

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Rhoades v. Engen No. COPP 2017-CFP-006	DISMISSAL OF ALLEGED VIOLATIONS
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On October 25, 2017, Quentin Rhoades, a Missoula resident filed a complaint with the Office of the Commissioner of Political Practices (COPP) against John Engen, candidate for Mayor of Missoula, Montana. Mr. Rhoades alleges the Engen for Mayor campaign accepted two corporate campaign contributions.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance reporting and disclosure law addressed by this Decision is in-kind corporate campaign contributions to a Montana Candidate campaign

FINDINGS OF FACT

The foundational facts necessary for this Decision is as follows:

Finding of Fact No. 1: John Engen filed a C-1A Statement of Candidate as a candidate for Mayor of Missoula with the COPP on February 16, 2017. (Commissioner's Records.)

Finding of Fact No. 2: The City of Missoula, Montana will hold its municipal general election on November 7, 2017. (Montana Secretary of State website.)

DISCUSSION

The complaint alleges the Engen campaign accepted corporate in-kind contributions from two separate corporations, which is illegal under Montana Political Campaign Finance law. The Commissioner examines each of the two allegations.

1. Office rent as in-kind corporate contribution

The complaint alleges the Engen campaign was provided an additional 1921 square feet of office space by a corporation, and should have been valued at \$1,650 per month, or \$9.42 per Annual Square Foot (ASF).¹

Finding of Fact No. 3: ZillaState RE and Engen for Mayor entered into a commercial lease for 180 square feet of office space sublet at 140 S. 4th Street W., Suite 3, Missoula, MT 59801, commencing August 15, 2017 and terminating November 15, 2017. The commercial lease provided to the COPP as well as correspondence from ZillaState RE confirms the use of 180 sf of commercial office space. (Commissioner's Records.)

Finding of Fact No. 4: ZillaState RE charged a rate of \$20 ASF² and indicated this amount was the current lease market rate in the downtown Missoula area for commercial office space. (Commissioner's Records)

Finding of Fact No. 5: On its October 3, 2017 timely filed C-5 campaign finance report, the Engen campaign reported a \$300.00 expenditure to ZillaState RE for "Office Rent August 15 to September 15, 2017." (Commissioner's Records.)

Finding of Fact No. 6: On its October 26, 2017 timely filed C-5 campaign finance report, the Engen campaign reported a \$600.00 expenditure to ZillaState RE for "Office Rent September 16 to November 15, 2017." (Commissioner's Records.)

¹ The COPP estimated an Annual Square Footage rate as \$9.42 ASF; \$1,650 per month multiplied by 12 months divided by 2101 square feet.

² ZillaState RE stated the lease market rate as \$20 ASF in its letter to the COPP. The calculation is correct, \$300 per month multiplied by 12 months divided by 180 square feet.

The Engen campaign entered into a lease for 180 square feet of commercial office space with ZillaState RE at a rate \$300 per month, for a period of 3 months, from August 15 to November 15, 2017 (FOF No. 3). In correspondence from ZillaState RE, a market rate of \$20 ASF was established, the current downtown Missoula commercial office space rate sub lease and confirmed a space of 180 square feet (FOF Nos. 3, 4). The Engen for Mayor campaign had subsequently paid its monthly rent obligation according to campaign finance reports filed (FOF Nos. 5,6).

The Commissioner find that the Engen for Mayor campaign is paying a fair market value for the commercial office space, and that no corporate campaign in-kind contribution was made. The Commissioner hereby dismisses the allegation as it is without foundation.

2. Corporate in-kind contribution from the Missoulian Newspaper

The complaint alleges the Missoulian newspaper and its parent company, Lee Enterprises, provided an in-kind contribution to the Engen campaign in the form of advertising by promoting a Facebook post of the Missoulian's endorsement of John Engen.

Finding of Fact No. 7: On October 22, 2017, the Missoulian newspaper printed and released to their digital platforms and accounts (Website, Facebook, Twitter, etc.) an editorial endorsing John Engen for Mayor of Missoula, as they do with other news articles, editorial and opinion pieces. (Commissioner's Records.)

Finding of Fact No. 8: On or about October 23, 2017, Lee Enterprises automatically "boosted" the Facebook post linking the Missoulian editorial endorsing John Engen for Mayor of Missoula for a period of 24 hours at a cost of .76 cents, independent of the Engen for Mayor campaign. (Commissioner's Records.)

Finding of Fact No. 9: The Engen campaign was not involved in any decision by Lee Enterprises to boost the editorial post. (Commissioner's Records.)

The Missoulian is a daily newspaper for Missoula, Montana and the surrounding area. The Missoulian's editorial board endorsed Jon Engen over his opponent, Lisa Treipke in an editorial published on October 22, 2017 (FOF No. 7). As a matter of business practice, the Missoulian includes articles and editorials of interest on its Missoulian Facebook page and its other digital properties (FOF No. 7). Lee Enterprises, the parent company, automatically "boosts"³ Facebook posts which receive a set number of likes for a period of up to 24 hours. On or about October 23, 2017 the Engen editorial was automatically boosted and appeared in users Facebook feeds as a "sponsored"⁴ post (FOF No. 8). The Engen campaign did not request or coordinate with the Lee Enterprises in the decision to boost the post, and were unaware that the post would be sponsored. (FOF No. 9).

The Commissioner dismisses the allegation of a corporate contribution through coordination with the candidate as without basis in fact. Therefore, any expenditure to sponsor or boost the post should be considered an independent expenditure.

³ A boost is a form of paid promotion or advertising on the Facebook social network platform. Facebook describes a boost as, "Boosting a post may help you get more people to like, share and comment on the posts you create. Boosted posts are also a way to reach new people who are likely interested in your content but don't currently follow you on Facebook." See <https://www.facebook.com/business/help/547448218658012>.

⁴ From Facebook: "The ad you create will look just like the Page post it's based on. The only difference is that your ad will appear with a Sponsored label in the top-left corner." See <https://www.facebook.com/business/help/547448218658012>.

LEGITIMATE PRESS FUNCTION

In determining the boost as an independent expenditure of Lee Enterprises, it is necessary to discuss whether or not this particular independent expenditure would be considered a reportable election or electioneering communication expenditure under Montana Campaign Finance and Practice law.

Montana's definition of expenditure includes an exemption for "the cost of any bona fide news story, commentary, blog, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication of general circulation...." Mont. Code Ann. § 13-1-101(18)(b)(iii). Further, the definitions of both election communications and electioneering communications contain a press exemption from their definitions. Mont. Code Ann. § 13-1-101(14)(b)(iii) and (16)(b)(i).

When a complaint is made against an activity to which a potential press exemption applies, the COPP first inquires as to whether the communication was distributed by "any broadcasting station, newspaper, magazine or other periodical publication of general circulation." Here, the communication was distributed by the Missoulian, a daily newspaper of general circulation available both in print and online to the public and owned by Lee Enterprises.

Second, the COPP inquires as to whether the communication is a "bona fide news story, commentary, blog, or editorial." Mont. Code Ann. § 13-1-101(14)(b)(iii), (16)(b)(i) and (18)(b)(iii). Here, the communication in question is an editorial of the Missoulian staff, and easily falls within the exemptions.

Therefore, the editorial and the costs associated with it are not “expenditures” subject to reporting and disclosure under Montana’s Campaign Finance and Practice laws.

The Missoulian also maintains a Facebook page which is regularly updated throughout the day with links to the content it publishes in its print and online versions of the newspaper. The question before the COPP is whether the costs of “boosting” an editorial written, published, and posted by the newspaper results in a reportable expenditure as either an election communication or electioneering communication under Montana’s Campaign Finance and Practice laws.

The COPP considers two factors in determining whether a press entity is acting within its legitimate press function in its communication. First, whether the press entity’s communications are available to the public, and second whether the communication is comparable in form to those ordinarily issued by the press entity. *See e.g. Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, (S.D.N.Y. 1981) (press exemption applies when a press entity provides information to other press entities for publicity of the issue); *FEC v. Phillips Publ’g Co.*, 517 F. Supp. 1308, 1312 (D.D.C. 1981) (press exemption applies when performing normal business activities, including advertising and subscription solicitation); *FEC v. Mass. Citizens for Life (MCFL)*, 479 U.S. 238, 251 (1986) (press exemption does not apply as “Special Edition” issue was not comparable to any other issue of the newsletter, facilities, staff, distribution, etc.); *FEC v. Multimedia Television, Inc.*, 1995 U.S. Dist. Lexis 22404 (D. Kan.

1995) (press exemption does not apply to fliers placed in monthly statements to customers).

Here, the Missoulian editorial is available to the public generally through its website and print editions. Second, the communication is the type of communication in which newspapers regularly engage, *i.e.*, evaluating candidates and issues and potentially issuing an endorsement of a particular candidate or issue prior to an election. Finally, paying to “boost” an article published by the newspaper leads to increased traffic on the paper’s website. After a certain number of articles viewed each month, the public must pay for a subscription to continue viewing articles, some might also subscribe to the print edition. The Commissioner finds that it is a legitimate press function for a newspaper to promote its own original content on other platforms in order to generate interest in and business to the newspaper itself, therefore the costs of “boosting” the its own original content/article on Facebook are not an expenditure regulated by Montana’s Campaign Finance and Practice laws.

FINDINGS

The Commissioner finds the Engen for Mayor campaign did not violate Montana Political Campaign Finance laws as set herein.

DECISION

The Commissioner hereby dismisses this complaint.

DATED this 21 day of October, 2017.



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