

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

O'Hara v. Madison County Republican Central Committee No. COPP 2016-CFP-011	Finding of Sufficient Facts to Show a Campaign Practice Violation
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On May 16, 2016, Jesse O'Hara a resident of Lakeland, Florida,¹ filed a complaint against the Madison County Republican Central Committee (hereinafter "Central Committee") alleging that certain actions of the Central Committee violated campaign practice law.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign practice law addressed by this Decision is the role and function of a political party political committee as well as timeliness of reporting and disclosure.

¹ Mr. O'Hara is a former Great Falls resident and former Montana Republican legislator who retired to and resides in Florida.

INTRODUCTION

The Complaint presents the issue of the role of political party organizations in the election of Montana public officials. Political party organizations are specially covered by two Chapters of Title 13, the portion of Montana's statutory law defining and dealing with issues related to elections held in the State of Montana.²

Chapter 38 of Title 13 of the Montana Code is entitled "Political Parties." It defines the powers, structure and levels of political party organizations. A political party organization is any entity that was on the ballot during either of the "two most recent statewide general elections." (§13-1-101(32), MCA.) At the time of this Decision there are three political party organizations –Republicans, Democrats and Libertarians – that meet the political party qualifications of Montana law.³

Under Montana law a political party "makes its own rules" (§13-38-101, MCA) and is organized at a state and county central committee level. (§13-38-203, MCA.) For the purposes of this Decision, a "political party committee" means a political committee formed by a political party organization and includes all county central committees. (§13-1-101(31), MCA.)

DISCUSSION

The Complaint alleges that the Madison County Central Committee violated Montana's campaign practice laws in several particular ways. The

² A political party committee is, of course, also subject to campaign practice rules, as set out in Chapters 35 and 37 of Title 13 of the Montana Code.

³ Information provided on June 28, 2016 by Eric Stern, Deputy Director Montana Secretary of State.

individual allegations are identified and discussed separately, below.

1. The Central Committee's Political Committee Status

This Complaint again raises an issue involving a political party organization that formed a Montana political party committee.⁴ The facts of this Complaint require an analysis of the means by which a political party committee is formed.

There are four types of political committees allowed under Montana law. (§13-1-101(3)(b), MCA). Three of the four types of political committees are “formed” by two or more people who “make[s] an election communication, an electioneering communication, or an independent expenditure” of more than \$250. §13-1-101(3)(d), MCA.⁵ The fourth type of Montana political committee (political party committees) is different in origin as it is “formed by a political party organization and include[s] all county and city central committees,” (§13-1-101(31), MCA).⁶

There are implications to this discussion. The first implication is that the types of political committees subject to the \$250 threshold expenditure amount are only those formed by “two or more people.” §13-1-101(3)(d), MCA.⁷ In contrast, a political party committee is “formed” by an act of a political party organization. §13-1-101(31), MCA. A political party committee does not fall

⁴ See similar complaint: *O'Hara v. Cascade County Republican Central Committee* COPP-2016-CFP-004 and COPP-2016-CFP-013.

⁵ The political committees that are so formed are ballot committees, independent committees or incidental committees.

⁶ A county central committee is authorized and defined by statute. (§13-38-201 through 205, MCA.)

⁷ Aggregate expenditures in amounts below \$250 are considered *de minimis* such that they do not need to be reported or disclosed.

under the law setting a \$250 threshold expenditure amount and therefore reports from the first dollar of expenditure.

Second, a political party committee is exclusively controlled by a political party organization. Stated another way, a political party committee cannot be formed by an act of individuals and, instead, is “formed” only by an act of a political party organization. §13-1-101(31), MCA.

Third, the main business and function of a political party committee is the election of candidates running under the party label of the political party organization that formed the political party committee. Accordingly, all activity of a political party committee is considered as made to “support or oppose a candidate” and is reportable as an expenditure or contribution under §§13-1-101(9) and (17), MCA.

The above determinations are stated for the first time in this Decision because the statutory language providing for political party control of political party committees was added by the 2015 Montana legislature as part of the Disclose Act.⁸ The control of a political party committee by the appropriate political party organization (rather than individuals) is logical because it ensures that election use of political party associational rights is limited to political party committees that are actually “formed” by a political party organization. In particular, it ensures political party organization control of the paid professional staff used by political party committees to provide assistance

⁸ The Disclose Act refers to SB 289, a bill passed by the 2015 Montana legislature that made several changes to Montana campaign practice laws. Prior to the 2015 statutory changes political party committees could be formed by the act of individuals. Compare §13-1-101(22), MCA (2013) to §§13-1-101(30)(31), MCA (2015).

to Montana candidates for public office.⁹ In short, it is political party organizations, and only political party organizations, that control political party committees.

The determinations set out in this Decision will require an examination of the political committees that are currently registered as political party committees with the Commissioner.¹⁰ This examination is necessary to ensure that these committees are, indeed, formed by a political party organization.¹¹ The Commissioner has initiated this examination task through the publication of a draft advisory opinion, a copy of which is attached to this Decision. The draft advisory opinion will be sent to the currently registered political party committees for their review and comment. The Commissioner will review and consider any comments received and adopt a final advisory opinion. The Commissioner will then review the status of current political party committees based on the approach set out in the Advisory Opinion.

2. Failure to Timely File and Complete a Form C-2

The Complaint, filed on May 16, 2016, alleges that the Central Committee failed to timely file and complete the proper registration form (Form C-2) with the Commissioner. The Madison County Central Committee was and is a

⁹ The paid professional staff services provided by political party committees to candidates can be made in any amount but must be reported and disclosed: “coordinated expenditure[s] made solely by a political party committee in the form of provision of personal services by paid staff of the political party that benefit the associational interest of the political party but also constitute reportable election activity benefiting a particular candidate of the same political party.” 44.11.225(3) ARM. For a discussion of events and circumstances leading to the adoption of this ARM please see *Welch Advisory Opinion*, COPP-2014-AO-009.

¹⁰ There are currently 107 political party committees registered under C-2 (Statement of Organization) forms filed with the COPP.

¹¹ The Commissioner, under the authority of 44.11.204 ARM, can reclassify improperly formed political party committees as independent committees.

political party entity.¹² §13-1-101(31), MCA (2015). Consequently it was “formed” as a political committee by virtue of its status as a county central committee and its registration with the COPP. *Id.*

Finding of Fact No. 1: The Central Committee filed its first C-2 Statement of Organization form on May 31, 2016. (Commissioner’s records.)

Finding of Fact No. 2: The Central Committee began political committee expenditures no later than February 25, 2016 and continued making expenditures regularly in March, April and May of 2016. (June 12, 2016 email from the Central Committee to Commissioner’s investigator; June 6, 2016 C-6 report by Central Committee).

Finding of Fact No. 3: The Central Committee’s C-2 form lists the names of no candidates that the Central Committee supports or opposes. (Commissioner’s records.)

Finding of Fact No. 4: The 2016 Republican primary election for Representative from House District 71 involved two candidates: Ray Shaw and Robert Wagner.¹³ Candidate Shaw won the primary election. There were no 2016 Democratic candidates for election from HD 71 so Ray Shaw will serve as the HD 71 representative in the 2017 legislative session. (Montana Secretary of State Election Website.)

Finding of Fact No. 5: The Central Committee censured Candidate Shaw in an April 19, 2016 resolution stating that it had “with[drawn] support for his [Shaw’s] candidacy.” (Commissioner’s records.)

Finding of Fact No. 6: On May 5, 2016 the Central Committee published the text of its censure of Candidate Shaw in a newspaper of general circulation in HD 71, the Madisonian. (Commissioner’s records.)

¹² The Commissioner notes that Montana law imposes certain internal responsibilities on Central Committees, including promulgation of rules of governance. §13-38-203(1)(a), MCA. The COPP investigator’s work allowed the Commissioner to determine that the Madison County Central Committee has failed to file a copy of its rules of governance as required by Montana law (§13-38-105, MCA). The issue of improper function of a political party entity recognized by statute must, however, be dealt with the political party as the Commissioner must accept a Central Committee as a political party committee. See §13-1-101(31), MCA (2015).

¹³ HD 71 is a rural voting district that includes Madison County voters.

The Central Committee made expenditures as early as February of 2016. (FOF No. 2.) Under Montana law a political committee is required to file its C-2 form or Statement of Organization “within 5 days after it makes an expenditure,” §13-37-201(2)(b), MCA. As set out above, the Central Committee was required to register as a political party committee as early as February of 2016.

Sufficiency Finding No. 1: The Commissioner determines that there are sufficient facts (FOF Nos. 1 through 3) to show that the Central Committee late filed its C-2 Statement of Organization form.

The Commissioner notes that the role of (and law regarding) political party committees has changed substantially in the past few years. That change can be offered as a reason for mitigation of the fine due for the campaign practice actions criticized in Sufficiency Finding No. 1. The Central Committee’s late filing cannot, however, be completely excused given that its filing occurred well after the publication of censure of Representative Shaw (FOF No. 6). That publication alone should have caused the Central Committee to consider and fulfill its reporting and disclosure obligations.

The Central Committee further failed to provide required information when it late filed its C-2 registration form. Specifically, under Montana law a C-2 statement filed by political committee shall list “the name ... of each candidate on whom the committee makes a reportable election expenditure.” (44.11.201 ARM.)

Sufficiency Finding No. 2: The Commissioner determines that there are sufficient facts (FOF Nos. 3 through 6) to show that the Central Committee’s C-2 Statement failed to list the

name of Candidate Shaw as a candidate on whom it made an election expenditure.

The Commissioner notes that the candidate disclosure information provided by a C-2 Statement has become increasingly important in post-Disclose Act reporting. A political committee is required to include “the name, office sought and party affiliation of each candidate on whom the committee makes a reportable election expenditure.” 44.11.201(1)(f) ARM.¹⁴ A political committee must file an amendment to its C-2 statement within five business days of any change brought about by an election activity. 44.11.303 ARM.¹⁵

Candidate Shaw was a candidate for office running under the label of the Republican Party. (FOF No. 4.) The Central Committee censured Candidate Shaw in April of 2016 (FOF No. 5) and published a “withdrawal” of its support in a newspaper in early May of 2016 (FOF No. 6). Even when late filed, the Central Committee’s C-2 form was deficient as it failed to list Candidate Shaw as a candidate on whom it made a reportable election expenditure.¹⁶

3. Failure to Disclose Reportable Election Expenditures

The Central Committee was required to file “periodic reports of contributions and expenditures.” §13-37-225, MCA. The following additional findings apply.

Finding of Fact No. 7: The May 5, 2016 Madisonian ad was

¹⁴ The Central Committee could not claim the “entire ticket” exception to the listing of candidates as it was not “supporting the entire ticket of any party” when it “withdrew” its support of Candidate Shaw. 44.11.201(1)(f) ARM.

¹⁵ It is possible, even likely, that an expenditure for or against a particular candidate by a political committee will fall between campaign finance reporting periods such that the first disclosure of the activity will occur when an amended C-2 is filed.

¹⁶ The Decision in *O’Hara v. Cascade County Republican Central Committee-2016-CFP-004* and *COPP-2016-CFP-013* did not address the C-2 reporting issue.

one-quarter page in size and cost \$159.00. (Investigator's notes.)

Finding of Fact No. 8 : The ad was attributed as "paid for by: Madison County Republican Central Committee."
(Commissioner's Records.)

Under Montana law once an expenditure was made the Central Committee was and is a political committee. §13-1-101(31), MCA. The Central Committee published an ad at the cost of \$159. (FOF No. 7.) The ad censured Candidate Shaw and "withdrew" Central Committee (Republican Party) support of Candidate Shaw. (FOF Nos. 5-6.) The ad was published on May 5, 2016. (FOF No. 7.) The ad is an expenditure that must be reported and disclosed.

Sufficiency Finding No. 3: The Commissioner determines that there are sufficient facts (FOF Nos. 2, 7 and 8) to show that the Central Committee's C-6 Statement failed to report and disclose expenditures, including the Shaw ad.

In making this sufficiency finding the Commissioner notes that the Central Committee completely failed to report the \$159 ad expense.

4. Failure to Attribute Voting Record

Candidate Shaw served as a legislator prior to the 2016 primary election (SOS Election Records). Consequently, Candidate Shaw had a legislative voting record prior to running for a HD 71 seat in 2016. The Complaint alleges that the Central Committee violated a particular campaign practice disclosure law (§13-35-225(3)(a) MCA) when, during the 2016 primary election campaign, it made public claims about Candidate Shaw's voting record without substantiating those claims as required by Montana law. *Id.*

It is noted that §13-35-225(3)(a), MCA is the latest in a series of attempts

by the Montana legislature to regulate the words a candidate can use when challenging an incumbent's voting record. As of May 23, 2016, §13-35-225(3)(a), MCA joined the fate of its predecessor laws when a federal court struck the statute as an unconstitutional attempt to regulate the content of candidate speech. *National Association for Gun Rights v. Motl*, CV-16-23-H-DLC (D. Mont.).

The Complaint's allegations of unfounded voting record claims may or may not be true. Either way, the Court has determined that the remedy for voting record issues is more information, that is to say more political speech. Candidate Shaw must respond in that light, in other words, with responsive speech.

The Commissioner notes that the Complaint was filed at a time when §13-35-225(3)(a), MCA was in place and not enjoined. Accordingly there was good faith basis for the complaint at the time it was filed. Nevertheless, this part of the Complaint must be, and is now dismissed.

5. Failure to Attribute

The May 5, 2016 Central Committee advertisement concerning Candidate Shaw was attributed as "paid for by: Madison County Republican Central Committee." (FOF No. 8.) Under Montana law the attribution of a political committee must also include "the name of the committee treasurer" §13-35-225(1)(b), MCA.

Sufficiency Finding No. 4: The Commissioner determines that sufficient facts exist to show that the Central Committee failed to completely attribute (FOF No. 8), as

required by Montana's campaign practice laws.

The Commissioner notes that Montana law requires the Commissioner to promptly notice any attribution violation so that the same may be corrected.¹⁷ This was not possible in this Matter as the dates of publication had passed at the time of filing of the Complaint.

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 the Central Committee's 2016 campaign activities 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

¹⁷ See, *Lund v. Osmundson*, COPP-2016-CFP-017.

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 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 to the sufficiency findings, 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 the Central Committee. 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.

While it is expected that a 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*.

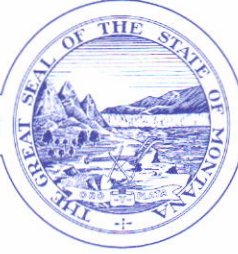
Should this Matter not settle the Commissioner reserves his right, upon return of the Finding by the County Attorney, to instigate an enforcement action on behalf of the people of Montana.

DATED this 6th day of July, 2016.



Jonathan R. Motl
Commissioner of Political Practices
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July 6, 2016

THE FOLLOWING IS A DRAFT ADVISORY OPINION PROVIDED TO JESSE O'HARA AS A COMPANION RESPONSE TO *O'HARA V. MADISON COUNTY*, NO. COPP 2016-CFP-011.

To: Jesse O'Hara

Re: Companion Response to *O'Hara v. Madison County*, No. COPP 2016-CFP-011.

To all Currently Registered Montana Political Party Committees:

Beaverhead County Democratic Central Cmte, Beaverhead County Republican Central Cmte, Big Horn County Republican Central Cmte, Blaine County Democratic Central Cmte., Blaine County Republican Central Cmte., Broadwater County Democratic Central Cmte., Broadwater County Republican Central Cmte., Burros Club of Butte, Butte Silver Bow County Democratic Central Cmte., Butte Silver Bow County Republican Central Cmte., Butte Silver Bow County Republican Women, Carbon County Democratic Central Cmte., Carbon County Republican Central Cmte., Carbon County Republican Women, Cascade County Democratic Central Cmte., Cascade County Republican Central Cmte., Chouteau County Republican Central Cmte., Custer Co Democratic Central Cmte., Custer County Republican Central Cmte., Custer County Republican Women, Daniels County Republican Central Cmte., Dawson County Democratic Central Cmte., Dawson County Republican Central Cmte., Dawson County Republican Women, Fallon County Democratic Club, Fergus County Republican Central Cmte., Flathead County Democratic Central Cmte., Flathead County Democratic Women's Club, Flathead County Republican Central Cmte., Flathead County Republican Women's Club, Gallatin County Democrats, Gallatin County Republican Central Cmte., Garfield County Republican Central Cmte., Glacier County Republican Central Cmte., Golden Valley County Republican Club, Granite County Democratic Central Cmte., Granite County Republican Central Cmte., Helena Republican Womens Club, Hill County Democratic Central Cmte., Hill County Republican Central Cmte., Jefferson County Democratic Central Cmte., Jefferson County Republican Central Cmte., Judith Basin County Democratic Central Cmte., Judith Basin County Republican Central Cmte., Lake County Democratic Central Cmte., Lake County Pachyderm Club, Lake County Republican Central Cmte., Lake County Republican Womens Club, Laurel Democratic Club, Lewis & Clark County Republican Central Cmte., Libertarian

Party of Ravalli County, Liberty County Democratic Central Cmte., Liberty County Democratic Women, Liberty County Republican Central Cmte., Lincoln County Democratic Central Cmte., Lincoln County Republican Central Cmte., Lincoln County Republican Club, Madison County Republican Central Cmte., Meagher County Republican Central Cmte., Mineral County Republican Central Cmte., Missoula County Democratic Central Cmte., Missoula County Republican Central Cmte., Montana Democratic Party, Montana Federation Of Republican Women, Montana Green Party, Montana Republican Legislative Campaign Cmte., Montana Republican State Central Cmte., Montana State Democratic Women's Club, Montana Stonewall Democrats, Montana Young Republicans League, Musselshell County Republican Central Cmte., Park County Democratic Central Cmte., Park County Republican Central Committee, Phillips County Republican Club, Pondera County Democratic Central Cmte., Pondera County Republican Central Cmte., Powell County Republican Central Cmte., Prairie County Republican Central Cmte., Prairie County Republican Women, Ravalli County Democratic Central Cmte., Ravalli County Democratic Women's Club, Ravalli County Republican Central Cmte., Ravalli County Republican Womens Club, Richland County Democratic Central Cmte., Rosebud County Republican Central Cmte., Rosebud County Republican Women's Club, Sanders County Democrats, Sanders County Republican Central Cmte., Sheridan County Republican Central Cmte., Stillwater County Republican Central Cmte., Stillwater Republican Women, Sweet Grass County Republican Central Cmte., Teton County Democratic Central Cmte., Teton County Republican Central Cmte., Toole County Democratic Central Cmte., Toole County Republican Central Cmte., Treasure County Republican Central Cmte., Tri County Young Republicans, Valley County Republican Central Cmte., Wheatland County Republican Central Cmte., Women In Republican Leadership, Yellowstone County Democratic Central Cmte., Yellowstone County Republican Central Cmte., Yellowstone County Republican Women

Advisory Opinion No. COPP-2016-AO-013

I write to advise each of the above listed Montana Political Party Committees of intended review of political party committee status by the Commissioner as follows:

1. This Advisory Opinion is a companion to that certain Sufficiency Decision: *O'Hara v. Madison County*, No. COPP 2016-CFP-011. The Sufficiency Decision is posted and may be reviewed on the COPP website.
2. The Disclose Act, as passed by the 2015 Montana Legislature, has modified the manner in which a political party committee may be formed. See *O'Hara v. Madison County* for a discussion of this issue.
3. The Commissioner has authority under 44.11.204 ARM to classify and reclassify a Montana political committee.
4. There are currently 107 political committees registered with the COPP as a political party committee.

5. The Commissioner will examine each of the 107 political party committees, reclassifying some of those committees as independent committees consistent with the discussion in *O'Hara v. Madison County*.

ADVISORY OPINION

The Commissioner may issue an advisory opinion that addresses an ethics or campaign practice issue. See 44.11.102 ARM.

DISCUSSION

As discussed in *O'Hara v. Madison County*, COPP-2016-CFP-011, the Disclose Act has changed the way that a political party committee may be formed. The Disclose Act, by definition, limits political party committees to those formed by political party organizations. §13-1-101(31), MCA. It is likely that a number of currently registered political party committees were not formed by political party organizations and therefore must be reclassified as independent committees.

With the above in mind, the Commissioner seeks public comment as to his intention to put the principles of *O'Hara v. Madison County* into action through a reclassification review of the existing registration of Montana political party committees. Such a public comment opportunity is allowed under 44.11.102(2)(c) ARM. In particular, the Commissioner provides this draft Advisory Opinion and opportunity for comment to each of Montana's political parties and to the 107 political committees currently registered as political party committees.

METHOD OF PUBLIC COMMENT

The Commissioner will accept public comment on this proposed review and potential reclassification of political party committees. Any comment should be in writing and addressed to the Commissioner at the address listed above. Comments must be received no later than July 25, 2016.

Sincerely,

Jonathan Motl
Commissioner of Political Practices