

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Matter of Royston v. Malone No. COPP 2012-CFP-050	Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act
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On December 13, 2012, Shelia Royston, a resident of Wilsall, Montana filed a complaint against Park County Commissioner (District 2), Marty Malone. Mr. Malone was a candidate for reelection in 2012. Ms. Royston's complaint alleges that Mr. Malone violated several Montana campaign practice laws.

**SUBSTANTIVE ISSUES ADDRESSED**

The substantive areas of campaign finance law addressed by this decision are: 1) Reporting of contributions to and expenditures by a candidate; 2) Disclosure of purpose of campaign expenditures; 3) Public forum posting of candidate information; and, 4) *De minimis* and/or excusable neglect theories as applied to campaign practice violations.

## **RELEVANT FOUNDATIONAL FACTS**

The foundation facts necessary for determination in this matter are as follows:

Finding of Fact No. 1: Livingston, Montana is the county seat of Park County, Montana. The position of Park County Commissioner is a non-partisan elected position with a term of four years. The Park County commission is composed of three members who represent 3 districts within Park County (District 1, District 2 and District 3). (Park County Clerk & Recorder's Office).

Finding of Fact No. 2: In 2012, Park County Commissioner Marty Malone ran for reelection as County Commissioner in District 2. Park County did not hold a non-partisan primary election in 2012. On November 6, 2012, a general election was held. Candidate Malone won the general election with 4,083 votes against candidates Kevin Funk (1,783 votes) and Ralph Johnson (1,794 votes). (Park County Clerk & Recorder's Office, Commissioner's records).

### **I. DISCUSSION**

This Complaint in this matter poses alleges several violations of the Montana Campaign Practice Act. Each allegation is discussed separately below.

#### **1. Primary Election Contributions**

The complaint alleges that Candidate Malone improperly accepted and handled three primary election contributions.

Finding of Fact No. 3: Park County did not hold a primary election in 2012 for local offices, including that of County Commissioner. On March 13, 2012 the Park County Election Administrator proposed such a waiver and shortly thereafter the involved local officials (County attorney and County Commissioners) agreed to waive the primary election for local offices. (Investigator's Notes).

Finding of Fact No. 4: Candidate Malone filed a pre-primary campaign finance report on May 24, 2012, reporting no expenditures and three contributions: Allan Carter \$100 (4/16/12); Don Gimbal \$100 (3/25/12) and Ron Carlstrom \$100 (3/13/12). (COPP records).

Finding of Fact No. 5: Candidate Malone filed pre-general election campaign reports on August 24, 2012 and October 22, 2012. (COPP records).

Finding of Fact No. 6: Candidate Malone filed a post-election report for his 2012 general election account on November 21, 2012. (COPP records).

Finding of Fact No. 7: On January 14, 2013 Candidate Malone filed an "Amended" C-5 report. (COPP records).

Candidate Malone accepted three contributions (FOF No. 4) identifying the contributions as "primary election" contributions. This \$300 in "primary election" contributions was accounted separately and carried forward on Candidate Malone's pre-general and post-general campaign finance reports (FOF Nos. 5 and 6).

The complaint implies that primary election donations, once received, are subject to separate accounting, including post-primary election distribution through a closing report, but that is not the case for candidates passing on to a general election: "[l]eftover funds that were designated for a primary election may be used for general election purposes if all primary debt has been paid." 44.10.330(2)(e) ARM. There is nothing generally wrong with Candidate Malone's application of \$300 in primary election funds for general election use. Further, the Commissioner reviewed the general election contributor list and determined that there is no attempt by Candidate Malone to improperly use a "two election" (primary and general - See §13-37-216(6) MCA) contribution scheme for the three contributors (FOF No. 4). While Candidate Malone should have relabeled the three contributors as "general election" contributors in his

pre-election campaign finance report (FOF No. 5), his failure to do so did not cause harm to the public such that this particular complaint is dismissed as *de minimus*. (*Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009).

Candidate Malone is subject to timely reporting and disclosure laws when reporting expenditures paid by campaign funds, including his general election use of the \$300. Candidate Malone's first required campaign finance report was the pre-general report due 12 days pre-election or by October 25, 2012.<sup>1</sup> [§13-37-226(4) MCA]. Candidate Malone filed his pre-election report on October 22, 2012 but reported through October 20, 2012, the correct reporting date for pre-election contributions or expenditures. (§13-37-218 MCA).<sup>2</sup> Candidate Malone's pre-election campaign finance report was therefore timely filed. Candidate Malone then timely filed a post-election campaign finance report (§13-37-226(5) MCA), designating that report as his closing report.<sup>3</sup>

Candidate Malone clearly did not know what to do with the \$300 he had segregated as "primary" contributions because he left that \$300 amount as a "cash in the bank" balance on his closing report. On December 12, 2012 the complaint in this matter was filed. On January 14, 2013 Candidate Malone filed an amended C-5 campaign finance report (FOF No. 7) that accounted for the use of the \$300 in general election expenditures.

Candidate Malone disclosed \$315.57 in additional campaign expenditures

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<sup>1</sup> The general election date was November 6, 2012.

<sup>2</sup> Expenditures and contributions are reported until the 5<sup>th</sup> day before the date of filing. §13-37-218 MCA

<sup>3</sup> Candidate Malone filed his campaign finance reports under the COPP's former electronic reporting system. The old system, unlike the current (CERS) electronic report system, did not display the report status for viewing by the public. The Commissioner's records, however, show that Candidate Malone designated the post-election report as a closing report.

in the amended C-5 report filed on January 14, 2013.<sup>4</sup> The expenditures were reported as being made in January, July and August of 2012. Each of the expenditures was therefore required to be reported in Candidate's Malone's pre-election campaign finance report for expenditures through October 20, 2012. (§13-37-218 MCA). The Commissioner makes the following sufficiency finding:

Sufficiency Finding No. 1: The Commissioner determines that sufficient facts exist to show that Candidate Malone late reported \$315.57 in campaign expenses.

2. Purpose of Printing Costs

The Complaint alleges that Candidate Malone improperly described the purpose of two newspaper ads.

Finding of Fact No. 8: On his November 21, 2012 C-5 campaign finance report, Mr. Malone reported an expenditure of \$130 paid to the Livingston Enterprise Newspaper on November 1, 2012. Mr. Malone listed the purpose as "Thank you". On his January 14, 2013 "Amended" C-5 report, Mr. Malone listed the same \$130 under "Schedule D - Corrections" explaining the correction as "was 2 ads, \$78 + \$52 paid 11/1/12." (COPP records).

Montana law requires that Candidate Malone disclose "amount, date and purpose of each expenditure..." §13-37-230 MCA. The complaint alleges that the November 21, 2012 campaign finance report was improper because the ads were campaign ads, not "thank you" ads. The Commissioner determines that Candidate Malone timely and correctly reported the amount, date and site (Livingston Enterprise) of the campaign expenditure. Any harm caused by the

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<sup>4</sup> The claimed expenses included \$244.41 for the candidate filing fee. While a candidate is not required to report a filing fee as a campaign expenditure [§13-1-101(11)(b)(2)MCA, once he or she does so then it must be reported at the time set by law.

technical failure to exactly describe the expense in this instance (campaign ad vs. thank you note) is deemed *de minimis* and this part of the complaint is dismissed. See *In the Matter of the Fitzpatrick Complaint*, COPP- CFP-2011-014 and *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

### 3. Failure to Report and Disclose

The complaint claims that Candidate Malone failed to timely and properly report and disclose two campaign expenditures.

Finding of Fact No. 9: Candidate Malone timely filed the pre-general and post general reports --- see FOF Nos. 5 and 6. (COPP records).

Finding of Fact No. 10: Candidate Malone's pre-general campaign finance report disclosed a campaign reimbursement to himself of \$199.95 (Check #1006) for "Reimburse Livingston Chamber and Insty-Prints" dated October 18, 2012. Candidate Malone's January 14, 2013 "Amended" C-5 report, listed the same \$199.95 under "Schedule D - Corrections" explaining the correction as "Livingston Chamber \$100 dated 6/13/12 parade entry and Insty-Prints business cards \$99 dated 8/30/12." (COPP records).

Montana law required that Candidate Malone timely report campaign expenditures. (§13-37-225 MCA). The parade entry and business card expenses were timely reported on Candidate Malone's pre-election campaign finance report. However, while Candidate Malone did disclose the total amount spent the disclosure lacked the "amount, date and purpose of each expenditure..." specificity required by §13-37-230 MCA.

Sufficiency Finding No. 2: The Commissioner determines that sufficient facts exist to show that Candidate Malone failed to properly report expenses of \$199.

#### 4. Lack of Website Attribution

The complaint claims that Candidate Malone created a campaign website but did not attribute the same.

Finding of Fact No. 11: Candidate Malone established a campaign website “electmarty Malone.com” that contained four webpages: Home page, Successful Projects, About Marty Malone and Photos. None of the pages contained an attribution statement. Mr. Malone told the Commissioner’s investigator that he was made aware of the lack of attribution on January 4, 2013 and promptly took down the website on January 5, 2013. (Investigative notes).

Since October of 2003 the COPP has posted (See frequently asked questions, COPP homepage) the following website rule:

A website utilized by a candidate or political committee to advocate the success or defeat of a candidate or issue is categorized as election material. The costs associated with the development and maintenance of the website should be reported in the same manner as costs associated with the production of brochures, bumper stickers, print ads, and other forms of advertising.

In a January 31, 2014 advisory opinion the COPP defined the attribution for web sites as follows: “... any act of electronic campaigning that rises to the level of becoming a contribution or expenditure will need to be properly attributed.”

Boyles AO: COPP-2014-AO-003. The COPP has applied the *de minimis* principle to excuse an instance of a candidate website disclaimer lacking the required address. *Shannon v. Andrews*, October 25, 2012 (Commissioner Murry). In this Matter, however, the entire attribution was lacking such that the attribution requirements §13-35-225 are not met.

Sufficiency Finding No. 3: The Commissioner determines that sufficient facts exist to show that Candidate Malone failed to attribute his campaign website, as required by law.



5. Godaddy.com Website Service

The complaint alleges that Candidate Malone failed to report the costs of website services provided by Godaddy.com. The COPP considers Godaddy.com to be a commercial entity charging for its website services. *See Vanmeter v. Larson, November 10, 2011 (Commissioner Gallik)*. Montana law required that Candidate Malone timely report campaign expenditures. (§13-37-225 MCA). The parade entry and business card expenses should have been but were not reported by Candidate Malone on his October 22, 2012 campaign finance report (*See* FOF No. 9). The Commissioner has already determined that sufficient facts exist (SF No. 1) to show a failure to timely report the Godaddy.com expenditures.

6. LivingstonMontana.com

The complaint alleges that Candidate Malone received an in-kind contribution when he posted biographical information, without charge, on a LivingstonMontana.com website. The Commissioner has reviewed the website and by observation determined it to be a community forum website featuring a listing of community events and a menu bar with 6 categories of information including one labeled "Park County." The Park County menu bar includes a "candidate profile and election results" entry that currently features biographies of 17 candidates for elected offices ranging from state senator to county treasurer.

The Complaint alleges that the space provided by LivingstonMontana.com



to Candidate Malone was an unreported and undisclosed in-kind contribution to the candidate. The Commissioner disagrees with this allegation.

The LivingstonMontana.com presentation of candidate biographies does advocate for or against any candidate. In fact, candidate biographies of competing candidates are presented. Under Montana law an in-kind contribution “means the furnishing of services, property ...to a candidate ...for the purpose of supporting or opposing any candidate....” 44.10.323(2) ARM. The tasteful, civic-minded and informative presentation of biographical information by the LivingstonMontana.com publication is a true community service, advancing and serving an informed voting citizenry.

Because there is no contribution or expenditure to any candidate stemming from the LivingstonMontana.com publication, there is no need for the Commissioner to further examine or consider the corporate sponsorship of the information. The LivingstonMontana.com portions of the complaint are dismissed.

## **II. ENFORCEMENT**

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must make, a decision as the law mandates that the Commissioner [“shall 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. In this matter Montana's campaign finance report filing requirements are mandatory: "shall file" [See §13-37-225 MCA]. Therefore, any failure to disclose or report an expenditure on a mandatory, date-certain filing date is a violation of §13-37-226 MCA.

This Commissioner, having been charged to investigate and decide, hereby determines that Candidate Malone has, as a matter of law, violated Montana's campaign practice laws, including §§13-37-225, 226, MCA. Having determined that a campaign practice violation has occurred, 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.

A Commissioner is given discretion ["may", See §13-37-124(1) MCA] in regard to prosecution of a violation. The Commissioner now considers whether Candidate Malone's conduct may be excused under the legal concepts of *de minimis* or excusable neglect.

The Commissioner does not apply *de minimis* to Candidate Malone's late filing failures. The Commissioner has refused to apply *de minimis* to a late filing of 71 days (See *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009) and does not do so in this Matter as it involves late filing of more than 71 days.

The Commissioner now considers excusable neglect. This Office has, based on certain facts, declined prosecution based on late filing by a period of

11 days (*See In the Matter of the Washburn Complaint*, COPP-CFP-2013-002) and by a period of 17 days (*See In the Matter of the Complaint Against CMRG*, decided February 21, 2002). These determinations were, in part, based on an excusable neglect theory stemming from the Commissioner's determination of genuine confusion among multiple parties over who was to file what and when. However, as discussed in detail in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009 intent and motive are not considered in an excusable neglect consideration.

Specifically it is noted that a showing of excusable neglect generally requires justification for error beyond mere carelessness or ignorance of the law. *Empire Lath & Plaster, Inc. v. American Casualty Co.*, 256 Mont. 413, 417, 847 P.2d 276, 278 (1993). Neglect that is "due to forgetfulness and the press of other, more important business is not sufficient to establish excusable neglect." *Foster Apiaries, Inc. v. Hubbard Apiaries, Inc.*, 193 Mont. 156, 161, 630 P.2d 1213, 1216 (1981). A party's busy schedule or inattentiveness to the matter does not constitute excusable neglect. *Matthews v. Don K. Chevrolet*, 2005 MT 164, ¶¶13-15, 327 Mont. 456, ¶¶13-15, 115 P.3d 201, ¶¶ 13-15. With this analysis in mind, the late filing violations in this Matter are not appropriate for application of an excusable neglect theory.

Because there is a finding of violation and a determination that, as to late reporting, *de minimis* and excusable neglect theories are not applicable, civil prosecution and/or a civil fine is justified [See §13-37-124 MCA]. This Commissioner has, through this decision, issued a "sufficient evidence"

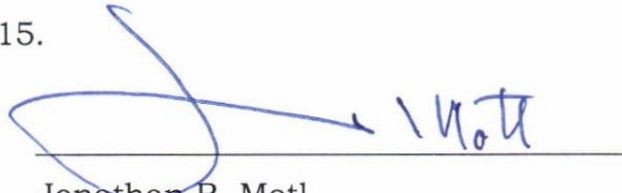
Finding and Decision justifying civil prosecution under §13-37-124 MCA. Because reporting was required in Lewis and Clark counties it is the proper venue for an allegation of a campaign practice violation. See §13-37-124 MCA. By the choice of the Commissioner this matter will now be submitted to [or “noticed to”] the Lewis and Clark County attorney for his review for appropriate civil action. §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 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 Chapter 37, including those of §13-37-226. [See 13-37-128 MCA]. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

In regard to any such fine the Commissioner has discretion to determine if mitigation is appropriate to reduce a fine based on the explanation of why a

violation occurred or circumstances of payment. *See In the Matter of the Complaint of MacLaren*, COPP-2011-CFP-012. Mitigation means “abatement or diminution of a penalty or punishment imposed by law.” *Black’s Law Dictionary, Revised 4<sup>th</sup> Addition*. The Commissioner will consider the facts of this matter to determine whether mitigation will be applied to the amount of fine negotiated in this Matter, should Candidate Malone choose to settle this Matter with a negotiated fine.

DATED this 14<sup>th</sup> day of May, 2015.



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