

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES (COPP)

DARRIN GAUB v. MT United PAC, Montanans for Fair Taxation, and candidates Kyle McMurray, Scott Sales, Randyn Gregg, and Michelle Binkley	COPP-2024-CFP-025 DISMISSAL ORDER OF CORRECTIVE ACTION
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COMPLAINT

On May 28, 2024, Darrin Gaub of Helena, MT, filed a Campaign Finance and Practices (CFP) complaint against the MT United PAC (also referred to as “MT UNITED”), Montanans for Fair Taxation, and candidates for Montana’s House of Representatives, Kyle McMurray (HD 77), Scott Sales (HD 68), Randyn Gregg (HD 78), and Michelle Binkley (HD 85). The complaint alleged that MT United PAC coordinated expenditures intended to benefit candidates McMurray, Sales, Gregg, and Binkley, and failed to subsequently report these as contributions in violation of Montana election law. The complaint also alleges that Montanans for Fair Taxation and MT United PAC failed to timely register and file committee finance reports with COPP.

The above-named complaint was submitted pursuant to MCA § 13-37-111, conforms to the basic requirements of Admin. R. Mont. 44.11.106, and alleges violations of election law which fall under my jurisdiction as Commissioner of Political Practices. MT United PAC and Montanans for Fair Taxation filed a joint response through counsel on Monday June 10, 2024. In their response, they assert that this complaint should be dismissed for failure to cite to specific statutes which have been violated, as required by ARM 44.11.106(2)(b)(iii). However, “commissioners regularly proceed with complaints that adequately describe violations of law, even when the complainant does not provide specific citation.” *Hogan v Knudsen and Olson*, COPP-2024-CFP-017. 018, 13. Here, the complainant clearly describes violations based on independent expenditure coordination, leaving no ambiguity as to the statutes and rules the complainant alleges to have been violated. Therefore, I accepted it as filed and requested a response from each of the named respondents. The complaint and responses are posted on COPP’s website, politicalpractices.mt.gov.

ISSUES

This dismissal addresses coordination between candidates and political committees, Montana Code Annotated (MCA) § 13-1-101(10) and ARM 44.11.602; and registration and reporting requirements for political committees, MCA §§ 13-37-201, 226 - 229.

BACKGROUND

In this matter, the submitted complaint asserts illicit coordination involving candidates McMurray, Sales, and Binkley, based on campaign postcards which arrived in “mailboxes on or before 4/20/24,” each containing photos of the candidates with Montana Governor, Greg Gianforte, and each with a “paid for by” attribution statement indicating an entity named MT United PAC had financed the material. (Complaint, 2.)

The complainant additionally states that the four respondent candidates received contributions from Montanans for Fair Taxation and provides social media posts where candidates McMurray and Gregg publicize endorsements received from Montanans for Fair Taxation and/or Governor Greg Gianforte. (Complaint, 2.)

The complainant asserts that the photos used in the above-described campaign material were not publicly available before the postcards were distributed, and therefore coordination must have occurred between the campaigns of Sales, McMurray, and Binkley, and the political committee MT United PAC. If such coordination occurs, the candidates must declare the costs of the implicated materials as contributions and the committees must declare each expenditure as a contribution to the candidate. MCA § 13-37-229.

MCA § 13-1-101(10) defines the term coordinated as “made in cooperation with, in consultation with, at the request of, or with the express prior consent of a candidate or political committee or an agent of a candidate or political committee.” Coordination is described in more detail by ARM 44.11.602(1) which states:

A "coordinated expenditure" means any election communication, electioneering communication, or reportable election activity that is made by a person in cooperation with, in consultation with, under the control of, or at the direction of, in concert with, at the request or suggestion of, or with the express prior consent of a candidate or an agent of the candidate. The coordination of an expenditure need not require agreement, cooperation, consultation, request, or consent on every term necessary for the particular coordinated expenditure, but only requires proof of one element, such as content, price, or timing, to be met as a fact of a coordinated expenditure.

Concerning candidate Gregg, the complainant states only that candidate Gregg (among others) accepted a contribution of \$450 from Montanans for Fair Taxation and in the provided evidence presents a screenshot of a social media post in which candidate Gregg reposts an endorsement from Governor Gianforte.

Notably, the complaint does not assert that any material supporting candidate Gregg was paid for by MT United PAC or Montanans for Fair Taxation but does include Gregg in their assertion of illicit coordination.

As to Montanans for Fair Taxation, the complainant only states that they have made contributions to the candidates named in this complaint and have received contributions without properly reporting these contributions and expenditures to COPP. (Complaint 2-3.)

DISCUSSION

I. Coordination with MT UNITED PAC

The complainant first alleges that MT United PAC and candidates McMurray, Sales, Binkley, and Gregg, “colluded in independent expenditures” in violation of Montana law. (Complaint, 2.) This allegation relies on campaign postcards picturing candidates Sales, McMurray, and Binkley with Governor Gianforte and a social media post by candidate Gregg, also featuring a photo with Governor Gianforte.

When it comes to determining coordination has occurred, COPP requires hard evidence, beyond mere speculation or conjecture. As noted in *Pennington v. Bullock*, “successive Montana Commissioners of Political Practices...have limited a finding of coordination to instances shown by specific actions objectively showing cooperation, knowledge or action shared between the two entities engaged in coordination.” COPP-2013-CFP-012, at 4-5.

For example, in *Harmon and Sweet v. Citizens for Common Sense Government*, COPP dismissed allegations that a political committee had coordinated expenditures with certain candidates because the agency’s investigation reviewed all committee files and “disclosed no notes, memoranda, records of telephone conversations, correspondence, or other documents or evidence of any kind that would support a conclusion that there was any coordination, cooperation, or consultation.” COPP-December 31, 1997, *Harmon* at 19. Similarly, COPP dismissed allegations of coordination presented in *Luckey v. Gianforte* because the agency’s

investigation “could not find evidence to dispute candidate Gianforte and the RGA’s [Republican Governors Association] denials.” COPP-2020-CFP-048A at 9.

Conversely, COPP was able to determine that coordination had occurred in the combined matters of *Merwin v. Cooney* and *Foundation for Accountability and Civic Trust (FACT) v. Cooney*. COPP-2020-CFP-052 and 051. COPP was able to come to this determination because documents and information provided to COPP by the responding parties included solid, verifiable evidence that the Cooney campaign and DGA had engaged in prior discussions regarding the content and timing of expenditures made by the committee in support of the Cooney campaign. *Id.* at 9-11.

Here, reliance on photographs used in advertisements, and the timing of their dissemination does not provide COPP with any solid evidence that the MT United PAC acted “in cooperation with, in consultation with, at the request of, or with the express prior consent of” any of the candidates or anyone associated with their campaigns when conceiving of, designing, printing, or distributing the postcard relevant to this matter, required elements to establish coordination under MCA § 13-1-101(10) and ARM 44.11.602.

Candidate Sales

Here, the complainant provides as evidence, a copy of a postcard supporting candidate Sales financed by MT United PAC. Both candidate Sales and MT United PAC dispute the complaint’s assertion that this activity was coordinated.

In his written response, candidate Sales states that “I was asked by the Governor if I wanted to have my picture taken with him, I accepted the invitation and didn’t inquire regarding the purpose...I had no indication that any third-party mail was going to be issued on my behalf and the copies of the mailers is the first time that I was made aware that this took place.” (Sales Response). Further review and investigation conducted by COPP has not provided any reason to dispute or disbelieve this explanation.

COPP lacks any evidence that the MT United PAC acted “in cooperation with, in consultation with, at the request of, or with the express prior consent of” candidate Sales or anyone associated with his campaign regarding the creation or dissemination of the provided post card. Timing, specifically candidate Sales’s stated lack of knowledge about this postcard material until after its distribution, strongly supports his denial of coordination.

In this case, it appears the re-election campaign of Governor Gianforte, *not* candidate Sales, was responsible for providing the photograph used by MT United PAC on the postcard. Even if Governor Gianforte, himself a 2024 candidate for re-election, participated in planning or distributing the pro-Sales postcard with MT United PAC, this does not mean that coordination has occurred relevant to candidate Sales. This is because a coordinated expenditure does not exist solely because an expenditure “is made at the request or suggestion of a candidate or an agent of a candidate for the benefit of another candidate or political committee where the other potentially benefitted candidate or political committee has no involvement.” ARM 44.11.602(4)(d). In other words, coordination as it applies to candidate Sales would not have occurred even if MT United PAC had financed its pro-Sales postcard at the “request or suggestion” of candidate Gianforte or individuals associated with his campaign.

To be clear, COPP has no evidence that such a “request” or “suggestion” was ever made, nor reasoning to consider its possibility. This administrative rule is simply provided to show additional reasoning that evidence does not support coordination involving candidate Sales. As noted above, COPP has no evidence to refute candidate Sales’s assertion that he had no advance notice of, or involvement in, the creation or distribution of this postcard material.

Candidate McMurray

The circumstances surrounding Candidate McMurray are nearly identical to those of candidate Sales. Here, a similar postcard, using a photo taken with Governor Gianforte, was distributed by MT United PAC. In his response, candidate McMurray directly denied any suggestion that this material was coordinated between his campaign and the committee. On its end, MT United PAC also denies the allegation, stating “MT United PAC states unequivocally that it did not coordinate its independent expenditure activities with Candidate McMurray or any other candidate” (McMurray and Binkley Response, 2.)

To be considered a coordinated expenditure, COPP would need solid evidence that MT United PAC coordinated one or more element of the postcard, including “content, price, or timing,” with the McMurray campaign. ARM 44.11.602(1). In his written response, candidate McMurray does not directly deny or affirm that his campaign provided the image used on the postcard and no evidence has been provided to reach a conclusion either way.

Like candidate Sales, the Gianforte campaign is also a possible source of the photograph used by MT United PAC. However, in the event the photo was provided to MT United PAC

directly by the McMurray campaign, COPP still lacks necessary evidence to determine that the postcard constitutes a coordinated expenditure. COPP investigation was unable to identify or uncover any solid evidence that candidate McMurray or individuals associated with his campaign “made or participated in any discussion or in making any decision regarding the content, timing, location, media, intended audience, volume of distribution, or frequency or placement of the communication or activity” with MT United PAC regarding use of the photo in expenditures made by the committee, ARM 44.11.602(2)(e).

Candidate McMurray’s response indicates that he learned of MT United PAC’s postcards only *after* they had been publicly distributed, via “a third party” other than MT United PAC. (Response, 2.) The response additionally asserts that neither candidate McMurray nor anyone associated with his campaign “communicated with any political action committees, requested independent expenditures by any political action committees, or coordinated with the any political action committee with respect to the messaging or timing of any independent expenditures” (McMurray and Binkley Response, 1.)

COPP lacks evidence of any “specific actions objectively showing cooperation, knowledge or action shared between” the McMurray campaign and MT United PAC specific to the postcard material. See *Pennington*, 5-6.

Candidate Binkley

No evidence or reasoning supporting a claim of coordination against Candidate Binkley has been provided by the complainant. The submitted complaint does not provide, refer to, or identify any specific material or actions for COPP to consider.

In her response, candidate Binkley argues that, while MT United PAC did finance and distribute a postcard supporting her candidacy, the photograph used was from a public bill signing ceremony. (McMurray and Binkley Response, 1-2.) Consequently, any images captured at this event and publicly circulated by media or other attendees are available for use by committees such as MT United PAC.

ARM 4.11.602(3)(e), specifically exempts from coordination “the independent use of statements, images, or other information that is appropriated from a public source.”

Here, the complainant seems to be arguing coordination solely via use of a photograph featuring candidate Binkley on postcard material financed by MT United PAC. Without further evidence of coordination, candidate Binkley’s assertion that the image was obtained from a

publicly accessible source and used independently by the committee is adequate grounds to dismiss this complaint against candidate Binkley.

Candidate Gregg

To support its allegations of coordination involving candidate Gregg, the submitted complaint refers only to an Instagram post “liked” by candidate Gregg, where Montana Governor Greg Gianforte endorses his candidacy. The submitted complaint does not provide any information or context allowing COPP to find the original post, it does not include or provide information as to who made the original post, the date on which the post was made, or any other relevant information. Based on context, COPP deduces that it was made directly by candidate Gregg. There is no evidence to support any claim that the post was made by or in any way involved MT United PAC or Montanans for Fair Taxation. Being an action done entirely and exclusively by the candidate or his campaign, there is no need for COPP to further consider coordination with MT United PAC as it pertains to candidate Gregg.

Additionally, there is no evidence that this was a paid post to social media. It appears instead to be a traditional, organic post, something any Instagram user can do free of charge. Being a traditional social media post rather than a paid activity, it does not qualify as a campaign expenditure made by candidate Gregg subject to reporting and disclosure. MCA § 13-1-101(21).

All allegations that MT United and Candidates Gregg, Binkley, McMurray, or Sales, engaged in improper coordination regarding independent expenditures are hereby dismissed in full.

II. Committee registration and reporting

MT UNITED or MT UNITED PAC

All allegations that MT United PAC engaged in coordination with candidates Gregg, McMurray, Sales, or Binkley, have been addressed above. The complaint also alleges that MT United PAC (also referred to in the complaint as “Montana United PAC”) failed to register as a political committee with COPP and file finance reports disclosing its contributions received and expenditures made. On this point the complainant is technically correct, as no entity named “Montana United PAC” or “MT United PAC” has registered or filed reports with COPP connected to Montana’s 2024 primary or general elections.

However, COPP review of campaign finance filings determined that an independent political committee named MT UNITED did file a C-2 Statement of Organization with COPP on April 29, 2024, listing an address of P.O. Box 81515 in Billings, and individual Wendy Smith as the committee treasurer. A review of the campaign postcard materials referenced in the submitted complaint shows they contain an attribution statement of “paid for by MT United PAC, P.O. Box 81515, Billings MT 591018, W. Smith, Treasurer.”

Consequently, COPP concluded that the MT UNITED committee registered with COPP is one and the same as the MT United PAC who financed the mailers referenced in the submitted complaint. For purposes of discussion the rest of the way, COPP will refer to the committee using the MT UNITED name provided on the C-2 Statement of Organization filed with COPP.

The MT UNITED committee filed an Initial C-6 committee finance report on May 30, 2024, followed by a Periodic report filed on June 26, 2024. The initial report disclosed four (4) debts owed by MT UNITED, for “Text Messages,” dated May 23, 2024 in amount \$4,800.00 and “Direct Mail,” dated May 24, 2024, in amount \$12,660.00; May 29, 2024, in amount \$2,981.00; and May 21, 2024, in amount \$17,651.00 intended to support candidates Gregory Oblander (HD 38), Brad Barker (HD 55), John Fitzpatrick (HD 76), Joshua Kassmier (SD 13), and Ray Shaw (SD 35) in addition to candidates McMurray, Sales, Binkley, and Gregg. (COPP Records.)

Based on this review, COPP determined that MT UNITED timely and appropriately filed both its C-2 Statement of Organization and C-6 committee finance reports as required under Montana election law, specifically MCA §§ 13-37-201 and 226. Similarly, COPP lacks and evidence or reason to believe MT UNITED has failed to fully or properly disclose its expenditure activities as required under MCA § 13-37-229.

However, MT UNITED has failed to conform to Montana’s campaign finance disclosure requirements concerning the information provided on its C-2 Statement of Organization. ARM 44.11.201(1)(f), specifically requires that political committees include “The name, office sought, and party affiliation (if any) of each candidate on whom the committee makes a reportable election expenditure.” As filed with COPP, MT UNITED’s C-2 Statement of Organization describes the purpose of the committee as simply “[s]upport candidates for public office,” without identifying any individual candidates. As reported by MT UNITED, the committee engaged in expenditure activities intended to support candidates Oblander, Barker, Fitzpatrick, Kassmier, Shaw, McMurray, Sales, Gregg, and Binkley. In order to be compliant with ARM

44.11.201(1)(f), MT UNITED was required to name each on their C-2 registration. (COPP Records.)

COPP also notes that MT UNITED failed to properly disclose the correct name of the committee in the “paid for by” attribution statement included on the campaign postcards referenced in the submitted complaint. The attribution statement names the committee as MT United PAC. Logically, the provided MT United PAC name is what interested recipients would search in Montana’s Campaign Electronic Reporting System (CERS) or the internet at large if choosing to seek out additional information about this committee. Unfortunately for those individuals, such a search in CERS would not provide any additional information, because the committee registered with COPP using the name MT UNITED. The name provided on the C-2 Statement of Organization is the name a committee must use in the “paid for by” attribution statement included on any election communication, electioneering communication, or independent expenditure financed by the committee, including the postcards referenced in the submitted complaint.

Montanans for Fair Taxation

Finally, the submitted complaint alleges that Montanans for Fair Taxation (MFT) failed to timely register as a political committee or file committee finance reports with COPP.

COPP records indicate that MFT filed a C-2 Statement of Organization as an independent political committee with COPP on September 12, 2014. Since that date, Montanans for Fair Taxation has been continually filing campaign finance reports in CERS, including timely filed reports submitted on or before each of March 30, April 30, May 30, and June 30 for election year 2024. MFT is therefore determined to be in compliance with the registration and reporting requirements of MCA §§ 13-37-201 and 226 as they relate to the submitted complaint.

COPP’s review of MFT’s finance reports and related C-5 campaign finance reports filed by candidates, indicate that MFT made monetary contributions of \$450.00 each to candidates McMurray, Sales, Binkley, and Gregg, as well as candidates John Fitzpatrick, Tony Brockman, Julie Dooling, and Gregory Oblander. In total, then, the MFT committee provided direct monetary contributions to 8 candidates participating in Montana’s primary elections, totaling \$3,600.00. MFT does appear to have timely and appropriately disclosed each of these campaign contributions on the May 30, 2024, C-6 committee finance report as required.

Like MT UNITED, the MTF committee has failed to conform to Montana’s campaign finance disclosure requirements concerning the information provided on its C-2 Statement of Organization. As filed with COPP, MTF’s C-2 describes the purpose of the committee simply as “[t]o advocate for fair taxation in the state of Montana.” Having engaged in reportable expenditure activity intended to support Republican primary election candidates McMurray, Sales, Binkley, Gregg, Fitzpatrick, Brockman, Dooling, and Oblander, MFT must name each of the above-named candidates on their C-2 to be compliant with 44.11.201(1)(f), ARM.

ENFORCEMENT

Upon a determination that sufficient evidence of election violations exists, the commissioner next determines if there are circumstances or explanations that may affect whether prosecution is justified. *Rose v. Glines*, COPP-2022-CFP-030. “The determination of whether prosecution is justified must take into account the law and the particular factual circumstances of each case, and the prosecutor can decide not to prosecute when they in good faith believe that a prosecution is not in the best interest of the state.” *Montana Freedom Caucus v. Rep. Zephyr*, COPP-2023-CFP-010, at 26.

Attribution

MT UNITED violated Montana election law by using the name MT United PAC for the “paid for by” attribution statement on the election materials provided by the complainant, while their C-2 registration uses the name MT UNITED. While this is a technical violation of MCA § 13- 35-225, this violation is dismissed as de minimis.

Montana election law defines de minimis as “an action, contribution, or expenditure that is so small that it does not trigger registration, reporting, disclaimer, or disclosure obligations under Title 13, chapter 35 or 37, or warrant enforcement as a campaign practices violation under Title 13, chapter 37.” MCA § 13-1-101(11).

Here, a simple search in CERS, for MT United, brings up MT United as “In process” and MT UNITED, as “Active” while a search for MT United PAC yields no results. While this is obviously not ideal, the complainant here states that MT United shows as “in process,” indicating that they indeed conducted just such a search and were able to discover the existence of a committee named MT United when seeking information regarding MT United PAC.

This error, while technically a violation, did not significantly affect voters access to information regarding MT United PAC and is therefore dismissed as de minimis.

C-2 Registration with COPP

Although sufficient evidence exists to conclude both MT UNITED and Montanans for Fair Taxation violated ARM 44.11.201(1)(f) by failing to include the names of candidates supported on their C-2 registration, in accordance with the discretionary authority provided by MCA § 13-37-124, I find prosecution for this violation is not justified.

Here, these violations were not issues raised by the complainant but rather discovered by COPP in the course of this investigation. As I determined in *Zephyr it is fundamentally unfair that a candidate is treated differently when a violation is revealed* in the course of a complaint investigation than if a violation is found during the routine inspection of reports. *Zephyr*, p. 26. If COPP had found this particular deficiency in the course of a routine inspection, this matter would have been solved by providing notice to the respondent and a potential Order of Noncompliance if the respondent did not comply. *Id.* Furthermore, both MT UNITED and Montanans for Fair Taxation provided the relevant expenditure information on the appropriate C-6 campaign finance reports, providing transparency to Montana voters.

Therefore, I determine this matter is best resolved by an Order of Corrective Action. In order to avoid referral to an appropriate county attorney, MT UNITED and Montanans for Fair Taxation must amend their C-2 Statement of Registration to include “[t]he name, office sought, and party affiliation (if any) of each candidate on whom the committee [has made] a reportable election expenditure.” ARM 44.11.201(1)(f). This action must be taken on or before October 1, 2024, or this matter shall be referred to the appropriate county attorney in accordance with MCA § 13-37-124 and 128.

CONCLUSION

The named complaint has been considered as described above and sufficient evidence exists to conclude the following:

- Candidate Sales did not engage in coordinated expenditures as described in ARM 44.11.602(1) with MT UNITED.
- Candidate McMurray did not engage in coordinated expenditures as described in ARM 44.11.602(1) with MT UNITED.
- Candidate Binkley did not engage in coordinated expenditures as described in ARM 44.11.602(1) with MT UNITED.
- Candidate Gregg did not engage in coordinated expenditures as described in ARM 44.11.602(1) with MT UNITED.

- MT UNITED did not engage in coordinated expenditures as described in 44.11.602(1) with candidates, Gregg, Binkley, Sales McMurray.

The above allegations are hereby dismissed in full.

- MT UNITED violated MCA 13-35-225 by failing to include the exact name of the committee in their “paid for by” attribution statement.

This violation is dismissed as de minimis.

- MT UNITED violated ARM 44.11.201(1)(f) by failing to identify each client supported by the committee on the C-2 Statement of Organization filed with COPP.
- Montanans for Fair Taxation violated ARM 44.11.201(1)(f) by failing to identify each candidate supported by the committee on the C-2 Statement of Organization filed with COPP.

The above violations will not be considered justified for prosecution if MT UNITED and Montanans for Fair Taxation take the following corrective action on or before October 1, 2024.

Amend the committee’s C-2 Statement of Organization to identify the name, office sought, and party affiliation (if any) of each candidate on whom the committee made a reportable election expenditure in compliance with ARM 44.11.201(1)(f).

If the above corrective action is taken on or before October 1, 2024, these allegations will also be dismissed. If the corrective actions are not taken on or before October 1, 2024, I reserve the right to refer these matters to the appropriate county attorney for civil action in accordance with the provisions of MCA §§ 13-37-124 and 128.

Dated this 25th day of September, 2024.



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