

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Roberts v. MSSA No. COPP 2016-CFP-005	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION
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On March 28, 2016, Billings, Montana resident Donald Roberts filed a complaint with the Commissioner of Political Practices (COPP) against Montana Shooting Sports Association (MSSA), an entity that formed a political committee at Montana and Federal levels. The Complaint alleges that MSSA violated Montana’s reporting and disclosure laws applying to political committees.

INTRODUCTION

This Complaint addresses the reporting and disclosure obligations of a federally filing political committee that is also making reportable expenditures in a Montana election. The following initial findings of fact are made:

Finding of Fact No. 1: MSSA was registered with the Montana Secretary of State as a Montana not-for-profit corporation at all times pertinent to this Decision. (Commissioner’s records, information from Montana Secretary of State).

Finding of Fact No. 2: MSSA's letterhead declares its mission as "asserting the rights of gun owners in Montana."
(Commissioner's records, information from Montana Secretary of State.)

Finding of Fact No. 3: MSSA filed as a political committee with the Federal Election Commission (FEC) as a federal political committee (MSSAFEC) at all times pertinent to this Decision. (Commissioner's records, Information from FEC.)

Finding of Fact No. 4: MSSA also filed with the COPP as a Montana political committee (MSSAMT) at all times pertinent to this Decision. (Commissioner's records.)

Finding of Fact No. 5: MSSA used a single depository (Wells Fargo Bank, Missoula, Montana) for its political committee activity, whether on a state or federal level, at all times pertinent to this Decision. (MSSA response to Complaint.)

MSSA has a history of operation through a political committee with dual registration as a federal and state political committee (FOF Nos. 3, 4). Dual registration, using a single depository, is allowed under Federal law and is not prohibited by Montana law. (FEC registration manual Chapter 2; 44.10.413 (2014) and 44.10.305 ARM¹.)

DISCUSSION

The Complaint alleges that MSSA's dual federal and state political committee operation failed to report and disclose contributions and expenditures as required by Montana law. Under Montana law each Montana "political committee shall file with the commissioner periodic reports of contributions and expenditures." §13-37-225(1), MCA. Montana statutes

¹ The COPP reorganized and renumbered its administrative rules in the spring of 2016. The ARM citations in this Decision reflect the version of the administrative rule in effect during the time period referenced in the Decision.

further direct the Commissioner to “adopt rules under which committees filing periodic reports with the federal election commission...shall report.” §13-37-227, MCA. In turn, Montana’s duly adopted rules allow for the filing of a copy of an affiliated federal political committee’s FEC reports in lieu of state committee reports so long as the copies of the federal reports “fully disclose the source and disposition of all contributions and expenditures used in elections in Montana.” 44.10.305(1)(a), ARM.

The Commissioner first examines MSSAMT’s involvement in Montana’s 2014 elections.

Finding of Fact No. 6: On June 2, 2014 MSSAMT registered as a Montana political committee for the 2014 Montana elections by filing a form C-2 with the COPP. (COPP records.)

Finding of Fact No. 7: On June 23, 2014 MSSAMT filed its first Montana C-6 campaign finance report of 2014 election expenditures disclosing \$6,948.61 in expenses used to mail postcards in primary election support of certain 2014 Montana legislative candidates.² (COPP records.)

The Commissioner determines that MSSAMT accepted contributions and made expenditures in Montana’s 2014 elections. (FOF Nos. 6, 7.) Accordingly, Montana law requires that MSSA, through filing either a copy of the MSSAFEC federal report or through a MSSAMT state report “fully disclose[d] the source and disposition of all contributions and expenditures used in elections in Montana.” 44.10.413(1)(a), ARM.

A. Failure to Properly Report and Disclose Contributions or Expenditures

MSSA attempted to report its 2014 election contributions and expenditures

² On June 2, 2014 MSSAMT also filed a C-7 campaign finance report disclosing the postcard expenditure information.

through a mixed use of federal and state campaign finance reports. Such an approach is possible if done correctly. The Commissioner “shall accept copies” of federal reports in lieu of state reports covering the same reporting period.

44.10.413(1)(a) ARM (2014).

Finding of Fact No. 8: MSSAMT filed a state of Montana campaign finance reporting form (Form C-6) on June 23, 2014. The report listed \$7,744.54 in contributions with the source of those contributions listed as the “MSSA federal PAC”. (COPP records.)

Finding of Fact No. 9: The Commissioner’s investigator has reviewed the MSSAFEC filings to identify contributions received in 2012, 2013 and 2014³:

- i) In 2012, the MSSAFEC received and reported a \$15,000 contribution from Its Now or Never PAC and \$3,450.00 in “unitemized” contributions from Individuals.
- ii) In 2013, the MSSAFEC received and reported \$9,116.00 in “unitemized” contributions from Individuals.
- iii) In 2014, the MSSAFEC received and reported \$4,744.97 in “unitemized” contributions from Individuals.

There was no information other than the word “unitemized” provided as to the contributions so identified. (Commissioner’s records, based on review of MSSAFEC filings.)

Finding of Fact No. 10: With the exception of the third quarter of 2012, MSSA filed no copies of its federal PAC reports with the COPP. (COPP records).

Finding of Fact No. 11: MSSA reported no federal election expenditures in 2014. The only election expenditures MSSA reported in 2014 were made in Montana state level elections. (COPP records).

Based on the above facts the Commissioner examines whether or not MSSA political committees failed to report contributions or expenditures in Montana.

³ The MSSAFEC is required to file reports with the FEC.

1. Reporting of Mass Collections at Fund-Raising Events

In 2014 MSSA political committees took in \$4,744.97 in “unitemized” contributions. (FOF No. 9.) The only 2014 election activity engaged in by MSSA political committees was Montana state level election activity. (FOF No. 11.)

MSSA has self-described its “unitemized” contributions as being raised “through bake sale-type events, specifically a precision rifle match held occasionally” for which participants pay a shooting fee that is donated to a MSSA political committee. (MSSA Response.) MSSA further specified that it received any such funds from individuals and that it received no corporate funds. *Id.* All of these contributions by individuals were made at rifle match events held in Montana. *Id.*

Under Montana law a political committee must specially report mass collections made at fund-raising events, 44.10.521, ARM.⁴ Specifically, MSSA’s political committee campaign finance reports must include an itemized accounting of funds from such mass collections at fund-raising events. This itemized accounting “means the date and approximate number of individuals in attendance at a fund-raising event, a description of the method utilized to gain the proceeds ...and the total amount received.” 44.10.521(1)(b), ARM.⁵ Further, MSSA must have a method in place to ensure that it was able to aggregate contributions from a single individual so that his or her name could

⁴ This rule was recently readopted in substance at 44.10.406, ARM.

⁵ In MSSA’s case the several “bake sale” type events (that is, each precision rifle match) must be individually listed as to date, number of participants and total amount received.

be reported when their contribution total exceeded \$35. (44.10.521(2), ARM.)

Sufficiency Finding No. 1: The Commissioner determines that there are sufficient facts to show that the MSSA political committees failed to report and disclose the fundraising event detail required by Montana campaign practice law.

In making this finding the Commissioner notes that reporting contributions as coming from MSSAFEC (FOF No. 8) does not excuse MSSA of its obligation to report and disclose under Montana law. MSSA could have reported the required contribution information in its MSSAFEC filing and filed a copy of its FEC report with the COPP. MSSA did not report the required information in its MSSAFEC report and it did not file a copy of that report with the COPP.⁶ In the alternative MSSA could have supplied the required information in its separate MSSAMT filing, but it did not do so.⁷ Failure to properly report mass collections at fundraising events is a direct failure to report and disclose and also potentially undermines the validity of contribution limits.⁸

2. Reporting the "It's Now or Never PAC" Contribution

MSSAFEC received a \$15,000 contribution from another PAC (FOF No.

9(i)). The receipt of these particular PAC funds was reported on a 2012 federal

⁶ The reason MSSAFEC reports must be filed with the COPP (as required by law) is to allow the COPP staff to post the federal report on the Montana COPP website for review by the public. It is not sufficient to refer the COPP to the FEC website.

⁷ A March 3, 2015 email from MSSA to the COPP describing its political committee fundraising events shows its ability to report and disclose in the detail required by Montana law: "We offer eight different events there for \$3 per event, attending participants may enter as many of the different events as they wish. We don't sell tickets...We generally get between 20 and 45 shooters attending the match." (Commissioner's records.)

⁸ It appears that MSSAMT 2014 election expenditures were independent expenditures not subject to contribution limits. MSSA, however, stresses that its political committees take no funds from corporate sources thereby allowing it to also make contributions to candidates. Commissioners have strictly interpreted the effect of fundraising events on contribution limits, holding that any funds received at a pass-the-hat fundraiser must be aggregated and counted toward any contribution limit. *Garver v. Tussing*, February 27, 2008 (Commissioner Unsworth); *Bonogofsky v. Wittich*, COPP-2010-CFP-031 (Commissioner Motl).

form and under Montana law MSSAMT could have filed copies of the MSSAFEC reports “in lieu of [Montana’s] periodic reports.” 44.10.413(1)(a) ARM.

The Commissioner determines that, as a matter of mathematical deduction, some of this PAC contribution amount remained and was mixed with “unitemized” contributions to fund 2014 MSSAMT activity. MSSA, however, did file a copy of the third quarter 2012 MSSAFEC report with the COPP showing the name of the political committee that made the \$15,000 contribution. (FOF No. 10.) This FEC report was placed in the MSSAMT hard copy file that is available for public inspection at the COPP office.⁹ The Commissioner determines that MSSA has met the reporting and disclosure requirements of Montana law through the filing of a copy of the 2012 third quarter FEC report.

3. Reporting of Political Committee Expenditures

The Complaint alleges that there is a lack of detail as to the expenditures made by the MSSA political committees. In 2014 all expenditures reported by MSSA political committees were made at the state level in Montana elections.

Finding of Fact No. 12: MSSAMT reported \$6,948.61 in independent election expenditures (“postcards”) in its 2014 post-primary election campaign finance report, filed June 23, 2014. The report disclosed postcards mailed in 18 Montana legislative district primary elections (seven Senate Districts and 11 House Districts). (COPP records.)

Finding of Fact No. 13: The postcards advocated a vote for a particular primary election candidate. (Sample Postcard, Complaint.)

⁹ At this time public access to federal reports is limited to an inspection of the hard copy file. The COPP staff is moving toward a system of posting PDF copies of such reports online so that public access (transparency) can be accomplished through a remote electronic inspection.

MSSAMT reported its 2014 election expenditures as independent expenditures. (FOF No. 12.) Independent expenditures are third party election expenditures that are not coordinated with a candidate.¹⁰ Independent expenditures in Montana elections increased following the 2010 *Citizens United* decision by the US Supreme Court. Independent expenditures are generally carried out in the form of an election communication (in this case, a postcard mailing) issued by a third party (here, MSSA) attacking or promoting the election of a candidate.

COPP has determined that under Montana law independent expenditures “must be reported in accordance with the procedure for reporting other expenditures.” (*Hanes v. Bianco*, 44.10.323(3) and 44.10.531(4), ARM). Section 13-37-225, MCA requires that the MSSA file “periodic reports of ... expenditures made ...on behalf of a candidate...”. Independent expenditure reporting requires “reporting of the name of the candidate...the independent expenditure was intended to benefit...” 44.10.531(4), ARM.

Finding of Fact No. 14: MSSAMT disclosed its independent expenditure activity by listing the name and legislative district of each of the 18 candidates on whom expenditures were made, along with the number of postcards mailed into each legislative district. (Commissioner’s records).

The Commissioner determines that the disclosure set out in FOF No. 14 meets the requirements of Montana law. While in general the independent expenditure disclosure should set out the amount spent on each candidate, a uniform postcard and mailing was used and therefore the MSSAMT reporting

¹⁰ 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.

(listing number of postcards according to candidate along with the total amount spent) allows a calculation of expense per candidate.

The Commissioner notes that prior to the 2014 elections COPP dealt only with narrow independent expenditure issues including the requirement of reporting¹¹ and third party election expense advocacy determinations.¹² The 2014 Montana election cycle involved significant independent expenditure activity by multiple entities in multiple elections. The entities making the independent expenditures generally 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.¹³ To its credit, the MSSAMT expenditure disclosure described in FOF No. 14 is more complete and therefore distinguishes itself from the disclosures described in the Decisions listed in Footnote 13.

B. Failure to File a Proper Statement of Organization

The Commissioner next examines whether MSSAMT properly filed its statement of organization.¹⁴ MSSAMT's organizational existence was that of a political action committee defined by the registration form (Form C-2) filed with

¹¹ COPP has discussed narrow issues regarding independent expenditures in Montana elections as early as 2003. See *Haines v. Bianco* (March 2003, Commissioner Vaughey).

¹² See *Bonogofsky v. NGOA*, COPP-2010-CFP-008.

¹³ The additional complaints concerning 2014 independent expenditure activity are: *Gibson v. Montana League of Rural Voters*, COPP-2014-CFP-064; *Shellnutt v. Planned Parenthood*, COPP-2014-CFP-058; *Perea v. MDP*, COPP-2014-CFP-055; *Buttrey v. MDP*, COPP-2014-CFP-050, *Kary v. MDP*, COPP-2014-CFP-059 and *Gibson v. MDP*, COPP-2014-CFP-062.

¹⁴ Once a complaint is filed the Commissioner "shall investigate any other alleged violation" (§13-37-111(2)(a), MCA). This investigation authority includes authority to investigate "all statements" and examine "each statement or report" filed with the COPP. §§13-37-111, 123, MCA. The Commissioner is afforded discretion in exercising such investigative authority. *Powell v. Motl*, OP-07111, Supreme Court of Montana (November 6, 2014).

the COPP. (FOF NO. 3.)

Finding of Fact No. 15: The 2014 MSSAMT Statement of Organization lists “support or oppose candidates for office” under its statement of purpose and does not list the name of any of the 18 candidates on which it made independent expenditures. (COPP records.)

Montana law requires that MSSAMT registration form list “the name...of each candidate whom the committee is supporting or opposing” (44.10.405(f), ARM.) Further, “[a]ny material change ... in a Statement of Organization ... shall be reported by filing an amended statement ... within five (5) days after the change.” (44.10.403(2), ARM.)

Sufficiency Finding No. 2: The Commissioner finds sufficient facts to show that MSSAMT failed to list the name of 18 candidates on its C-2 form, as required by 44.10.405(f), ARM.

The Commissioner has noted that failure to timely and properly report and disclose on C-2 forms can deprive the public, press and opposing candidate of information to which they are entitled.¹⁵ This could have been the case in this matter as the MSSAMT expenditures occurred on May 29, 2014 and were therefore too late to be reported by a pre-election report. MSSAMT, however, did report the expenditures (including a list of the 18 candidates on whom expenditures were made) in a C-7 campaign finance report filed on June 2, 2014.

MSSAMT’s approach to its C-2 reporting is perplexing. MSSAMT’s Statement of Organization was filed on June 2, 2014, the same day that MSSAMT filed a C-7 report listing the 18 candidates on which it made

¹⁵ *O’Hara v. Madison County Republican Central Committee*, COPP-2016-CFP-011.

expenditures. (FOF No. 7, including FN 2.) There is therefore no reason that MSSAMT could not have listed the candidates on its C-2 as required by law. While MSSAMT can point to its C-7 disclosure of this information, that goes to mitigation and does not excuse the failure to follow the clear directives of law. The simple fact is that the C-2 form is often the first COPP form that is examined by the press or members of the public. It needs to be complete and it needs to be updated as the purpose of the political committee changes.

C. Notice Laws

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).

The following findings of fact apply:

Finding of Fact No. 16: The MSSA postcards (FOF No. 7) were mailed within 10 days of the Montana’s 2014 primary elections. (Commissioner’s records).

Finding of Fact No. 17: The MSSA postcards endorsed candidate “Cary Smith for SD 27” and referred negatively to “Cary’s opponent” stating that he was “hiding an anti-gun and anti-hunting attitude”. The postcard did not list the name of Cary’s opponent. (Commissioner’s records).

Finding of Fact No. 18: The 2014 Republican primary election for Senate District 27 involved two candidates: Don Roberts and Cary Smith. Cary Smith won the primary election with 2,673 votes to Roberts 1,752 votes and advance to the 2014 general election. (Montana Secretary of State election website).

MSSAMT did not provide notice to Candidate Don Roberts of its SD 27 postcard (Complaint)¹⁶. Such notice “must be provided to all other candidates who have filed for the same office and who are individually identified or mentioned in the advertising.” (§13-35-402(2), MCA.) MSSAMT did not provide notice because the postcard did not list the name or image of Candidate Roberts. Accordingly, MSSAMT believed that the postcard did not trigger the “identified or mentioned” criteria (MSSA Response). Complainant Roberts disagrees asserting he “was a target” of the mailing (Complaint).

The Commissioner agrees with Candidate Roberts on this issue. When an election involves only two candidates for an office and the attack mailing identifies the specific election, supports one candidate and attacks his “opponent”, those actions are sufficient to individually identify the “candidate” such that notice to the candidate is required by law.

Having agreed with Candidate Roberts as to the law, the Commissioner, however, declines to find MSSAMT in a campaign practice violation for its actions in this Matter. The COPP interpretation of statute set out above was not made until this Decision. The Commissioner will apply this interpretation prospectively.¹⁷

¹⁶ Don Roberts also filed the Complaint in this Matter.

¹⁷ The Commissioner adopted this approach in *Thomas v. Gianforte* No. COPP 2016-CFP-001 stating in Footnote 5 the following: The Commissioner applies the principle of excusable neglect to dismiss the immediate [complaint on this issue]. The Commissioner applies this principle on the basis that the necessary distinctions were first made in this Decision. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-006 and 009.

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 MSSA’s 2014 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 and/or the amount of the fine.

The failure to properly 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 report and disclose are excused as *de*

minimis. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009.

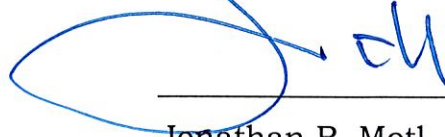
Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the sufficiency findings, civil/criminal prosecution and/or a civil fine is justified. §13-37-124, MCA. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying civil prosecution of MSSA. 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*.

DATED this 16th day of August, 2016.



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