

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Pennington v. Bullock No. COPP 2013-CFP-012	Summary of Facts and Finding of Insufficient Evidence to Show a Violation of Montana's Campaign Practices Act DISMISSAL OF COMPLAINT
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On March 13, 2013, James Pennington, a resident of Billings, Montana filed a complaint against Steve Bullock, the 2012 Democratic candidate for Governor of Montana. Mr. Pennington alleged that Mr. Bullock's 2012 campaign and several other political committees active in 2012 campaigns violated campaign finance laws through coordination of campaign actions.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this decision is that of coordination based on shared vendors and/or associations between individuals and groups.

INTRODUCTION

This is a complaint of many allegations against many parties centered around one assumption. The assumption is that association, by itself, can create coordination. For a number of reasons, including constitutional considerations, such an assumption, if adopted into law and applied equally across the board to all candidate races would have an insidious and far

reaching effect on candidates across Montana.¹ The issue, though, of coordination by association, regardless of merit, is one that has been raised in Montana by people from all political persuasion. For that reason this Complaint, while lacking in merit (see below) is not frivolous as it raises an issue that deserves discussion and resolution for the benefit of Montanans, including those Montanans who are or will become candidates for public office.

DISCUSSION

This complaint does not allege or concern a failure to report or disclose. That is, the complaint accepts that the campaign expenditure amounts discussed in the complaint were fully disclosed and reported as independent expenditures to the people of Montana. Instead, the complaint alleges that the amounts were improperly reported as independent expenditures because coordination in the expenditures existed between “Steve Bullock, his campaign and third party groups” in regard to the expenditures.

Coordination is important because any expenditure reported and disclosed as an independent expenditure by a third party group can become a campaign contribution attributed to a candidate if the expenditure is deemed to be “coordinated” between a candidate (Candidate Bullock in this Matter) and the third party. Because of coordination the independent expenditure status

¹ Application of coordination solely by association would, for example, implicate a number of sitting Montana legislators who were associated with Western (American) Tradition Partnership, an entity that has been found to have engaged in coordination by specific action with a number of 2010 Montana legislative candidates. *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Clark v. Bannan*, COPP 2010-CFP-023; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; *Bonogofsky v. Wittich*, COPP-2010-CFP-031; *Madin v. Sales*, COPP-2010-CFP-029; *Bonogofsky v. Prouse*, COPP-2010-CFP-033, and *Bonogofsky v. Wagman*, COPP-2010-CFP-035.

(which allows unlimited expenditure activity) is lost and the expenditure is treated as though it is a contribution to the candidate's own committee.

Contributions to a candidate, of course, are limited in amount from any source and prohibited completely from a corporate source. (See §§13-35-227, 13-37-216, MCA). Coordination, if shown to exist, would limit or prohibit completely many of the campaign expenditures at issue in this Matter.

The complaint identifies the third party groups engaged in independent expenditures in Montana's 2012 election of governor as the Build Montana PAC, MT AFL-CIO, MEA-MFT, MEA-MFT COPE, MT-JET PAC, Montana Conservation Voters, Planned Parenthood of Montana, Democratic Governor's Association, Montana Democratic Party, Big Sky Democrats, and Forward Montana. The general claim of coordination between the Bullock campaign and the named third party groups was based in part on the use of common vendors by the third parties and the Bullock campaign for governor. The Common Vendors were listed as Hilltop Public Solutions, Three Point Media, Greenlight Media Strategies, Element and NGP Van.

I. Foundational Findings of Fact

The following findings of fact apply to this Decision.

Finding of Fact No. 1: On April 1, 2009, Steve Bullock submitted his "original" C-1 Statement of Candidate form to the Commissioner of Political Practices Office (COPP). The C-1 form was amended on September 8, 2011 and March 19, 2012. During Steve Bullock's 2012 campaign for Governor, the COPP received six folders with approximately 470 pages each of C-5 campaign finance reports (including several amendments to each report). (Commissioner's records).

Finding of Fact No. 2: Build Montana PAC filed the required

registration forms (C-2) with the COPP and reported its contributions and expenditures on the required forms (C-6) during the 2012 elections. (Commissioner's records).

Finding of Fact No. 3: MTAFL-CIO filed the required registration forms (C-2) with the COPP as an incidental committee and reported its contributions and expenditures on the required forms (C-6) during the 2012 elections. (Commissioner's records).

Finding of Fact No. 4: MEA-MFT COPE filed the required registration forms (C-2) with the COPP as a PAC and reported its contributions and expenditures on the required forms (C-6) during the 2012 elections. (Commissioner's records).

Finding of Fact No. 5: MT-JET PAC filed the required registration forms (C-2) with the COPP as a PAC and reported its contributions and expenditures on the required forms (C-6) during the 2012 elections. (Commissioner's records).

Finding of Fact No. 6: Montana Conservation Voters Action Fund filed the required registration forms (C-2) with the COPP as a PAC and reported its contributions and expenditures on the required forms (C-6) during the 2012 elections. (Commissioner's records).

Finding of Fact No. 7: Planned Parenthood Advocates of Montana filed the required registration forms (C-2) with the COPP as a PAC and reported its contributions and expenditures on the required forms (C-6) during the 2012 elections. (Commissioner's records).

Finding of Fact No. 8: The Democratic Governor's Association filed the required registration forms (C-2) with the COPP as a PAC and reported its contributions and expenditures on the required forms (C-6) during the 2012 elections. (Commissioner's records).

Finding of Fact No. 9: The Montana Democratic Party filed the required registration forms (C-2) with the COPP as a political party committee and reported its contributions and expenditures on the required forms (C-6) during the 2012 elections. (Commissioner's records).

Finding of Fact No. 10: The Big Sky Democrats filed the required registration forms (C-2) with the COPP as a political

action committee but did not file or report any expenditures (C-6) during the 2012 election cycle. (Commissioner's records).

Finding of Fact No. 11: Forward Montana registered as a political committee during the 2012 elections and reported its contributions and expenditures on the required forms (C-6) during the 2012 elections. (Commissioner's records).

The Commissioner hereby applies Findings of Fact Nos. 1 through 11 to the allegations of the Complaint in this Matter.

II. Coordination Alleged Solely Through Association

The complaint alleges coordination created by shared, cross-entity association between individuals or by "common vendor" campaign expenditures consisting of expenditures made by one or more of the 3rd party groups through a campaign vendor also used by the Governor Bullock campaign. Another COPP Decision (*Dick/MDP v. Republican State Leadership Committee*, No. COPP 2012-CFP-038) made contemporaneously with this Decision rejects any basis under Montana law for assumed coordination based solely on a shared vendor or a shared person relationship.² The question of degree (that is, the number of instances of shared vendor or shared person) is now addressed by this Decision.

Montana law [44.10.323(4) ARM] defines coordination as "an expenditure made in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate...".³ In a series of past Decisions, successive Montana Commissioners of Political Practices have declined to find

² *Dick/MDP v. Republican State Leadership Committee* determined that "...coordination cannot be inferred solely by relationship, including that of political party to a candidate in the same political party." A finding of agency between the candidate and the third party entity or, to a lesser degree, actual shared knowledge of specific campaign activity, could result in coordination. *Little v. Progressive Missoula*, July 22, 2004 (Commissioner Vaughey).

³ The COPP has new proposed administrative rules moving through the administrative rule making process. These proposed rules include a new rule defining coordination.

coordination based solely on a relationship or common vendor and instead have limited a finding of coordination to instances shown by specific actions objectively showing cooperation, knowledge or action shared between the two entities engaged in coordination.⁴

Commissioner Argenbright considered a complaint that a political committee, Citizens for Common Sense Government (CCSG), and six candidates for the Missoula City council were coordinated or linked such that CCSG was a candidate committee subject to contribution limits. *Harmon and Sweet v. Citizens for Common Sense Government, et. al.*, December 31, 1997. Despite extensive crossover in involvement (participation in parade using same mode of transportation) and people, the Commissioner found no coordination because there were “no notes, memoranda, records of telephone conversations, correspondence, or other documents” supporting “coordination, cooperation, or consultation”. *Id.* p. 19.⁵

Likewise, Commissioner Higgins rejected coordination between a candidate and a political committee that engaged in attack activity against the opposing candidate. *Close v. People for Responsive Government*, December 15, 2005.

The Commissioner found crossover contributors between the political

⁴ The FEC uses a similar actual evidence approach. The FEC, while advancing a new coordination regulation in 2012 (11 C.F.R. §109.21(d)(4)), operates under a 6 member commission structure and that commission has deadlocked on basic enforcement decisions. *Coordination Reconsidered*, Briffault, Columbia Law Review, May 2013. In regard to coordination, the FEC has found that there needs to be more than common vendors, interrelated individuals (as in a former employee of the candidate) and shared contacts. Thus, the FEC has not found coordination unless there is actual evidence showing the coordination between the expenditure and the candidate. *Id.*

⁵ COPP staff have generally referred to Montana’s existing coordination rule as a “smoking gun” rule because application required objective, actual evidence.

committee and the candidate, but found no evidence of communication or activity showing coordination between the candidate and committee.

Commissioner Unsworth implicitly rejected relationship based coordination in *Keane v. Montanans for a True Democrat*, April 2, 2008. The Commissioner noted crossover contributions/activity by people involved in both the candidate campaign and the political committee, but found no coordination because “...there is no evidence that MTDC’s expenditures for newspaper and radio ads, billboards, and campaign flyers opposing candidate Keane and supporting candidate McAdam were made with the prior knowledge, consent and encouragement of McAdam or his campaign.” *Id.* p. 9.

In contrast to the above three decisions, Commissioner Vaughey found coordination based on specific facts in *Little v. Progressive Missoula*, July 22, 2004. Specifically, the Commissioner found evidence showing that Candidate Handler and the individual members of a political committee (Progressive Montana) knew of the negative attack role that Progressive Missoula would play in support of Candidate Handler’s campaign. The Commissioner found that certain barriers between the Handler campaign and Progressive Missoula, including a letter of reproach from Progressive Missoula to Handler, were artifices designed to disguise the real acts of cooperation that led to coordination. The Commissioner found that the Progressive Missoula expenditures for flyers were made with “...prior knowledge, consent and encouragement of Handler...”. Thus they were coordinated expenditures.

This Commissioner has issued a series of Decisions finding coordination,

all based on actions between Western (American) Tradition Partnership and 2010 candidates for Montana public office. These Decisions, like *Little v. Progressive Missoula*, rely on documents, actions and activity showing coordination. In total this Commissioner has found undisclosed, unreported, and coordinated corporate involvement by WTP (and agents) in nine 2010 candidate campaigns.⁶

Applying the above analysis to this Matter the Commissioner decides as follows:

A. Forward Montana and Big Sky Democrats

The complaint lists Forward Montana and Big Sky Democrats as suspect third party entities involved in coordination of campaign expenditures based solely on association created by personal relationships.⁷ The complaint asserts that two individuals involved in Big Sky Democrats were also involved with other entities named in this Matter.⁸ The Complaint asserts that three individuals involved in Forward Montana were also involved with other entities involved in this Matter.⁹ The complaint asserts that this shared association by personal relationship is sufficient to create coordination.

⁶ *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Clark v. Bannan*, COPP 2010-CFP-023; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; *Bonogofsky v. Wittich*, COPP-2010-CFP-031; *Madin v. Sales*, COPP-2010-CFP-029; *Bonogofsky v. Prouse*, COPP-2010-CFP-033, and *Bonogofsky v. Wagman*, COPP-2010-CFP-035.

⁷ Forward Montana and Big Sky Democrats registered in 2012 as political committees with the COPP. (FOF Nos. 10 and 11).

⁸ The Complaints lists Anna O'Brien, Melanie Brock, and Molly Bell as people who share relationships with other third party entities, the Bullock campaign or vendors used in the 2012 elections.

⁹ The Complaints lists Molly Bell, Aaron Browning and Chris Cavazos as people who share relationships with other third party entities, the Bullock campaign or vendors used in the 2012 elections.

The complaint against Big Sky Democrats or Forward Montana is particularly tenuous as neither entity reported independent expenditures in the 2012 governor's race that could be subjected to coordination and turned into a prohibited or limited contribution to the Bullock campaign. (FOF Nos. 10 and 11). The Commissioner declines to tie these two groups to the independent expenditures of the other groups named in the complaint and therefore dismisses the complaint in full against Big Sky Democrats or Forward Montana.¹⁰

B. Build Montana PAC, MTAFL-CIO, MEA-MFT COPE, MT-JET PAC, Montana Conservation Voters Action Fund¹¹, Planned Parenthood Advocates of Montana, the Democratic Governor's Association and the Montana Democratic Party and Bullock for Governor.

The Complaint alleges coordination through a shared vendor¹² and through shared association through individuals serving as members, employees, officers or leaders of two or more of the above listed groups.¹³ The complaint argues the potential for coordination through the shared vendor or through the interlocked individuals, pointing to the individually executed but similar

¹⁰ The Commissioner recognizes that the complaint states a "spotty reporting record" by Big Sky Democrats. There is a one page email included as part of Complaint Exhibit 17 that supports that allegation. Because of the number of entities involved in this Complaint the Commissioner is limiting his review and this Decision to the common alleged campaign practice violation of coordination. Mr. Pennington is invited to submit another complaint should he wish to allege reporting and disclosure violations against Big Sky Democrats.

¹¹ The complaint also makes references to reporting and disclosure errors as to this entity. Those references are vigorously denied in the responsive documents but this issue, if it is an issue, is not addressed in this Decision for the reason set out in FN 10.

¹² The shared vendor is Hilltop, a public relations firm catering to Democratic candidates with offices in Billings and Washington, DC. The complaint claims Hilltop is associated with direct mail, media and grassroots vendors: Three Point Media; Brushfire Strategies; Greenlight Media, Element L and NGP Van.

¹³ The shared associations alleged by the complaint are numerous and involve at least 10 individuals who were involved with one or more groups and/or vendors.

direct mail, media and grass roots activity of the groups, each reported and disclosed as an independent expenditure by the applicable group.

In general, Montana law does not recognize coordination based solely on association, whether that association be through a common vendor or through an individual involved in multiple entities. (*Dick/MDP v. Republican State Leadership Committee*). This complaint tests that principle by alleging an extensive inter-relationship “of common vendors (Hilltop) and political affiliations [such that] it is difficult to comprehend how these parties maintained the separation necessary...” to avoid coordination. (Complaint). While some of the specific allegations appear to have missed the target completely, enough of the allegations remain to allow the general principle stated above to remain.¹⁴

In response, however, Hilltop, the shared vendor entity responded with a similarly general statement that “...not one individual at Hilltop provided campaign consulting for *both* the Bullock campaign and the independent organizations.”¹⁵ Hilltop then backed that general statement by producing its “Firewall Policy” for the time period of January 1 through November 6, 2012:

Finding of Fact No. 12: The Hilltop Firewall policy sets out a separate firewall for the Montana Governor race with Nick Baldick, Dana Bykowski and Barrett Kaiser firewalled to the “candidate staff side” and Aaron

¹⁴ JETPAC, responding through attorney Peter Meloy, responded that it never worked with Hilltop at all and pointed out that the claimed vendor NGP-VAN is simply an accounting firm used by JETPAC in preparing and filing campaign finance reports.

¹⁵ May 1, 2013 letter from James Lamb, Hilltop legal counsel. This response explains the non-coordination basis for the Bullock campaign conference call to Hilltop identified in the complaint by placing the call solely with the campaign side staff at Hilltop.

Browning firewalled to the “IE [independent expenditure] staff side.”¹⁶

Finding of Fact No. 13: In addition to the Firewall Hilltop provided affidavits from: Nick Baldrick (attesting to working only governor campaign side and not working on independent side); Dan Bykowski (attesting to working only governor campaign side and not working on independent side); Molly Bell (attesting to working only independent side and not working on candidate campaign side);¹⁷ Barrett Kaiser (attesting to working only governor campaign side and not working on independent side); and Aaron Browning (attesting to working only independent side and not working on candidate campaign side).

The answer that Hilltop provides to the complaint’s “difficult to comprehend” query, then, is that it maintained the separation between candidate and independent committee expenditures¹⁸ by planning and discipline in the form of established and executed firewall separation between the two activities.¹⁹

Without contrary evidence (emails, letters and documents showing coordination) Montana Commissioners have accepted such an explanation and response by the responding party. *Keane v. MTDC*, April 18, 2008 (Commissioner Unsworth – candidate denied contact with independent

¹⁶ The Firewall also prohibited document transfer through the firewall, regardless of source of the document.

¹⁷ Molly Bell was not listed by name in the general Hilltop Firewall but her affidavit has the same Firewall effect as the affidavits of those individuals listed by name.

¹⁸ It is the relationship between the candidate’s committee and the 3rd party political committee that creates coordination. The 3rd parties are free to deal with each other so long as there is no coordination with the candidate’s committee.

¹⁹ The Democratic Party, responding through attorney Peter Meloy, adds that it “...insists that its vendors construct an impervious firewall between any work it does for the candidate from work it does on independent expenditures.” The letter points out that use of firewalls is necessary in Montana because there are “...only two firms assisting [Democratic] candidates and third party entities involved in [Democratic side] political races.” The Democratic Governor’s Association, through a letter from its counsel, echoed these thoughts and produced a copy of its firewall requirements for vendors.

expenditure group); *Hamlett v. McKamey*, February 28, 2013 (Commissioner Murry--candidate denied providing photo used in independent expenditure).²⁰ Based on the above discussion (and in particular FOF Nos. 12 and 13) the Commissioner determines that there is insufficient evidence to support a complaint of coordination by shared vendor.²¹

This leaves the claim of coordination by relationship. Again, in general Montana does not recognize a claim of coordination based solely on relationships. (*Dick/MDP v. Republican State Leadership Committee*). Given, however, the claim of extensive, interlocked relationship Governor Bullock's campaign was asked to respond to the allegation.²² The response specifically stated that no one in the Bullock campaign, including campaign manager Kevin O'Brien "...discuss[ed] confidential campaign strategy or independent expenditures with any of the independent groups." A statement accompanying the letter was signed by Kevin O'Brien and extended the lack of discussion to "...the individuals identified in the Pennington complaint as 'players' in the organizations that made independent expenditures in support of Governor Bullock...". Under the same reasoning and analysis set out above as to

²⁰ In contrast, *Little v. Progressive Missoula*, July 22, 2004 (Commissioner Vaughey – coordination found despite candidate denial based on documentary evidence) and the Decisions set out, above, in FN 4.

²¹ The Commissioner understands that the complainant wished a generic evidentiary investigation but this is something that past Commissioners and this Commissioner have not engaged in without some initial piece of evidence (such as the WTP documents) that provide initial support for a finding of actual evidence of coordination. The evidence provided in this Matter (association) is not sufficient to provide such initial support for the reasons set out in this Decision.

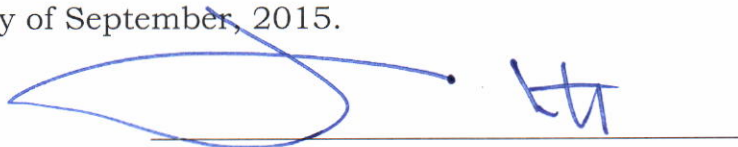
²² The response is dated May 20, 2013 in letter from attorney Karl Englund.

common vendor the Commissioner dismisses the complaint based on the allegation of coordination through shared association.

OVERALL DECISION

This Commissioner, having duly considered the matters raised in the Complaint, and having completed his review and investigation, hereby holds and determines, under the above stated reasoning, that there is insufficient evidence, to justify a civil adjudication against the named parties. The Commissioner hereby dismisses this complaint in full against each party named as to and limited to the allegations based on coordination.

DATED this 23rd day of September, 2015.

A handwritten signature in blue ink, consisting of a large, stylized loop followed by the letters 'JM', is written above a horizontal line.

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