

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Taylor v. Mowbray, MTBASE, et. al. No. COPP 2013-CFP-007	Dismissal of Complaint Against Carmine Mowbray and B&H Ranch Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act By MTBASE and MH&A
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On February 15, 2013, Janna Taylor, a resident of Dayton Montana and 2012 Republican candidate for Senate District 6 (Lake County) filed a complaint against Carmine Mowbray, a resident of Polson, Montana and also a 2012 Republican candidate for SD 6. Candidate Taylor alleged that Candidate Mowbray's campaign, along with campaign practices of several third party groups, violated campaign finance laws.

INTRODUCTION

Candidate Taylor's complaint makes allegations against Candidate Mowbray, MTBASE, MH&A and B & H Ranch. The foundational facts for these allegations are as follows:

Finding of Fact No. 1: On November 17, 2011, Janna Taylor submitted her C-1 statement of candidate form to run as a 2012 Republican Candidate for SD 6. (COPP records).

Finding of Fact No. 2: On April 5, 2011, Carmine Mowbray filed a C1 statement of candidate form with the COPP to “explore” running for a Republican candidate for SD 6. On October 3, 2011, Ms. Mowbray amended her C1 form confirming she will be running as a 2012 Republican candidate for SD 6. (Commissioner’s records).

Finding of Fact No. 3: On June 5, 2012, a primary election was held. Three Republican candidates were on the ballot for nomination as the Republican candidate for election to SD 6: Janna Taylor won the primary election with 1,792 votes, Carmine Mowbray received 1,630 votes and Mike Larson 517 votes. Janna Taylor then won the general election as Senator for SD 6. (Montana Secretary of State (SOS) website).

Finding of Fact No. 4: On May 30, 2012, MTBASE PAC filed a Statement of Organization (form C-2) with the COPP. The PAC’s purpose was listed as: “support candidates from all political parties who supported...[certain issues].” The form listed Bruce Tutvedt and Jesse O’Hara as candidates it would support in the June 5, 2012 primary election. (Commissioner’s records).

Finding of Fact No. 5: On June 1, 2012, MTBASE submitted an “amended C2 form” adding Carmine Mowbray as a third candidate the PAC supported for the June 5, 2012 election. (Commissioner’s records).

Finding of Fact No. 6: On February 22, 2013, B&H Ranch filed (Form C-2) as an incidental committee with the COPP. James Peterson was listed as President and Lorraine Peterson was listed as Secretary/Treasurer. (Commissioner’s records).

Finding of Fact No. 7: Montana Hunters and Anglers (MH&A) is a political action committee that formed in 2010. The committee amended its C-2 statement of organization form on May 8, 2012 listing Joseph James Splinter as treasurer. The committee listed its purpose as “To support or oppose legislative and statewide candidates on public hunting, fishing and access to public land for 2012 and beyond.” (Commissioner’s records).

DISCUSSION

Candidate Taylor’s complaint sets out eight paragraphs of factual allegations.¹

It is accompanied by 20 pages of documents. The Complaint alleges campaign

¹ Candidate Mowbray also filed a COPP complaint against Candidate Taylor and a number of third party groups. That complaint was dismissed by a summary dismissal letter *Mowbray v. Taylor*, April 12, 2013 (Commissioner Murry). The COPP has, based on evidence not available in early 2013, reopened two of the Spring of 2013 dismissals (*Madin v. Sales* and *Washburn v. Murray*, See COPP Website). The COPP will look at the *Mowbray v. Taylor* complaint for possible reopening after the remaining 2012-2014 complaints are decided.

practice violations against Candidate Mowbray and three 3rd party groups (MTBASE, MH&A, and B&H Ranch).

I. Candidate Mowbray

The complaint alleges generally that Candidate Mowbray coordinated expenditures with 3rd parties and engaged in several illegal campaign practices. Each allegation is discussed below.

Candidate Taylor alleges that Candidate Mowbray coordinated with MTBASE. MTBASE engaged in SD 6 independent expenditures and those expenditures can become a contribution if deemed to be “coordinated” between a candidate (Candidate Mowbray in this Matter) and another entity or person (MTBASE in this Matter).² 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 Taylor cites to no specific fact, document, testimony or other evidence of coordination between Candidate Mowbray and MTBASE.³ The complaint is therefore examined as a complaint based on coordination inferred

² 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

³ Instead the complaint cites to a shared vendor (Anderson Broadcasting) and a person (Jim Simpson) who is alleged to be active in the Mowbray campaign and also to have provided the voice recording for a MTBASE commercial advocating the election of Mowbray for SD 6.

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...”⁴ This Commissioner, citing to precedent from other jurisdictions and prior Commissioners, has recently issued two Decisions rejecting coordination based solely on relationship.⁵

Based on the extensive discussion and analysis set out in two prior Decisions (FN 5), the Commissioner in this Matter repeats that coordination cannot be inferred solely by relationship, including that of shared vendor or cross over of volunteer workers.⁶ Because this allegation of the complaint is based on relationship (with no fact or evidence showing actual coordination) there is no coordination to be inferred between Candidate Mowbray and MTBASE.⁷ The coordination allegation against Candidate Mowbray is dismissed in full.

The Complaint next alleges that Candidate Mowbray violated Montana’s prohibition on corporate contributions to a candidate (§13-35-227 MCA) when she accepted a contribution from the Confederated Salish and Kootenai Tribes. The Complaint alleges that the tribe is a corporation.

⁴ The COPP has new proposed administrative rules moving through the administrative rule making process. These proposed rules include a new rule defining coordination.

⁵ *Dick v. Republican State Leadership Committee*, COPP-2012-CFP-038 and *Pennington v. Bullock*, COPP-2013-CFP-012.

⁶ 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. For a volunteer worker crossover discussion please see the Decisions listed in FN 5.

⁷ Both the candidate and MTBASE deny any shared knowledge or actions as to the independent expenditures. The complainant needs to show some fact or evidence of coordination in order to justify independent investigation on this issue.

The Complaint allegation is wrong. The Confederated Salish and Kootenai Tribes do not exist in Montana as a corporation but instead draw existence as a tribal government, governed by a tribal council, as provided by the Indian Reorganization Act of 1934.⁸ The documents submitted with the Complaint show that the tribal government has formed corporations for specific purposes but do not show that the tribal government has in any way changed the non-corporate character of its own existence. The Commissioner determines that §13-35-227 MCA does not apply since the Confederated Salish and Kootenai Tribes contribution to Candidate Mowbray was not a corporate contribution.⁹ This corporate contribution allegation of the Complaint is dismissed as lacking in sufficient facts.

Lastly, the complaint alleges that Candidate Mowbray's campaign account was, in reality, a constituency account such that all campaign expenditures from the campaign account violate §13-37-402 MCA. The COPP staff thoroughly examined Candidate Mowbray's campaign records. Candidate Mowbray did not seek approval of, nor did the COPP approve, a constituency services account into which surplus campaign funds were deposited.

The Commissioner notes that Candidate Mowbray served in the 2011 legislature by appointment and therefore had no prior campaign or prior campaign funds to which a public trust obligation could have attached.

Whatever Candidate Mowbray chose to call a bank account consisting solely of

⁸ Investigator review of SOS filings. Confederated Salish and Kootenai Tribes Website.

⁹ In 2003 the COPP (under Commissioner Vaughey) issued a memo to campaign treasurers informing that Indian Tribes are to be considered "persons" for campaign contribution purposes. Longtime COPP staffer Mary Baker recalls that the memo has been since used without revocation or change.

her own funds did not create a constituency account obligation with the State of Montana and she was free to later label the bank account differently and to use her own funds in her campaign.¹⁰ This constituency account allegation of the complaint is dismissed as lacking sufficient facts.

Having dismissed the corporate contribution, constituency account and coordination allegations, the Commissioner determines that there are insufficient facts to support any allegation of the Complaint against Candidate Mowbray and therefore dismisses the Mowbray portion of the complaint in full.

II. B&H Ranch

B&H Ranch registered as an incidental committee after the date of its contribution to Candidate Mowbray. FOF No. 6. An identical late registration allegation against B&H Ranch based on the same facts (including the Mowbray contribution) has been considered (and a fine assessed) in another complaint and Decision. *Ponte v. MTBASE*, COPP-2014-CFP-012. B&H Ranch Co., having already paid a fine for untimely registration in the 2012 elections, cannot again be determined for the same campaign practice violation in this Matter. The Commissioner hereby dismisses the allegations against B&H Ranch Co. in full on the basis that these allegations have been raised, decided and resolved in *Ponte v. MTBASE*.

¹⁰ The Complaint incorrectly and inappropriately focuses on entries made in the April, 2011 campaign finance report filed by Candidate Mowbray. The report notes that Candidate Mowbray was “appointed to Montana SD 6- no previous campaign.” The report recites that Candidate Mowbray had opened a bank account and called it a “constituent” account into which she deposited personal funds. The bank account was later renamed a “campaign account”.

III. MTBASE

Candidate Taylor's complaint alleges that MTBASE coordinated its expenditures in the SD 6 election with Candidate Mowbray.¹¹ That coordination issue is discussed and resolved above, this Decision, as to Candidate Mowbray. 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 took contributions in the name of an undisclosed principal thereby violating §13-37-217 MCA. This allegation of the Complaint offers a jumbled and confusing arrangement of facts showing, at most, that the persons who contributed to MTBASE may not have known the full range of its activity.¹² This set of facts, as set out in the Complaint, does not show a violation of §13-37-217 MCA. A violation of §13-37-217 MCA depends on a showing that the contribution itself was "laundered" or made by someone other than the person who is listed on the campaign finance report as the source of funds.¹³ There is no evidence showing that the MTBASE campaign finance reports did not list and disclose the people who, in fact, made the contribution. This "laundering" allegation of the Complaint is

¹¹ MTBASE reported and disclosed its SD 6 expenditures as "independent" expenditures.

¹² The Complaint argues, for example, that MTBASE "went negative" against Candidate Taylor when MTBASE leaders said the opposite. The Commissioner, however, sees no such contradiction in the facts as the MTBASE SD 6 independent expenditure supported Candidate Mowbray but did not attack or "go negative" on Candidate Taylor. It was the separate SD 6 independent expenditure by MH&A that attacked Candidate Taylor.

¹³ See *VanDyk v. Brown*, March 17, 2008 (Commissioner Unsworth), *Wilcox v. Raser*, May 26, 2010 (Commissioner Unsworth).

dismissed as lacking sufficient facts.

Finally, the Complaint alleges that MTBASE failed to properly attribute a 2012 SD 6 radio ad. The radio ad ran from May 31, 2012 to June 4, 2012 and it advocated a vote for Candidate Mowbray. (Commissioner's Records).¹⁴ The attribution on the radio ad read: "This ad paid for by Montana Base."¹⁵

Montana's campaign finance attribution requirements are mandatory: "must...include" (see §13-35-225(1) MCA). Political committees must include "the name of the political committee, the name of the committee treasurer and the address of the committee or the committee treasurer" in the attribution. *Id.* The Commissioner determines that the MTBASE ad does not meet the attribution requirements of Montana law as it lacks the required address and the name of the treasurer.

Sufficiency Finding No. 1. The Commissioner determines sufficient facts to show a MTBASE campaign practice violation for failure to properly attribute as required by law.

The Commissioner notes that MTBASE argues that the attribution deficiency is inconsequential such that *de minimis* should be applied to excuse the oversight. Indeed, the COPP has excused past attribution oversights under application of *de minimis*.¹⁶ The Commissioner, however, declines to apply *de minimis* in this Matter. While MTBASE did attribute "paid for by" and the name

¹⁴ The radio ad does not identify or mention Candidate Taylor and therefore no notice is required under §13-35-402 MCA.

¹⁵ The cost of the ad was fully and timely reported and disclosed by campaign finance reports filed by MTBASE. (Commissioner's records).

¹⁶ *Cohenour v Dooling*, COPP-2014-CFP-043 (omission of political party, promptly corrected); *Brastrup v Ravndal*, COPP-2014-CFP-040 (omission of attribution from a limited number of letters); and *Ulvestad v. Brown*, COPP-2013-CFP-0025 (omission of "paid for by").

of the political committee, the attribution lacked both the name of the treasurer and the address of the committee and that is too much missing information to excuse as *de minimis*.

IV. Montana Hunters and Anglers

Lastly, the Taylor complaint alleged that MH&A did not timely provide the “fair notice” required by Montana law as to certain independent expenditures. Montana law requires that any entity producing an attack communication¹⁷ provide notice to the affected candidate of the final copy of the campaign advertising: “intended for public distribution in the 10 days prior to an election...” (§13-35-402(1) MCA).

The Complaint does not state when the MH&A attack flyer was mailed. The MH&A response to the Complaint, however, asserts that the Flyer was mailed well in advance of the 10 day period. A review of the MH&A campaign finance reports shows that expenses related to printing and mailing were reported in the May 15 to May 18, 2012 time period, thereby placing the mailing well outside of the 10 day pre-election window. The Commissioner determines that sufficient facts are lacking and thereby dismisses the allegation that MH&A violated the notice provisions of §13-35-402(1) MCA.

The dismissal of the allegation in the Complaint against MH&A, however, does not end review of this political committee. Once a complaint is filed the Commissioner “...shall investigate any other alleged violation ...” (§13-37-

¹⁷ Independent expenditures include an election communication (in Candidate Taylor’s case, flyers) issued by a third party (MH&A in Candidate Taylor’s case) attacking a candidate (Taylor).

111(2)(a) MCA). The Taylor complaint, once filed, triggered a review of adequacy of the independent expenditure information reported and disclosed by MH&A.

Under Montana law independent expenditures “must be reported in accordance with the procedure for reporting other expenditures”. ARM 44.10.323(3) and ARM 44.10.531(4). Section 13-37-225 MCA requires that the MH&A file “periodic reports of ... expenditures made ...on behalf of a candidate...” (Emphasis added). The reports must include “debts and obligations owed” by MH &A. §13-37-230(1)(g) MCA. Independent expenditure reporting requires “reporting of the name of the candidate...the independent expenditure was intended to benefit...” ARM 44.10.531(4).

The Commissioner determines that the MH&A campaign finance reports did not meet these requirements. The pertinent MH&A campaign finance report disclosed printing and postage costs as 2012 election expenditures, but did not identify expenditures made in a particular candidate election, such as that of SD 6 or Candidates Mowbray/Taylor.

Sufficiency Finding No. 2. The Commissioner determines that sufficient facts exist to show that MH &A failed to meet the independent committee candidate disclosure requirements of Montana law.¹⁸

The Commissioner further notes that MH&A reported the flyers as expenditures rather than independent expenditures. That failure to properly

¹⁸ A number of political committees that engaged in independent expenditures in 2012 and 2014 elections failed to meet this requirement. *Gibson v. League of Rural Voters*, No. 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.

report is included in sufficiency finding No. 2.

ENFORCEMENT OF SUFFICIENCY FINDINGS

The allegations against Candidate Mowbray and B & H Ranch are dismissed in full. Enforcement applies solely to MTBASE and MH & A as to the sufficiency findings set out above. 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 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 and/or MH & A has, as a matter of law, violated Montana’s campaign practice laws, including 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 attribute or disclose 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.

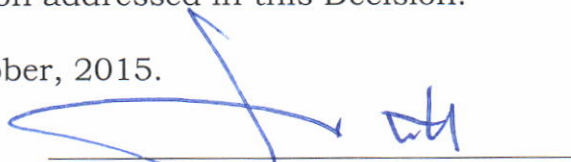
Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil/criminal prosecution and/or a civil fine is justified (See §13-37-124 MCA). The Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution under §13-37-124 MCA. Because of the nature of violations (MH & A’s failure to properly report occurred in Lewis and Clark County but MTBASE’s failure to attribute occurred in Flathead County) this matter is referred to the County Attorneys of Flathead County and Lewis and Clark County for their consideration as to prosecution. §13-37-124(1) MCA. Should both of the County Attorneys 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 5th day of October, 2015.



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