

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

<i>Ulvestad v Brown</i> No. COPP-2013-CFP-0025	Finding of Sufficient Evidence to Show a Campaign Practice Violation Dismissal of Further Action by Determination of Lack of Justification to Prosecute
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Dennis L. Ulvestad and Shaun Brown are Billings residents and 2013 general election candidates for City Council Ward 5 for the City of Billings, Montana. On October 23, 2013, Mr. Ulvestad filed a complaint against Mr. Brown alleging a violation of Montana's campaign practices law.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: "paid for by" attribution, excusable neglect and *de minimis*.

FINDING OF FACTS

The facts necessary for this Decision are as follows:

Finding of Fact No. 1:

A candidate for local office in Montana, including Mr. Brown, is required to place a certain attribution on any campaign publication.

Finding of Fact No. 2:

The Billings City Council Ward 5 election is nonpartisan.

Finding of Fact No. 3:

Mr. Brown prepared that certain campaign flyer (Flyer), a copy of which is attached to this Decision as Exhibit A. (Commissioner's Investigator's notes).

The following subfindings are made:

- a. The Flyer has value, was produced by the candidate and advocates his electoral success; thereby becoming an election communication.
- b. The top half of Exhibit A represents the front side of the flyer and states, "SHAUN BROWN For City Council WARD 5."
- c. The bottom half of Exhibit A represents the back side of the flyer and in the top left hand return address portion, states, "911 25th St. west Billings, MT 59102." In the center on the back side it states, "SHAUN BROWN For City Council Ward 5."

Finding of Fact No. 4:

Mr. Brown was required to print on the Flyer the attribution "paid for by" followed by the name and address of the candidate. Because this was a nonpartisan race it was not necessary to print party affiliation.

Finding of Fact No. 5:

Mr. Brown failed to print the required "paid for by" attribution (see FOF ##3, 4) on the Flyer.

DISCUSSION

An objective review of the Flyer (Exhibit A) establishes that Mr. Brown failed to print “paid for by” at any place on the Flyer. Section 13-35-225(1) MCA requires that this “paid for by” attribution be included on any election communication.

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. 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] 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 to justify a civil...prosecution” of a violation the Commissioner must (“shall notify”, see §13-37-124 MCA) initiate consideration for prosecution.

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 attribution requirements are mandatory: “must...include” (see §13-35-225(1) MCA). The “paid for by” attribution requirement is specifically stated. Therefore, any failure to include “paid for by” in the attribution is a violation of §13-35-225 MCA.

This Commissioner, having been charged to investigate and decide, hereby determines that sufficient evidence exists to show that Mr. Brown has, as a matter of law, committed a violation of Montana’s campaign practice attribution law, specifically §13-35-225 MCA. The Commissioner, however,

further determines that the violation does not justify further action beyond the issuance of this Decision.

Prosecution, and therefore referral to the County Attorney, is not justified as the principle of *de minimis* applies in this Matter. The concept of a *de minimis* exception to civil enforcement of a violation of Montana's campaign practice law is set out and defined in *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F. 3d 1021, 1028-29 (9th Cir. 2009). Without identifying it as such prior Commissioners have used *de minimis* to excuse prosecution of comparable attribution omissions: no prosecution for lack of address, *Shannon v Andrews* COPP-2012-CFP 35 (Commissioner Murry); no prosecution for failure to list party affiliation or funding source, *Fitzpatrick v. Zook* COPP-2011-CFP-14 (Commissioner Gallik); and, no prosecution when full name of committee treasurer omitted, *Ellis v Yes on CI-97* April 15, 2008 (Commissioner Unsworth). This Commissioner likewise finds in this Matter that *de minimis* applies such that referral for civil prosecution is not justified.

This Commissioner also considered but did not apply the principle of excusable neglect. 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

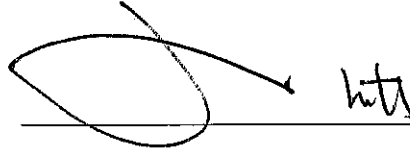
does not constitute excusable neglect. *Matthews v. Don K. Chevrolet*, 2005 MT 164, ¶¶13-15, 327 Mont. 456, ¶¶13-15, 115 P.3d 201, ¶¶ 13-15. Unlike the situation in *Womack v Jenks* COPP-2013-CFP-23, there was no third party intervention (in the Womach Matter, mail returned by the post office) that caused the violation of campaign finance law. Here it was the candidate's own ignorance of law that led to the failure to attribute and the action leading from that ignorance, however unintentional, cannot justify application of excusable neglect. See the Discussion in *Matters of Vincent*, Nos. COPP-2013-CFP-0006 and 0009.

With the above considerations in mind this Commissioner finds that no further action is required beyond the issuance of this Decision. Because there is a finding of violation and a determination that *de minimis* is applicable, civil prosecution and/or a civil fine is not justified (see §13-37-124 MCA).

CONCLUSION

Based on the preceding discussion as Commissioner I find and decide that there is sufficient evidence to show that Mr. Brown violated Montana's campaign practices laws, by failing to fully attribute. This violation, however, does not justify any further action, upon application of the *de minimis* principle, such that prosecution is not justified and will not be pursued. The issuance of this Decision ends this Matter.

DATED this 29th day of October,
2013.

A handwritten signature in black ink, consisting of a large, stylized loop followed by the initials "JRM". The signature is written above a horizontal line.

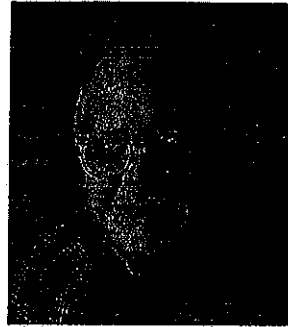
Jonathan R. Motl
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EXHIBIT A

SHAUN BROWN

FOR CITY COUNCIL
WARD 5

A vote for me is a vote for Open
Communication, Dedication, Commitment, and
Integrity.



I am running for City Council because there has not been enough of an effort by our elected officials to promote community awareness and involvement. I will make a concentrated effort to improve the relationship between our City Council and our community.

*If you vote by mail with your ballot
this election is by mail only. Your ballot will be mailed to you on
October 18th. Thank You!!*

No Left

No Right

Just Forward!!!

911 25th St. west
Billings, MT 59102.

SHAUN BROWN

For City Council
Ward 5

PSBT STD-
US POSTAGE
PAID
BILLINGS MT
PERMIT 288

**THIS ELECTION IS BY MAIL AND YOUR BALLOT WILL BE MAILED OUT TO
YOU ON OCTOBER 18TH.**

Please take just a moment and Vote.
Regardless who you plan to vote for or what your choices are exercise your right
and VOTE.



*****AUTO**5-DIGIT 59102 5-7164
Dennis Ulvestad
or Current Resident
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Billings MT 59102-6673