

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Roberts v. Tutvedt and MTBASE  No. COPP 2013-CFP-008	Dismissal of Complaint Against Bruce Tutvedt  Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act By MTBASE
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On February 21, 2013, Rollan Roberts II, a resident of Whitefish, Montana and 2012 Republican primary election candidate for Senate District 3 (SD 3) filed a complaint against his primary election opponent, Bruce Tutvedt, alleging violations of Montana's Campaign Practice Act. Mr. Roberts II also alleged that a political committee, Montana Business Advocates for Sensible Elections (MTBASE), violated Montana's campaign laws.

**INTRODUCTION**

Candidate Robert II's complaint makes allegations against Candidate Tutvedt and MTBASE. The foundational facts for these allegations are as follows:

Finding of Fact No. 1: Rollan Roberts II and Bruce Tutvedt ran as candidates in the 2012 Republican primary election for nomination to the SD 3 general election to the Montana legislature. Candidate Tutvedt won the Republican primary election for SD 3 and went on to win the general election as well. (Secretary of State -SOS-Website).

Finding of Fact No. 2: On May 30, 2012, MTBASE PAC filed a C-2 Statement of Organization form with the COPP. The PAC's purpose was stated as: "support candidates from all political parties who supported [certain issues]...". MTBASE listed Bruce Tutvedt and Jesse O'Hara as candidates it would support in the June 5, 2012 primary election<sup>1</sup>. (Commissioner's records).

## **DISCUSSION**

Candidate Roberts II's complaint is four pages in length. It is accompanied by copies of 6 campaign leaflets. It alleges campaign practice violations against Candidate Tutvedt and against MTBASE.<sup>2</sup>

### **I. Candidate Tutvedt**

The complaint alleges generally that Candidate Tutvedt coordinated expenditures with 3<sup>rd</sup> parties and "accepted excessive contributions and did not accurately or timely file reports..."

Finding of Fact No. 3: Candidate Tutvedt filed three pre-primary SD 3 election campaign finance reports:

- a. May 24, 2012, reporting to May 19;
- b. May 24, 2012, reporting May 19 through May 24;
- c. June 1, 2012, reporting over \$100 contributions

Candidate Tutvedt filed a post-election campaign finance report on June 25, 2012 (Commissioner's records).

Candidate Tutvedt was required to report and disclose as Montana's campaign finance report filing requirements are mandatory: "shall file" (see §§13-37-225,

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<sup>1</sup> MT BASE added another candidate, Carmine Mowbray, in an amended filing.

<sup>2</sup> Candidate Tutvedt has also filed a COPP complaint against Candidate Roberts II and a number of third party groups. *Tutvedt v. Roberts II, ATP, et. al.* COPP-2012-CFP-047. This complaint is pending on the COPP docket for Decision.

226 MCA). Montana law governing the 2012 primary election required that legislative candidates file their campaign finance report “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. June 5, 2012 was the date set for primary elections in Montana. The 12<sup>th</sup> day preceding the June 5 primary election was May 24, 2012 and 20<sup>th</sup> day after the election was June 25, 2012. Candidate Tutvedt timely filed both his pre-election and post-election campaign finance reports(FOF No. 3). Candidate Roberts II’s allegation on this issue is without merit and without facts in support. This allegation of the complaint is dismissed in full.

Candidate Roberts II further alleges that Candidate Tutvedt accepted “excessive contributions.” Candidate Roberts II, however, cites to no examples of such excessive contributions and a review of Candidate Tutvedt’s campaign finance reports shows no listing of contributions in amounts over contributions limits. The Commissioner determines that this part of the complaint is without direct factual support and must instead be linked to the general complaint of coordination. To the extent the “excessive contributions” allegations is intended as a stand-alone allegation, the Commissioner determines that it lacks factual support and is therefore dismissed in full.

Candidate Roberts II alleges that Candidate Tutvedt coordinated with MTBASE. MTBASE engaged in SD 3 independent expenditures and those expenditures can become a contribution if deemed to be “coordinated” between a candidate (Candidate Tutvedt in this Matter)

and another entity or person (MTBASE in this Matter).<sup>3</sup> If coordinated, an independent expenditure is treated as though it is a contribution to and/or expense by the candidate's own committee. Contributions to a candidate are limited in amount from any source and prohibited completely from a corporate source. (See §§13-35-227, 13-37-216, MCA). Because a coordinated third party election expense is deemed to be a contribution it becomes subject to the limits and prohibition of these laws.

Candidate Roberts II cites to no specific fact, document, testimony or other evidence of coordination between Candidate Tutvedt and MTBASE.<sup>4</sup> The complaint is therefore examined as a complaint based on coordination inferred through a relationship.

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...”<sup>5</sup> This Commissioner, citing to precedent from other jurisdictions and prior Commissioners, has recently issued two Decisions rejecting

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<sup>3</sup> Independent expenditures are third party election expenditures that are not coordinated with the candidate. Stated another way, 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

<sup>4</sup> The anonymous phone call to Candidate Roberts II is not used as evidence as it did not come from anyone who can identified, much less identified as connected with the Tutvedt campaign. Candidate Tutvedt, when interviewed by the COPP, stated that neither he or his campaign had any knowledge of or involvement in the MTBASE 2012 independent expenditure activity. MTBASE, too, denied any independent expenditure involvement or association with Candidate Tutvedt.

<sup>5</sup> 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 relationship.<sup>6</sup>

Based on the extensive discussion and analysis set out in two prior Decisions (FN 6), the Commissioner in this Matter repeats that coordination cannot be inferred solely by relationship, including that between fellow office holders within the same political party.<sup>7</sup> Because this part of complaint is based on relationship, there is no coordination to be inferred between Candidate Tutvedt and MTBASE.<sup>8</sup> The coordination allegation against Candidate Tutvedt is dismissed in full.

Having dismissed the late reporting, over-the-limit contributions and coordination allegations, the Commissioner determines that there are insufficient facts to support any allegation of the Complaint against Candidate Tutvedt and therefore dismisses the Tutvedt portion of the complaint in full.

## II. MTBASE

Candidate Roberts II's complaint first alleges that MTBASE coordinated its expenditures in the SD 3 election with Candidate

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<sup>6</sup> *Dick v. Republican State Leadership Committee*, COPP-2012-CFP-038 and *Pennington v. Bullock*, COPP-2013-CFP-012.

<sup>7</sup> 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.

<sup>8</sup> While the Complaint also alleges MtBASE used Tutvedt campaign material, the complaint does not specify what that material was. A review of the documents accompanying the Complaint shows that, at most, MtBASE used images and information available from public sources. The MtBASE response to this allegation states that any such use of documents involved documents taken from venues available for public

Tutvedt.<sup>9</sup> That coordination issue is discussed and resolved above, this Decision, as to Candidate Tutvedt. The same facts, reasoning and law apply to the allegation against MTBASE. Accordingly, the coordination allegation against MTBASE is deemed to be without sufficient factual support and that allegation of the complaint is dismissed in full.

The Complaint next alleges that MTBASE engaged in 2012 SD 3 election expenditures without properly reporting or disclosing the same:

Finding of Fact No. 4: On May 31, 2012, MTBASE submitted three pages of C-7E pre-election reports listing 6 expenditures on the date of May 30, 2012, including expenditures made in the Tutvedt and Mowbray Senate elections as well as the O'Hara House election.<sup>10</sup> (Commissioner's records).

Finding of Fact No. 5: On June 25, 2012, MTBASE submitted its first C6 finance report for the reporting period of May 25, 2012 to June 20, 2012. Within this report, MTBASE listed a \$2,000 contribution from B&H Ranch. All MTBASE Tutvedt/Roberts expenditures were listed as to date made (May 30), with the amount either listed as an expense or debt. (Commissioner's records).

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<sup>9</sup> MTBASE reported and disclosed its SD 3 expenditures as "independent" expenditures.

<sup>10</sup> In 2012 the C-7E reports were not scanned and placed in the candidate or political committee folders available for public view on-line at the COPP website. Instead, the C-7E reports were placed hard-copy in the candidate or political committee folder maintained at the COPP office. Candidate Roberts II filed his complaint based on an COPP website data review of MTBASE's campaign finance records and therefore could not (and did not) see the C-7E reports because those reports could be viewed only in the hard-copy MTBASE file. The COPP is increasing the quantity of information it posts on-line (greatly aided by the electronic reporting authority granted by SB 289 passed by the 2015 legislature) and hopes to add the C-7E reports to the website accessible data base for the 2016 elections.

The SD 3 campaign amounts expended by MTBASE were independent expenditures. An independent expenditure in an amount greater than \$500 must be reported and disclosed within 24 hours of the expenditure (§13-37-226(5)(b) MCA) and on the on 20<sup>th</sup> day after the election (§13-37-226(3) MCA). MTBASE timely filed both the 24-hour (FOF No. 4) and 20 day post-election (FOF No. 5) reports and fully reported the independent expenditure in those reports.<sup>11</sup> Accordingly, the Commissioner dismisses the allegations of complaint as to MTBASE late filing of campaign finance reports or its failure to timely disclose independent expenditures as lacking in factual support.

Thirdly, the Roberts II complaint alleges that B and H Ranch Co., a contributor to MTBASE, was not timely registered as a political committee. An identical allegation based on the same facts has been considered (and a fine assessed) in another complaint and Decision. *Ponte v. MtBASE*, COPP-2014-CFP-012. B and H Ranch Co., having already paid a fine for untimely registration in the 2012 election, cannot again be determined for the same campaign practice violation in this Matter. The Commissioner hereby dismisses the allegations against B and H Ranch Co. in full on the basis that these allegations have been raised, decided and resolved in *Ponte v. MtBASE*.

Fourthly, the Roberts II complaint alleged a lack of “disclaimer” as to a radio ad and the MTBASE website. The complaint, however,

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<sup>11</sup> The response by MTBASE states that its activity was precisely reported at the times that the activity occurred.

submitted no evidence to support this allegation. In contrast the MTBASE response produced a properly attributed radio script and website image.<sup>12</sup> The Commissioner hereby dismisses the lack of attribution allegations on the basis that these allegations lack the support of sufficient facts.

Lastly, the Roberts II complaint alleged that MTBASE did not timely provide the “fair notice” required by Montana law as to certain independent expenditures.<sup>13</sup>

Finding of Fact No. 6: The Roberts II complaint asserts that MTBASE attack flyers and radio advertisements first appeared on June 1, 2012. (Commissioner’s records).

Finding of Fact No. 7: The response from MTBASE includes a copy of an email with a date of June 1, 2012 showing that MTBASE proved Candidate Roberts II with copies of the MTBASE attack flyers and the text of the radio commercial, stating that it was doing so “in compliance with 13-35-402 [MCA]” (Commissioner’s records).

Finding of Fact No. 8: The MTBASE C-7E campaign finance reports show that MTBASE delivered the attack flyers to a mailhouse on May 30, 2012. (Commissioner’s records)

Montana law requires that any entity producing an attack communication provide notice to the affected candidate of the final copy of the campaign advertising: “intended for public distribution in

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<sup>12</sup> The MTBASE response states that the complaint appeared to be based on a image of the website the day before it became public.

<sup>13</sup> Independent expenditures are generally carried out in the form of an election communication (in Candidate Roberts II’s case, flyers) issued by a third party (MTBASE, in Candidate Roberts II’s case) attacking a candidate ( Roberts II).



the 10 days prior to an election..." (§13-35-402(1) MCA). The Commissioner notes that the 2012 Montana primary election took place on June 5, 2012. The 10 days prior to the June 5 election was the period of May 26, 2012 through June 4, 2012. The MTBASE SD 3 flyers and radio communication fall within those 10 days (FOF Nos. 6-8) so notice must be provided by MTBASE to Candidate Roberts II.

The June 1, 2012 provision of the text of the radio commercial text (FOF NO. 6) was timely notice as it matched "the time [of] broadcast" requirement of §13-35-402(3)(a) MCA. The June 1 provision of the image of the attack flyer, however, was not timely notice as Montana law specifies that notice of such attack mail 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). In mailings where there are no postmarks (as was true for the MTBASE flyers) the Commissioner has determined that the date mailed or "dropped" by the mail house, is the equivalent of the postmark date.<sup>14</sup>

The Commissioner hereby determines the mailhouse drop date of the MTBASE attack flyers was May 31, 2014 (FOF Nos 6-8). MTBASE, however, provided notice of the attack flyers to Candidate Roberts II on June 1, 2012. This notice was one day late, and

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<sup>14</sup> The Commissioner previously determined that this mail date is the date that will be used to measure the date of "intended for public distribution" under §13-35-402(1) MCA. *Buttrey v. MDP* COPP-2014-CFP-050.

therefore in violation of the notice provisions of §13-35-402.<sup>15</sup>

Sufficiency Finding No. 1: The Commissioner determines that sufficient facts exist to show that the MTBASE violated Montana law by failing to provide timely notice as to certain flyers attacking Candidate Roberts II.

It is noted that MTBASE fully and timely reported the expense flyer cost. This Decision is limited to a finding that MTBASE did not timely provide notice within the particular notice period set by statute. Several other Montana political committees have likewise missed the “postmark” notice date for attack flyers sent by mail.<sup>16</sup> These Decisions should educate political committees such that notice is timely provided in 2016 campaigns.

### **ENFORCEMENT OF SUFFICIENCY FINDINGS**

The allegations against Candidate Tutvedt are dismissed in full. Enforcement applies solely to MTBASE for its failure to provide timely notice. 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

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<sup>15</sup> The entire notice period set by statute is 10 days and, with the Montana legislature having determined that limited a time period, even a single day is significant and cannot be excused as *de minimus*.

<sup>16</sup> *Perea v MDP* No. COPP-2014-CFP-055; *Shellnutt v. Planned Parenthood*, COPP-2014-CFP-058; *Buttrey v. MDP*, COPP-2014-CFP-050; *Gibson v. MDP*, COPP-2014-CFP-053 and, *Kary v. MDP*, COPP-2014-CFP-059. Given the technical nature of the violation and the first-time application of this campaign practice, the fine assessed in settling this violation was \$50 per late noticed attack flyer.

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 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 MTBASE has, as a matter of law, violated Montana’s campaign practice laws, including, but not limited to §13-37-402 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.

The failure to properly and timely provide notice was due to oversight. Excusable neglect cannot be applied to oversight. *See* discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. Likewise independent expenditures are emerging as an important component of spending in candidate races such that issues dealing with independent expenditures cannot be excused as *de minimis*. *See* discussion of *de minimis* principles in

*Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

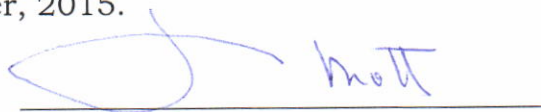
Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil/criminal prosecution and/or a civil fine is justified (*See* §13-37-124 MCA). The Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution under §13-37-124 MCA. Because of the nature of violations (the failure to timely provide notice occurred in Flathead County) this matter is referred to the County Attorney of Flathead 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 §13-37-226 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*.

At the point this Matter is returned to the COPP for negotiation of the fine or for litigation, mitigation principles will be considered. Included in mitigation will be recognition of first time nature of the enforcement of the campaign practice regulation addressed in this Decision.

DATED this 5<sup>th</sup> day of October, 2015.



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