House District 72 (HD 72). Mr. Welborn won the 2014 Republican primary election and went on to defeat a Democratic Party opponent in the general election. (Montana Secretary of State election records).

¹ Mr. O'Hara served in the Montana legislature for a number of sessions, as an elected Representative from a Great Falls area legislative district. Mr. O'Hara is now retired and lives in Florida.

Finding of Fact No. 2: A review of Candidate Erb's 2014 campaign finance reports shows there were two reports filed: an "initial" report for the period of February 24, 2014 through May 17, 2014 and a closing report through June 25, 2014. The two reports were filed with the COPP by fax filing. (Commissioner's records.)

Finding of Fact No. 3: A review of the two reports filed by Candidate Erb shows contributions from about 40 contributors and payment of about 22 expenditures. (Commissioner's records.)

The Complaint alleges that Candidate Erb's campaign finance reports failed to report and disclose the occupation and employer of several of the 40 contributors to her campaign.² An examination of Candidate Erb's campaign finance reports reveals a number of deficiencies.³ Specifically, an examination of Candidate Erb's 2014 HD 72 campaign finance reports shows:

1. A failure to list occupation or employer of multiple contributors;⁴
2. A failure to list businesses addresses for campaign expenditures;⁵
3. A failure to timely report campaign expenses;⁶
4. An unsupported claim of "cash in bank" for the initial report;⁷
5. Failure to disclose/report a campaign "debt" owed to Candidate Erb;⁸
6. A failure to reconcile final campaign balance by taking into account the amount, if any, of the remaining unpaid debt.

² It is difficult to confirm this directly from Candidate Erb's campaign finance reports because the reports, as fax filed, are cut-off and supply only partial information.

³ Once a complaint is filed the Commissioner "shall investigate any other alleged violation." §13-37-111(2)(a), MCA.

⁴ See Initial and Closing report, Schedule A.

⁵ See Initial and Closing report, Schedule B.

⁶ See Closing Report, Schedule B.

⁷ See Initial Report "cash in Bank."

⁸ See Closing Report.

Based on the above review the Commissioner determines as follows:

Sufficiency Finding No. 1. That sufficient facts exist to show that Candidate Erb failed to properly report and disclose contributions, debt, expenses and cash in her 2014 primary election.

The Commissioner notes that this Finding implicates violations of multiple Montana laws. Montana law in effect during the 2014 elections required that:

1. A candidate disclose the “name, mailing address, occupation and employer” of each contributor to her campaign (§13-37-229(2), MCA).

2. A candidate disclose the “name and mailing address of each person to whom expenditures have been made...[along with]...the amount, date and purpose of each expenditure” (§13-37-230(1), MCA).

3. A candidate disclose all expenditures or contributions in a timely manner (during the reporting made or received). (§13-37-228, MCA.)

Candidate Erb’s 2014 HD 72 campaign finance reports, while few in number and brief in content, managed to violate a number of Montana’s reporting and disclosure laws. Candidate Erb has responsibility for these violations as the COPP has found and enforced campaign practice violations for much lesser failures to report and disclose. See *Adams v. GCDCC*, COPP-2015-CFP-002.

The Commissioner notes that mitigation will apply in this Matter.

Mitigation lies because of the commendable remedial actions of Candidate Erb.

Candidate Erb responded to the Complaint by apologizing for her 2014

campaign errors and by providing a correction of the missing occupation and employer information.⁹

ENFORCEMENT OF SUFFICIENCY FINDINGS

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner “shall investigate” any alleged violation of campaign practices law. §13-37-111(2)(a), MCA. 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 Candidate Erb’s 2014 HD 72 campaign violated Montana’s campaign practice laws, including, but not limited to the laws set out in the Decision. 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 fully and timely report and disclose cannot generally be excused by oversight or ignorance. Excusable neglect cannot be applied to

⁹ Candidate Erb is running in the 2016 primary election for HD 72. Candidate Erb has timely filed the required 2016 campaign finance reports.

oversight or ignorance of the law. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009. Likewise, the Commissioner does not normally accept that failures to file or report be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006, 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. §13-37-124, MCA. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying civil prosecution of Candidate Erb. Because of the nature of the violations (the failure to report and disclose 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.*

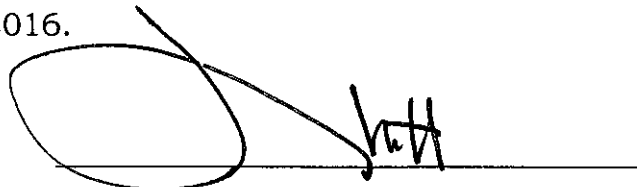
Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil or criminal prosecution as the Commissioner 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 setting that fine

the Commissioner will consider matters affecting mitigation, including the fact that the candidate named in the sufficiency finding promptly apologized and partially corrected when contacted by the COPP.

While it is expected that a mitigated fine amount will be negotiated and paid, 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 campaign practice 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*.

Should this Matter not settle the Commissioner reserves his right, upon return of the Finding by the County Attorney, to instigate an enforcement action on behalf of the people of Montana.

DATED this 31st day of May, 2016.

A handwritten signature in black ink, appearing to read 'JRM', is written over a horizontal line. The signature is stylized and somewhat cursive.

Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana
P. O. Box 202401
1205 8th Avenue
Helena, MT 59620