BEFORE THE COMMISSIONER OF POLITICAL PRACTICES (COPP)

MONTANA FREEDOM CAUCUS via DARIN GUAB (authorized representative) **v.** **MONTANA STATE REPRESENTATIVE ZOOEY ZEPHYR (HD 100 [now HD 95]—Missoula County)**	**COPP-2023-CFP-010** **DISMISSAL AND ORDER OF CORRECTIVE ACTION**

I. Complaint

On July 24, 2023, the Montana Freedom Caucus (MFC) filed a formal complaint against Montana State House District 100 Representative Zooey Zephyr (Rep. Zephyr). The complaint is notarized by MFC's authorized agent Darin Gaub. The MFC complaint alleges that Rep. Zephyr violated Montana campaign finance laws by raising 2024 campaign funds and paying 2024 campaign expenses while Rep. Zephyr's 2022 campaign account remained open. The complaint specifically relies upon MCA § 13-37-228(3) and 44.11.702(1) ARM to support this and other assertions. On August 4, 2023, I determined that the MFC complaint met the requirements of 44.11.106 ARM and requested a response to the complaint from Rep. Zephyr's campaign pursuant to MCA § 13-37-132. The response requested was provided on August 14, 2023. In accordance with Montana law and COPP practices the complaint, response, and other materials are posted for review on the COPP website.

A. Summary Regarding Direct Complaint Allegations:

My August 4, 2023, correspondence informed the affected parties to the complaint that I would continue to review the specific allegations in the complaint together with the response from Rep. Zephyr prior to making further determinations. Montana law allows me to request additional information, review COPP reports and communications, and determine whether a more thorough investigation or review is warranted. MCA § 13-37-111. As expressed to the affected parties, I reserve the right to dismiss a complaint upon completing such a review. I typically meet with the COPP investigator and the COPP compliance specialist to determine whether they agree that no additional investigation is necessary. Put another way, I double check whether their roles are essentially concluded and there is enough information to reach a determination regarding the complaint. These actions occurred. Accordingly, after reading Montana law and available facts

pertaining to this matter, I determine no further investigation is warranted, and I dismiss the direct allegations asserted by MFC.

B. Summary of Matters Discovered by COPP During the Complaint Review:

Dismissing the specific allegations of a complaint does not always end the matter, however. Montana law also permits COPP to ascertain whether other violations exist. MCA § 13-37-111(1) and (2)(a) and (b). COPP is, in fact, required to review all reports filed with the office during and after each election. MCA §§ 13-37-121 and 123. Though reports are reviewed as a matter of course, during the process of complaints there is more exacting review and errors outside the allegations of the complaint are often discovered.

A review of COPP data maintained on the CERS reporting system, material provided by MFC, and COPP's own records supports a finding that some reporting violations occurred, and prompt corrective action is required. While all contributions, and all expenditures, are timely and accurately disclosed, they are not always sufficiently described (MCA § 13-37-229) and it appears, at least on a few occasions, certain contributors exceeded campaign contributions limits (MCA § 13-37-216). In addition, the Statement of Candidacy (C-1) lists contact information for a person not listed as treasurer or deputy treasurer, but apparently fulfilling all or some of those functions without being properly appointed. MCA §§ 13-37-201, 202, 203 and 204, and Bishop v. Miller, COPP-2012-CFP-056. It is readily apparent from COPP reports and communications that individuals other than the candidate are providing services and functioning as the campaign's treasurer or deputy treasurer. Reports must be filed and certified as true, accurate and correct, and only the candidate or an officer—typically a treasurer or deputy treasurer--can file the certification of the report. MCA § 13-37-231. These errors by Rep. Zephyr's campaign treasurer(s) require corrective action or additional explanation.

C. Summary of Indirect Complaint Allegations Relating to Rep. Zephyr's Travel:

As aforementioned, the MFC complaint makes direct allegations specific to MCA § 13-37-228(3) and 44.11.702(1) pertaining to the operation and closing of campaign accounts. I would typically confine myself to these direct allegations and other issues described above to either dismiss or act on the complaint. In the present instance, however, there are other assertions and implications worthy of review and instruction because they show how I intend to approach these matters. In addition to campaign enforcement, Montana law, as adopted by the Legislature, also tasks me and the COPP staff to oversee ethics and lobbying.

In this regard, the MFC complaint also asserts that the substantial amount of travel by Rep. Zephyr resulted in in-kind contributions or expenditures because Rep. Zephyr was able to raise funds during these events. Even Rep. Zephyr's response describes these contributions as "voluminous". (COPP Records, Zephyr Response p. 1). This certainly gives an appearance that all Rep. Zephyr's travel is campaign related, but I must conclude that this is not the case. Evidence supports the conclusion that, while Rep. Zephyr's travel provided ample opportunity to receive reportable campaign contributions, the events were not organized with that purpose in mind. Contributions to Rep. Zephyr's campaign were ancillary to the intended purpose of the events. Rep. Zephyr was invited to these events in her official capacity as a Montana Legislator, and the travel and associated expenses are legislative activities rather than campaign activities. Applying campaign finance law and regulation in the way suggested by MFC, even indirectly, could have insidious and far-reaching effects implicating Rep. Zephyr's constitutional rights and interfere with her legislative functions. This would apply to all similarly situated candidates and officials. It could also result in an immense amount unnecessary of confusion. Consequently, I determine addressing these matters in the context of this complaint is warranted, as it presents an opportunity to clearly address them in a way that will benefit the parties, similarly situated candidates, and the public, who, like the complainant, might find the situation concerning. It is not.

Accordingly, I will first address the direct allegations contained in the MFC complaint. Second, I MFC's inference that Rep. Zephyr's travel involved in-kind contributions or expenditures that then went unreported provides me the opportunity to explore and clarify overlap between legislative activity and campaign activity in context of travel and events. Next, I address COPP discovered errors and violations with respect to Rep. Zephyr's campaign and the approach to corrective action through noncompliance. I conclude with the final agency action in this matter, which is contingent on prompt corrective action. If prompt corrective action does not occur, pursuing prosecution becomes justified and this matter will be referred to the Missoula County Attorney per MCA § 13-37-124 for formal action and adjudication. MCA §§ 13-37-121, 128 through 130.

II. Direct Allegations:

The complaint alleges that Representative Zephyr violated Montana Code Annotated (MCA) 13-37-228(3) and Administrative Rules of Montana (ARM) 44.11.702(1), by:

- "Raising for and paying expenses related to a 2024 campaign for House District

95" while a "2022 campaign for House District 100 was still active" despite being "informed that there could be no fund raising or expenses for the '24 campaign until the '22 campaign was closed out; and by

- Raising and expending funds "related to the '24 campaign despite this restriction. This includes the fact that there are no in-kind donations listed or valued despite traveling the country and speaking".

The complaint includes certain documentation, including records obtained by MFC through Lt. Col. (Ret.) Gaub from COPP via a prior Public Records Request, to support these alleged violations. These documents, along with the complaint, the response, and COPP's own records are incorporated into this decision and part of the official factual record.

A. Closing the 2022 Account:

As for Rep. Zephyr closing the 2022 HD 100 campaign account, a closing report was required to be filed after the November 8, 2022 general election "whenever all debts and obligations are satisfied and further contributions or expenditures will not be received or made that relate to the campaign", with the report to cover "the period of time from the last periodic report to the final closing of the books", MCA § 13-37-228(3). Rep. Zephyr filed a closing C-5 campaign finance report for the 2022 HD 100 campaign with COPP on June 29, 2023. This report disclosed certain campaign expenditures made by the 2022 campaign and covered "the period of time from the last periodic report to the final closing of the books", MCA § 13-37-228(3)". This report was timely filed per the reporting calendar outlined under MCA § 13-37-226(1)(e). [1] I conclude, then, that Rep. Zephyr filed a closing campaign finance report for the 2022 HD 100 campaign pursuant to MCA § 13-37-228(3). Montana election law requires all candidates to make good faith efforts to close their accounts and disburse surplus funds promptly upon the cessation of campaign activity. Rep. Zephyr did not violate this provision, and I note that the campaign properly responded to COPP communications urging it to close.

B. Rep. Zephyr's 2024 HD 95 campaign:

Montana election law specifically and clearly lays out how an individual becomes a candidate. With respect to campaign finance laws, an individual does not become a candidate on "a certain date", but instead "by certain actions of the individual that demonstrate he or she is to

[1] Post-election campaign finance reports are to be filed by candidates "semiannually on the 10th day of March and September, starting in the year following an election in which the candidate participates until the candidate files a closing report as specified in 13-37-228(3)". Rep. Zephyr did previously file such a "semiannual" report on March 10, 2023.

be a candidate for public office", including the receipt or solicitation of campaign contributions or the making of campaign expenditures, LaBreche v. Gianforte, COPP-2015-CFP-010 at page 3, and MCA § 13-1-101(8)(b).

No language included in MCA § 13-1-101(8)(b) impliedly or explicitly states that an individual does not become a candidate for election to public office in a future election if that candidate has not yet filed a closing campaign finance report pursuant to MCA § 13-37-228(3) for any prior candidacy of theirs. In this matter, Rep. Zephyr became a candidate for election under Montana election law by receiving initial campaign contributions supporting the 2024 HD 95 campaign on April 24, 2023, MCA § 13-101(8)(b).

Montana election law also specifically and clearly lays out when a candidate is required to file as such with COPP. MCA § 13-37-201(2)(a) requires that candidates file as a candidate with COPP within 5 days of becoming a candidate. Failure to file as a candidate within 5 days of becoming one is a violation of Montana election law, as discussed in the matters of Bondy v. Wilson, Corrigan, Waller, Isaak, Kornick, Hiatt, Fallon, Warnell, and Wilde, COPP-2021-CFP's-002 through 010.

No language included in MCA § 13-37-201(2)(a) impliedly or explicitly states that an individual is not required or otherwise allowed to file as a candidate for election to public office with COPP in connection with their candidacy in a future election if that candidate has not yet filed a closing campaign finance report for any prior candidacy pursuant to MCA § 13-37-228(3). Having become a candidate on April 24, 2023, by receiving campaign contributions, Rep. Zephyr was required to file a C-1 Statement of Candidate with COPP as a candidate for election to HD 95 in Montana's 2024 primary and general election cycle on or before May 1, 2023[2]- within five days of becoming a candidate. By filing the C-1 Statement of Candidate with COPP declaring candidacy for election to HD 95 in Montana's 2024 primary and general election cycle on April 27, 2023, Rep. Zephyr filed as a candidate within the five days provided by law, meeting the requirements of MCA § 13-37-201(2)(a).

After registration, candidates are required to periodically file campaign finance reports disclosing contributions received and expenditures made, MCA §§ 13-37-225, 226, 228 and 229.

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[2] April 29,2023, the fifth and final day to file under MCA § 13-37-201(2)(a), was a Saturday. Per MCA § 1-1-216(1)(a), then, Rep. Zephyr was provided until the following Monday - May 1, 2023 - to timely file the required registration.

"Montana's campaign finance reports are mandatory: "shall file" (See § 13-37-226 MCA) any failure to meet a mandatory, date-certain filing date is a violation of" Montana election law, Bradshaw v. Bahr, COPP-2018-CFP-008.

No language in MCA §§ 13-37-225, 226, 228 or 229 impliedly or explicitly provides that a candidate is exempted from filing finance reports or otherwise not allowed to file finance reports disclosing contributions received and expenditures made in connection with their candidacy in a future election if that candidate has not yet filed a closing campaign finance report for any prior candidacy. This would be antithetical to the purpose of campaign disclosure laws. Similarly, none of these statutes impliedly or explicitly provide that a candidate is prohibited from receiving contributions or making expenditures related to a future election until filing a closing campaign finance report for any prior candidacy. This would contradict the constitutional rights of the candidate.

In the year or years prior to an election in which a candidate participates, campaign finance reports are due "quarterly, due on the 5th day following a calendar quarter, beginning with the calendar quarter in which funds are received or expended" and ending "in the final quarter of the year preceding the year of an election in which the candidate participates", MCA § 13-37-226(1)(a). Candidates can certainly make their situation simpler by promptly closing reports after an election, but they are not actually required to do so until all related issues are resolved. Candidates should make good faith efforts to resolve outstanding issues, and the reasons to keep accounts open should be legitimate, but the Legislature has not established a date certain for when this must occur. Having become a candidate on April 27, 2023, Rep. Zephyr's initial campaign finance report for the 2024 HD 95 campaign was due on or before July 5, with a subsequent periodic report due on or before October 5, MCA § 13-37-226(1)(a). Rep. Zephyr timely filed each of these reports, disclosing contributions received and expenditures made. This complaint does not provide any sufficient evidence, documentation, or reasoning for me to question the veracity or accuracy of these reports.

Additionally relevant to this matter is MCA § 13-37-205(5), which specifically states that "This section does not prevent a candidate, political committee, or joint fundraising committee from having more than one campaign account in the same depository".

C. Use of 2022 Funds for 2024 Campaign:

This complaint also alleges that Rep. Zephyr financed activities related to participation in

a 2024 election using funds from the 2022 campaign. However, the complaint does not include any evidence or supporting material to substantiate this potential allegation. I would note that, in responding to this complaint, Rep. Zephyr stated that "no money was spent out of the 2022 account on any electioneering activity or to further the goals of the 2024 campaign account". [Response p. 1, Item 4.]. This statement is supported and independently verified by COPP under the authority to review information and reports. MCA §§ 13-37-111 and 121. After reviewing Rep. Zephyr's closing 2022 C-5 campaign finance report, all reported expenditures are directly related to the 2022 campaign, including the dispersal of surplus campaign funds to entities other than any future campaign of Rep. Zephyr's.

When considering the meaning of any statute I am limited in that I am "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted", MCA § 1-2-101. In other words, I must rely only on those words intentionally included in a statute when considering its meaning. To determine that a candidate may not file or otherwise engage in activity legally requiring registration and reporting as a candidate under Title 13, Chapter 37 if a prior campaign of theirs has yet to file a closing report would require me to "insert" language that "has been omitted" from existing statutes under my jurisdiction. At the same time, I would be required to "omit" language that "has been inserted" in MCA § 13-37-205(5).

Put simply, the alleged violations presented in this complaint are not actions or activities prohibited under Montana election law. It is not a violation of law for a candidate to receive contributions or make expenditures related to a future candidacy prior to filing a closing campaign finance report for a previous candidacy. Prior to changes by the 2023 Legislature, incumbent candidates with constituency service accounts were precluded from using their constituency service account during an active campaign, but this is not an issue here. It may have caused confusion in the present instance, but candidates were always allowed to begin new campaigns even though old campaigns were not closed. As these actions or activities described in this complaint are not violations of Montana election law, I must dismiss them in their entirety.

As mentioned, there are other less direct assertions in the complaint. These include questions regarding the following:

III. Legislative Travel Where Fundraising or Campaign Training Occurs

A. Legislative Events versus Campaign Events and Fundraising

The Montana Legislature has tasked COPP with regulation of a broad array of activity with respect to politics in Montana. COPP regulates campaign finance and reporting (Title 13, chapter 37, the Corrupt Practices Act (Title 13, chapter 35), lobbying (Title 5, chapter 7) and ethics (Title 2, chapters 1 and 2). No other single agency in the country oversees such a broad array of activity. In the area of travel, education, and professional development involving elected and public officials, these areas of law often converge. COPP is also tasked with assisting candidates, political committees, lobbying groups and officials navigate these legal areas through compliance training, help, and advice. Simultaneous to this compliance assistance function, COPP is also tasked with enforcement and investigation when complaints are filed. MCA § 13-37-111(2)(a), MCA § 5-7-305(4) and MCA § 2-2-136. As you can imagine, this often creates an odd set of circumstances, which COPP generally handles through separating staff functions. This becomes even more problematic because Montana appoints and confirms only one individual who must act to assist with compliance and oversee the enforcement functions. MCA § 13-37-102. Ordinarily, this would present due process and other issues, but Montana law also places checks on the commissioner's authority through concurrent jurisdiction with county attorneys MCA § 13-37-124, 125, 128, 129 and 130, the county attorneys' ability to conduct independent investigation and review MCA § 13-37-125, and judicial oversite MCA §§ 13-37-128 through 130. A commissioner can enter into settlements, but if settlement efforts fail, enforcement actions ultimately face judicial review once COPP is forced to file an action. Put another way, if a commissioner makes a determination that a violation occurred and the commissioner cannot reach a settlement with the affected party, a commissioner must ultimately submit his or her decision to the state district court to resolve issues and make a final determination. Id.

With that as background, in the present circumstance, MFC implies that Rep. Zephyr's travel and the resulting campaign contributions to Rep. Zephyr's campaign involves some level of impropriety. The allegations are not specific as to the law or supported by evidence. However, it still presents issues worthy of discussion, especially as we head towards the 2024 election cycle.

The Montana Legislature enacted laws and imposed duties on the commissioner to enforce campaign finance and ethics laws as those laws pertain to elected officials. The Legislature granted limited authority to the commissioner in the area of ethics laws. The commissioner has authority

over legislators so long as "legislative acts" are not involved. Unfortunately, the Legislature does not define "legislative acts", nor does it elucidate as to what this critical term actually means. For the commissioner, an analysis must by circumstance determine whether there should be broad or narrow applications of law. As is evident, from early decisions, as a matter of course, I favor narrow applications of authority because the First Amendment is almost always involved. This approach is judicially supported. Ditton v. DOJ Motor Vehicles Division, 2014 MT 54 ¶ 22.

With all due respect to the Legislature, I find legislative history unreliable in context of interpreting and applying laws affecting the First Amendment. In this arena the Legislature must act with precision, especially as it relates to critical terms. Legislative history has been described, and I agree, as being a lot like looking into a crowd and picking out your friends. (Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 214 (1983)). Too much supposition leading to mischief can result.

Consequently, especially when the Legislature asserts its control over the meaning of "legislative act" either as a body, through their leadership, or upon advice of their own legal counsel, I will not intercede absent a clear contradiction in law. For example, in 2019, COPP asserted authority after concluding that unless there are pending or future legislative matters the act of attending a conference is not a legislative act. Here, "all other acts" was applied and the COPP interpretation resulted in an event being cancelled because the event was not held to include discussion of legislative matters. It did involve education and professional development. It also involved contact with Montana citizens, constituents, and leaders from across the state.

COPP applied a very narrow definition of legislative acts to include only those that involve pending or future legislation upon which the legislature casts votes or engages in debate as part of the general legislative process. Applying the definition for "official act" (MCA 2-2-102(5), COPP determined only "a vote, decision, recommendation, approval, disapproval, or other action, including inaction, that involves the use of discretionary authority" was excluded from COPP authority. COPP reached a conclusion that a "legislative act" is an "official act" of the Legislature and would include drafting and introduction of legislation, committee work, speech and debate, and votes on matters before the Legislature. While each of the aforementioned is unquestionably a "legislative act", narrowly applying the definitions in this manner ignores vital aspects of what the public expects from their elected representatives.

I reviewed arguments presented by both COPP and Legislative Services Division (LSD) during the course of their 2019 debate regarding the issue and I view the LSD position as the better argument. LSD Memorandum of November 26, 2019. First LSD is presenting information to the legislative leadership to interpret its own existing policy as it relates to the matter. The LSD analysis is based on prior application of relevant laws. More importantly, it asserts a legislative prerogative with respect to the matter. Even LSD's memorandum acknowledges COPP's near exclusive authority with campaign finance disclosure. As a result, there is overlap when legislators attend events and engage in campaign activity. The legislative branch has no regulatory authority over outside groups that sponsor many of these events. This is especially true when these outside groups commonly engage in lobbying. After careful consideration of the law and issues involved, I intend to approach questions presented in the following manner:

1. Legislative or Official Duty Only Events:

When legislators receive invitations and attend outside events they should confer with the Legislative Services Division and rely on the November 26, 2019, LSD memorandum. This serves as an appropriate guide to legislators—and other officials—with respect to attending events. Officials still must avoid receiving gifts or other personal benefits. A legislator may not accept a gift of substantial value ($100) or a substantial economic benefit tantamount to a gift that would tend to improperly influence a reasonable person in their position from faithfully and impartially discharging their public duties. In addition, a legislator may not accept reward for official action taken. See MCA §§ 2-2-104(1)(b) and 2-2-102(5), respectively. See also, LSD 11/26/2019 Memorandum p. 2. The LSD memorandum recognizes the applicability of the MCA § 2-2-102(3)(b)(v) gift exclusion for educational activity that applies when the activity does not place or appear to place the legislator under an obligation, serves the public good, and is not lavish or extravagant. There is a cautionary notation to the Montana Supreme Court's opinion in Molnar v. Fox, 2013 MT 132 ¶ 34, wherein the Montana Supreme Court interpreted the gift ban broadly to include "something voluntarily transferred to another without compensation." In Molnar, the PSC commissioner argued that the educational exemption should apply, but the Court concluded the money was transferred personally and directly to the commissioner and was not a direct educational activity. Id. I note that the PSC commissioner self-created the educational activity and administered the funds and program on his own. He also later used leftover material in his

campaign. Regardless, the same judicial logic applies to legislators, and the LSD memorandum properly addresses ways to avoid similar pitfalls.

The LSD analysis also contains elements that are key to whether or not certain activities are exempt. Certainly, where legislators are charged with duties and engaged in activity being conducted by the Legislative Branch, the activity is unquestionably exempt and entirely under the purview of the legislative body in which they serve. Put another way, these are the activities associated with performing legislative duties and functions such as attending committee meetings, debating issues, and voting on pending or future legislative proposals. They quite necessarily also include voluntary attending sponsored education or training by the Legislative Branch, and meeting with other officials or executive agency personnel. In addition, the Legislator should consider whether the activity is truly educational or enhances professional development and whether attending the activity gives rise to argument with respect to improper influence over the discharge of duties. Whether there is a public benefit to the activity and whether the activity is lavish or extravagant are also important factors.

Applying the logic of the LSD memorandum in context of my overlapping or exclusive areas of authority, a simple rule of thumb develops wherein a legislator should appear in their official capacity, there should be an actual event and the event should involve education or professional enhancement that serves a public benefit, such as making the attendee a more effective leader or representative. In my view, the legislator or elected official should receive no special treatment with respect to the event. This would include covering costs for travel, lodging and meals associated with the event. For example, if conference fees are waived for event speakers, and the legislator is a speaker at the event, waiving the conference fee or providing a scholarship is not improper. This can be contrasted with a situation where the legislator's lodging is provided in a palatial suite while all other attendees pay for their own lodging or are provided only low-budget accommodations. Contrasting further, legislators should not receive first class airline accommodations while other attendees fly coach.

In 2023, the Legislature enacted a similar provision concerning the judicial branch. The judiciary is subject to oversight, unless they are performing "judicial acts." A similar and consistent approach should be applied to the judiciary. Consistent application of laws pertaining to elected and public officials should also be the same, in my view. This will certainly be my general approach. Interpretation of laws and rules with respect to how they are enforced through

COPP regulation will and should favor protecting an official's ability to engage in performing official acts, including legislative acts, and it should include normal and expected functions ordinarily expected of anyone serving in the same or a similar capacity. Judges commonly attend judicial conferences, Montana State Bar meetings, and ordinary continuing legal education functions. This benefits judges, the legal community and the public, and should always be allowed as an official function of their office.

2. Events and Travel:

Commissioners have legally and traditionally permitted this sort of activity and recognized these functions and roles. In Tschida v. Bullock and O'Leary, (COPP-2016-ETH-005) the commissioner rejected an ethics complaint as insufficient and frivolous. The Complainant alleged that a gift occurred when plane transportation and tickets were provided to attend an event, but the commissioner found there was no fact basis to show how this should cause the official to depart from the faithful and impartial discharge of official duties. Tschida p. 5. The commissioner further noted and agreed with the respondents' position that the Governor and Department Director flew on the state plane to attend the concert as part of a trip that included other events involving state interests in their official capacities. The respondents demonstrated that they appeared in their official capacity to meet with industry leaders, university leaders and alumni, and that the concert was an associated event where 20,000 people from across Montana attended. This provided the respondents an opportunity to interact with many Montanans on a variety of issues. (COPP records, COPP-2016-ETH-005, response pp. 2, 3, and 4). Andrew Huff, as legal counsel for the Governor and the Director, articulates it very well when he asserted:

> The Governor and others in public office regularly attend events around the State that allow them to interact with business and community leaders and hard-working Montanans. This type of interaction is vital to the Governor and to the other public officers as they evaluate the challenges facing the private sector as well as the opportunities that exist to grow Montana's economy and workforce. It is a major aspect of the job of "governor" and indeed an absolute necessity to meet a wide array of individuals, groups and constituencies from the Billings Chamber of Commerce to the Whitefish Senior Citizens Center.

I concur. I believe when the commissioner dismissed the Tschida complaint, as frivolous no less, the commissioner also concurred. Tschida p. 8. This notion of appearing in an official capacity to advance or learn about matters important to Montana citizens is quintessentially a part

of good governance. I would only add that it is unnecessary to confine our influence, representation, and knowledge to our own borders.

With respect to travel and expenses being paid by outside sources, in Wilcox v. Schweitzer, COPP-2007-CFP-7/12/2007, the commissioner dismissed a complaint involving Governor Schweitzer's travel to the Democratic Governors Association (DGA) in a letter ruling dated July 12, 2007. The DGA exists to elect Democratic governors and discuss collaborative or current policy issues. Even though the Governor had announced his candidacy, there was no basis to conclude that payment of his travel or travel reimbursement to a DGA function amounts to payments meant to influence the results of his election. The Governor held an important position in DGA and was a featured speaker at the event. Thus, there was a legitimate basis for the DGA to pay for his travel.

Whether by way of payment for travel or reimbursement of travel expenses, including lodging and meals, COPP decisions in this regard recognize and protect the associational interest and rights of the DGA and other individuals, groups or organizations.

In Montana State Republican Party v. Bullock, (MSRP) COPP-2019-ETH-002, the commissioner once again addressed whether there was unethical conduct involved with the governor's campaign for President. The commissioner relied on Fox v. Molnar, 2013 MT 132 ¶ 39, with regard to how MCA § 2-2-121(3) applies in the context of elections. Elected officials are permitted to use their own time to run for office so long as they avoid using public facilities, equipment, supplies or funds. MSRP is also important because it references the commissioner's decision in Ellsworth v. Bullock, (COPP-2016-CFP-041), which allowed the governor's campaign to reimburse the state for costs of using state resources where travel included official action and campaign activity. In this regard, the commissioner specifically relates that "It is appropriate for any candidate who is running for nomination or elected office to reimburse the government for additional costs incurred by campaigning." MSRP v. Bullock p. 11. This is an acknowledgement that such instances naturally occur and that there are ways to perform legal duties and still run for political office. This was not the case in Cooper v. Johnson, (COPP-2016-ETH-007) or Montana Democratic Party v. Stapleton, (COPP-2019-ETH-001) because in both instances the officials directed state employees to engage in campaign related activity and used other state resources.

There are also decisions by commissioners involving legislators travel for events and campaigning. In Wemple v. Connell, COPP-2014-CFP-041, the complainant alleged that Connell

used campaign funds for his own personal benefit and failed to properly maintain and keep accurate records. Specifically, as shown in COPP reports filed by Connell, he paid for a plane ticket that allowed his wife to go to Washington, D.C., attended the Montana Chamber's annual golf event, and paid fees to attend forestry related events outside the boundaries of his election district. In addition to conference fees, Connell paid for associated costs. These associated costs included general use of campaign funds for "spouse, meals, alcohol, lodging, travel, subscriptions, dues and conferences related to his profession." Wemple p. 3.

In addressing whether Connell's expenses were properly paid as campaign expenses, the commissioner determined that the expenses were campaign related and proper. Wemple pp. 7-9. Using the "personal use or benefit" provisions of the surplus campaign funds law (MCA § 13-37-240(2)) is limited to surplus campaign fund issues, and does not provide an appropriate legal standard, according to the commissioner. Wemple p. 5. Candidate Connell explained that the trip to Washington, D.C. enabled him, and his wife, to take a picture with a prominent Republican official, since his opposition was questioning his status as a "true" Republican. This was a priority issue for Connell in his campaign. Similarly, Connell's attendance, with his wife, at the Montana Chamber golf event, allowed them to be seen in association with other Republican leaders. Connell's attendance at forestry related conferences and events allowed Connell's campaign to "maintain contacts with a group of people who provided financial and political support for his candidacy." Wemple p. 8. The commissioner determined that there was a "campaign purpose element" to each campaign expense, and the fact that there may also be a personal use or personal purpose to the campaign expense it does not remove the expenditure from one definition and place it into another. Wemple pp. 8 and 9.

In Welker v. Bennett, COPP-1999-6/30/1999, the commissioner decided numerous issues. Among them was questions regarding the use of personal funds to pay campaign expenses and whether the candidate could pay to distribute a periodical outside the normal distribution area. Importantly, Welker recognizes and establishes that Montana campaign laws are penal in nature and must be strictly construed even though MCA § 13-37-128 designates them as "civil" and contains elements involving negligence. Welker p. 8. To support these propositions the commissioner cited and relied upon Sand Hills Beef, Inc., 196 Mont. 77 at 83, 639 P.2d 480 at 483, and State v. Nagel, 100 Mont. 86, 90, 45 P.2d 1041, 1042 (1935) (both partially overruled on other grounds). Courts will not apply penal statutes to cases that are not within the obvious meaning of

the language employed by the Legislature, even though they may be within the mischief intended to be remedied. State v. Aetna Banking & Trust Co., 34 Mont. 379, 382, 87 P. 268, 269 (1906). Consequently, many of Welker's allegations were simply dismissed by the commissioner, and only reporting and disclosure violations were left to pursue. It is important to note, however, that COPP must regularly follow judicial interpretation with respect to how we enforce laws.

Whether it be the DGA, the Montana Chamber of Commerce, or other groups and trade associations, the COPP must narrowly tailor enforcement to apply penal statutes that are within the obvious meaning of the language imposed by the Legislature. Where the Legislature has failed to provide clear and unambiguous language the COPP will not intercede to fill in gaps, even where such action seems warranted and within the identified mischief to be remedied. First Amendment speech and association rights supersede such ill-conceived attempts, in my view. Many of these First Amendment related matters are addressed in VanFossen v. Missoula County Republican Central Committee, COPP-2023-CFP-008.

B. Rep. Zephyr's Legislative Travel Resulting in Contributions and Expenditures:

As applied to current matters involving Rep. Zephyr's campaign and legislative travel schedule, the record is clear that Rep. Zephyr was invited to and attended actual events. Many of these events ultimately resulted in contributions to Rep. Zephyr's campaign as evidenced by the voluminous contributions, which the campaign properly reported. This is proper. Rep. Zephyr is permitted to attend events and accept campaign contributions at or following these events. If Rep. Zephyr has an actual fundraiser in association with the event the expenses incurred and the contributions received must be reported, but there is no evidence that such fundraisers occurred. Consequently, the contributions received are ancillary to attending an event Rep. Zephyr was otherwise legally permitted to attend. To the extent that Rep. Zephyr's campaign scheduler was used to coordinate and facilitate matters pertaining to attendance this is permitted because the decision to use the campaign scheduler is properly disclosed as such on the Zephyr campaign finance reports. Any contention to the contrary, whether direct or indirect, must be dismissed. Based upon careful consideration of facts and law, including relevant COPP decisions, after weighing such I use the discretion provided me to dismiss the allegations. Powell v. Motl, OP 711.

However, like VanFossen, I also review and apply campaign finance and disclosure laws. In this regard, Rep. Zephyr's campaign is deficient in certain respects.

IV. Violations Discovered by COPP During Review

When complaints are filed a commissioner must investigate the allegations contained in the complaint. MCA § 13-37-111(2)(a). A commissioner also has authority to investigate all statements and examine each report. MCA §§ 13-37-111 and 123. Commissioners have discretion while exercising this authority. Powell v. Motl, OP-0711 (MT Sup. Ct. Order (November 6, 2014)), see also, Molnar v. Fox, DV 10-1718, Order and Memorandum, Judge Susan P. Watters, MT 13th Judicial Dist. Ct. (Feb. 6, 2012). In certain instances, commissioners have allowed campaigns to correct errors prior to taking further action and referring matters to respective county attorneys pursuant to MCA § 13-37-124. See MRLCC, and Pinocci v. Hagan, COPP-2014-CFP-021. This makes particular sense when errors are essentially discovered by COPP pursuant to its legal requirement to review reports under MCA § 13-37-123 and fall outside the allegations of the filed complaint. This is the case here with respect to Rep. Zephyr.

A. Allowable Use of Campaign Staff for Official Travel:

Whether campaign staff can be used to schedule events and facilitate fundraising before, during, or after such an event, some de minimis activity is understandable and allowed. This might typically involve receiving an invitation, discussing it with the candidate, and accepting or rejecting the invitation. It might also include making necessary travel arrangements, such as transport and lodging. Passing along messages and communicating with the Legislator/Candidate on travel is also a necessary and ordinary function. This is in contrast to other duties that are not de minimis and are obviously connected to the function of the campaign. This would include invitations to fundraisers, booking rooms to hold a fundraiser, and making catering arrangements. If the campaign incurs additional expenses because the Legislator/Candidate is showing up early or staying beyond the official function, these expenses should also be reported. Tschida v. Bullock and MRP v. Bullock.

Here, Rep. Zephyr's campaign did, in fact, report these sorts of activity by including expenditures with the descriptions "campaign scheduling" and "scheduler and communications liaison" but details as to what these "campaign activities" pertain to are absent; so, the campaign must also sufficiently describe the activity in a manner that complies with Montana laws and COPP regulations. MCA § 13-37-229. One must recall that Rep. Zephyr is traveling to events by invitation to speak in her official legislative capacity. This permitted travel has resulted in permitted contributions to the 2024 campaign, but when utilizing the resources of the campaign to coordinate and facilitate attendance at these events it must be properly reported on the campaign

finance forms. Rep. Zephyr's campaign has other options at their disposal such as having event sponsors pay the expenses or reimburse them. But when the campaign account and its resources are used, full campaign finance reporting in compliance with all legal requirements must result.

Rep. Zephyr's campaign must also keep detailed and accurate records, current within no more than ten days, and guard against depositing contributions that exceed contributions limits.

B. Treasurer (or Deputy Treasurer) to Keep Accurate and Current Records:

Montana law provides that Treasurers or Deputy Treasurers must keep accurate records. MCA § 13-37-208. Those accurate records must be current within ten days or five days in proximity to the next reporting date. MCA § 13-37-208(1)(a) and (b). Deputy treasurers must be specifically appointed as such through a written record signed by the Treasurer defining deputy's assignments and role. MCA § 13-37-202. COPP recognizes that reports often contain minor reporting errors, which is why the Montana Legislature instructed COPP to review all filed reports. MCA § 13-37-121. COPP does not immediately lodge a violation when we discover an erroneous or incomplete report. Instead, we contact the candidate or committee regarding the discovery, and we typically provide affected parties instructions on how to correct it. This is done directly through the treasurer or deputy treasurer listed on either the C-1 (Statement of Candidacy) or C-2 (Statement of Organization). At this point, the Treasurer or Deputy Treasurer is clearly on notice that their records are inaccurate. Under Montana law they have ten days to correct any such error. MCA § 13-37-121(4). If no action is timely taken, the candidate or committee is exposed to a violation with financial enforcement penalty through the filing of a complaint MCA § 13-37-111 or an order of noncompliance MCA § 13-37-115, and the commissioner can seek an enforcement penalty (MCA § 13-37-128). A similar opportunity will be provided to Rep. Zephyr's campaign.

Candidates and committees self-select who their treasurer will be. As indicated above, they must report to COPP who the selected treasurer is. MCA § 13-37-201. The Treasurer, with the concurrence of the candidate, may select one deputy treasurer in each county of the state. MCA § 13-37-202. Nothing in law precludes a candidate from having a treasurer or deputy treasurer from outside their own electoral district. For example, Rep. Zephyr is permitted to have one treasurer (currently Rep. Zephyr) and another deputy treasurer in Missoula County. Rep. Zephyr can also have another deputy treasurer from any other county of the state, but the second treasurer must be from outside Missoula County, if a Missoula County deputy treasurer has already been appointed.

I disagree with the notion contained in other COPP decisions that interaction between campaigns and COPP staff is characterized as a collaborative effort. It is nothing of the sort. COPP reviews reports and identifies reporting mistakes. COPP then notifies candidates or committees of reporting errors discovered. It is then wholly incumbent upon the candidate or committee to correct the error using reasonable efforts in an appropriate amount of time depending on the circumstances of the errors identified. COPP will wait and offer assistance, but the ultimate responsibility to accurately and timely report rests entirely on the candidate or committees, and more exactly with the treasurer on file with COPP. Candidates and committees must have a current and accurate C-1 or C-2 on file with COPP. This is the only way the process can work efficiently. Like other reports, the responsibility to maintain a current C-1 or C-2 rests squarely with the respective treasurer, and not with COPP.

Berry v. Fanning, COPP-2012-CFP-4/23/2013, is perhaps an extreme example, but it certainly makes the point and supports the proposition that, while COPP will offer assistance the ultimate responsibility rests with the candidate or committee to comply. When candidates or committees are notified that they are out of compliance they do not have the luxury of explaining to COPP that they are "busy" and "will get around to it when they can." Fanning p. 2. Candidates and committees that keep their records updated, as required by MCA § 13-37-208, should have no problem substantially complying with the deadlines established in MCA § 13-37-228. This is especially true when campaigns employ professional individuals or firms to keep records and meet reporting obligations. Disclosure and reporting can be time consuming, especially during the middle of a campaign, but Montana's reporting is not so onerous that it fails constitutional review. National Gun Ass'n. for Gun Rights, Inc. v. Mangan, 933 F.3d 1109 (9th Cir. 2019).

C. Campaign Expenditures Must Be Adequately Described:

Since Montana Democratic Party (MDP) v. Montana Republican Legislative Campaign Committee (MRLCC), COPP-2016-CFP-029 commissioners have addressed the requirement that candidate and committee reports sufficiently describe each expenditure. Balancing the additional burdens placed on the campaigns with the public interest in reviewing the reports, commissioners have always sided in favor of the public. The public right substantially outweighs the minimum burden placed on campaigns to provide descriptions that provide an ascertainable explanation for what the spending was actually for, and who received that amount. Reporting and disclosure is required so that the public understands the contribution and expenditure of funds used to support

or oppose candidates in Montana elections. MDP v. MRLCC, p. 2. In MRLCC, the commissioner concluded that a generic expenditure list does not meet the requirements of 44.11.502(7), ARM or MCA § 13-37-229(2)(b). When services are provided, "reports of expenditure must be itemized and described in sufficient detail to disclose the specific services performed. MCA § 13-37-229(2)(b).

I have reviewed MRLCC and its progeny. I am left believing that there is still a significant amount of subjectivity involved, which causes me to approach enforcement with mindful ambivalence. This may explain why previous commissioners have made decisions but almost always merely provided instruction and an opportunity to confer and correct. This will be my approach here with respect to Rep. Zephyr, but I do so while also pointing out that Rep. Zephyr's assembled campaign team has a history of receiving instruction from COPP on properly describing expenditures and campaign finance reporting in general. Strandberg v. Cooney, COPP-2020-CFP-001.

With this in mind, I determine the use of "scheduler" as currently in the Rep. Zephyr campaign reports does not meet the requirements of Montana law. MCA § 13-37-229(2)(b). Rep. Zephyr's campaign is instructed to provide further details on what events were scheduled and what particular duties were involved. Strandberg and Rhoades v. Engen, COPP-2018-CFP-008, as well as other decision cited herein, should be helpful in this regard. Rep. Zephyr's campaign will be given ten days to address these and any other identified issues. See, Pinocci v. Hagan and MRLLC.

D. Contributions Limits Must be Adhered to and Excess Contributions Must Be Returned:

Montana establishes contribution limits under MCA § 13-37-216(1) and (2). The commissioner adjusts the limits pursuant to MCA § 13-37-216(3)(a) and (b). Unlike all other candidates, legislative candidates may use the same account for primary election contributions received and general election contributions received, but only if the legislative candidate maintains records concerning whether the contributions received are designated for the primary election or general election, and the balance of the account that contains commingled primary election and general election funds does not drop below the amount of the general election contributions until after the day of the primary election. MCA § 13-37-205(6). Put another way, and setting aside the fact that this would be convenient for all other candidates, legislators can commingle primary and general election contributions in one account, so long as they keep separate records as to what election the contribution is designated for and maintain a balance equal to the amount of the general

election contributions. The current contribution limit for legislative candidates is $400. MCA § 13-37-216(1)(a)(iii). At this point in time, Rep. Zephyr's campaign has not designated contributions between whether they are primary election contributions or general election contribution. In fact, to date, Rep. Zephyr's campaign has designated all contributions as "primary election" contributions.

The current rules adopted by the COPP establish a maximum contribution threshold for individuals is $400. The statute limiting contribution limits provides that an election means the general elections or a primary election that involves two or more candidates for the same nomination. MCA § 13-37-216(6). If there is not a contested primary election, there is only one election to which contribution limits apply. Id. If there is a contested primary election, then there are two elections to which contribution limits apply. Id. A legislative candidate can collect contributions in anticipation of having two elections, but they must designate the contributions between the primary election and the general election in their campaign records and maintain a sufficient balance in the account until after the date of the primary. If a candidate has only one election, the candidate must return or properly dispose of previously designated contributions. This makes sense because a candidate cannot use general election contributions in the primary and if the candidate loses the primary all general election contributions must be refunded. If a candidate collected money in anticipation of a primary that never occurs there is only one election—the general election—and contributions over the established limit must be returned.

Consequently, based on the established law, COPP reports show excess contributions to the Zephyr campaign from the following individuals:

- Kim Anderson (2 contributions of $250 each)
- Rachel Defoir (2 contributions of $400 each)
- Deborah Kazis (2 contributions of $400 each)
- Deborah Seymour (2 contributions of $400 each); and
- Jennifer Van Meter (2 contributions of $400 each).

V. Corrective Action

A. Commissioner's Authority and Approach Corrective Action:

Following is a discussion of the authority granted the commissioner and the commissioner's discretion to exercise that authority, which I then apply to Rep. Zephyr's campaign.

1. Commissioner's General Authority

The commissioner may exercise all of the powers conferred upon the commissioner by law in any jurisdiction or political subdivision of the state. MCA § 13-37-116. Montana law explicitly provides that the commissioner is responsible for investigating all alleged violations of the election laws contained in Title 13, chapters 35 (corrupt practices) and 37 (reporting). MCA § 13-37-111(1). The commissioner is responsible for enforcing these laws in conjunction with county attorneys. Id. The commissioner may investigate all statements but shall (must) investigate alleged failures to file any statements or the falsification of any statement filed. MCA § 13-37-111(2)(a). Upon submission of a written complaint the commissioner shall investigate any other alleged violations of law. Id. The commissioner may inspect records, accounts or books required to be kept by law and other records relevant or material while conducting investigations. MCA § 13-37-111(2)(b) and (c). The commissioner may also issue orders of noncompliance. MCA § 13-37-115. Commissioners must inspect each statement and report filed with the commissioner during an election or within 60 days after the election (MCA § 13-37-121(1)) and compare and examine statements or reports filed with the commissioner for compliance within 120 days after an election. MCA § 13-37-123.

When commissioners inspect reports and issue orders of noncompliance, the commissioner acts pursuant to the authority provided in MCA § 13-37-121(1) through (5). During an election or within 60 days after an election the commissioner must inspect each statement or report filed with the office. If a person has not satisfied a provision of law the commissioner must notify the person of the noncompliance. Notification is accomplished in writing, electronically (by email), or by telephone to the person who is not in compliance. Id. If the person fails to comply after notification, the commissioner must issue an order of noncompliance. Id. Under, MCA 13-37-121(2) an order of noncompliance "may" be issued when the commissioner examines the official ballot and it appears a statement or report by a person does not conform to law [subsection (2)(a)] or it is determined that a statement or report filed with the commissioner does not conform to requirement of chapter 37, or that a person has failed to file a statement or report required by law. MCA § 13-37-121(2)(a) and (b). It is confusing to me why the statute directs that the commissioner must issue an order of noncompliance in subsection (1), but then immediately thereafter, in subsection (2), allows that the commissioner may issue orders of noncompliance in the same exact circumstances. Whether by legislative design or oversight I must conclude that the statute fails to effectively grant

the permissive authority (may). Accordingly, I conclude that once notification is provided and a person fails to comply, I must issue an order of noncompliance.

When an order of noncompliance is issued during an election or within 60 after an election a candidate or political committee must comply within 5 days. MCA § 13-37-121(3). If the order of noncompliance is issued during any other period, a candidate or political committee shall comply within 10 days. MCA § 13-37-121(4). Upon failure to submit the required information within the time specified, the appropriate county attorney or the commissioner shall (must) initiate a civil or criminal action if it is outside the period of an election and may initiate during an election. MCA § 13-37-121(3) and (4). The procedures for such action are outlined in MCA §§ 13-37-124 and 125. For the 2024 election, the period of the election begins when candidates can start filing on January 11, 2024 (MCA § 13-10-201) and ends with the 2024 General Election is November 5, 2024 (MCA § 13-1-104). Accordingly, if noncompliance occurs during the election the commissioner or county attorney may file an action in district court, but if the non-conformity persists beyond the election and the notice period the commissioner or county attorney must file the action.

The authority to investigate and determine the sufficiency of allegations contained in complaints coexists with the authority to inspect reports and issue orders of noncompliance, and exercise of one authority does not preclude the other. As MCA § 13-37-121(5) explicitly provides, "the procedure described in this section [Orders of Noncompliance] regarding the provision of notice and issuance of orders of noncompliance is not a prerequisite to initiation of any other administrative or judicial action authorized", even after a complaint is filed under MCA § 13-37-111. The reverse is also true. Commissioners can, and commissioners have, issued what amounts to noncompliance orders in context of deciding MCA § 13-37-111 lodged complaints. Put another way, commissioners decide allegations in a complaint, but they commonly inspect records and go outside the allegations contained in the complaint when making determinations.

As commissioner, I have concurrent jurisdiction with county attorneys. MCA §§ 13-37-124 and 125. Whether by way of a noncompliance order or a determination resulting from complaint allegations, the commissioner must decide if there is sufficient evidence "to justify a civil or criminal prosecution." MCA § 13-37-124(1). When there appears to be evidence sufficient to justify a prosecution the commissioner must notify the affected county attorney and transfer all relevant information to the county attorney. Id. If the affected county attorney elects to prosecute

the noncompliance or the sufficiency determinations resulting from allegations in a complaint, the commissioner's role ends. Id. If the affected county attorney fails to act on a prosecution referral within 30 days or waives the prosecution back to the commissioner before 30 days, the commissioner is authorized to initiate the appropriate civil or criminal actions independently. MCA § 13-37-124(1) and (2). Nothing prohibits a county attorney from acting independently. MCA § 13-37-125 and MCA. County attorneys do act independently, especially with respect to certain chapter 35 violations where the alleged conduct occurs at the local level. The final arbiter of whether a violation occurred is a court, and judges may take into account the seriousness of the violation and the degree of culpability of the defendant. MCA §§ 13-37-128 and 129.

Over the course of nearly 50 years of COPP history, where hundreds of cases were referred to county attorneys, I am not aware of a single instance where the county attorney elected to take over prosecution of a case. That indicated, the independent review, and check on my authority as commissioner, by county attorneys and the judiciary serves an important oversight function on the commissioner and the COPP office. This check on authority is absolutely necessary, especially since Montana elects to place so much authority in the hands of a single individual.

Accordingly, I have limited discretion with respect to matters involving enforcement, and only ministerial duties with respect to investigating allegations, inspecting reports, and making evidence-based determinations. As commissioner I must investigate and must refer violations to the affected county attorney where the violation occurred before I can independently pursue an enforcement action.

2. Commissioner's Use of Prosecutorial Discretion

This entire legislatively established framework requires that a commissioner assess what authorities are ministerial (mandatory) and what authorities are discretionary (permissive). The Montana Supreme Court addresses these issues in Doty v. Montana Commissioner of Political Practices, 2007 MT 341, 340 Mont. 276, 173 P.3d 700. In Doty, the Court addressed issues concerning mandamus, declaratory judgment and judicial review, which required the Court to address the ministerial (mandatory) and discretionary (permissive) functions of the commissioner. Id. The Court determined that the role of the commissioner in determining whether to prosecute campaign violations is analogous to prosecutorial work done by a county attorney. Doty at ¶ 15. The Court specifically held that, "Once his Summary of Facts and Statement of Findings was issued, the Commissioner had discretion whether or not to "take appropriate action" by

undertaking a civil prosecution." Id. The Court also held that the duty to investigate and prepare a written summary was ministerial, and "the Commissioner does not have the discretion to ignore these tasks." Id. ¶ 16. Citing to Jeppeson v. Dept. of State Lands, 205 Mont. 282, 288, 667 P.2d 428, 431 (1983), the Doty Court observed that:

> [W]here the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial. Doty ¶ 15.

In Powell v. Motl, OP 14-0711 the Montana Supreme Court also addressed the discretionary powers of the commissioner. In Powell, the Court ruled that the commissioner acted within discretion to dismiss a complaint when he concluded under an administrative rule that the facts set forth in a MCA § 13-37-111 complaint failed to state an actionable violation. Powell p. 1-3. Since Powell was decided on November 6, 2014, COPP has heavily relied on it to show its authority, particularly with respect to discretion.

Since beginning my term as commissioner, I have reviewed many pertinent cases and decisions with respect to these aforementioned authorities. I note two distinctly different approaches as to when I must refer matters to an affected county attorney. Recent decisions appear to conclude that this occurs in a perfunctory way once a complaint is investigated, and a determination is reached by issuing a Summary of Facts and Statement of Findings. See Taylor v. Hale, COPP-2012-CFP-028, and Vincent v. Vincent, COPP-2013-CFP-006 and 009. Under this approach, commissioners referred all matters to the Lewis and Clark County Attorney, unless it was de minimis or the commissioner could establish "excusable neglect". While these are important considerations, they are not the only considerations. In fact, such a narrow approach ignores or omits other considerations actually contained in the statute—MCA § 13-37-124(1). Under this provision of Montana law, commissioners can also assess whether prosecution is justified. The code unambiguously provides that, the commissioner shall notify the county attorney and transmit all information, "whenever the commissioner determines that there appears to be sufficient evidence to justify a civil or criminal prosecution." Id. Historically, prior to Taylor and Vincent, commissioners did actually use this particular authority and approach.

In the Matter of Citizens for More Responsive Government, (Motl v. CMRG, COPP-2001-CFP-2/21/2002), the commissioner investigated and issued a Summary of Facts and Statement of

Findings involving numerous allegations and issues. In CMRG, the commissioner specifically addressed the provision relating to whether prosecution was justified. CMRG p. 9. According to the commissioner, the determination of whether a 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. Id. Despite finding that CMRG "unquestionably failed" to file reports, the commissioner stressed alternative approaches to compliance. CMRG's transgressions resulted from miscommunications rather than intentional misconduct, and CMRG quickly corrected reporting errors once they became aware of the violation. Accordingly, the commissioner did not refer the matter to the county attorney, even though clear violations with sufficient evidence in support were determined.

In the Matter of the Complaint Against Ronald Murray (Washburn v. Murray, COPP-2013-CFP-02), the commissioner investigated the allegations of the complaint, issued his Summary of Facts, Statement of Funding, and a Conclusion. The commissioner's investigation discovered sufficient evidence to determine that Murray's campaign incorrectly reported and failed to file reports on time. In Murray, the commissioner relied on CMRG and determined that it was not in the best interest of the state to pursue civil action. Murray p. 3 and 4. Accordingly, the commissioner did not refer the matter to the county attorney, even though clear violations with sufficient evidence in support were determined.

In Fitzpatrick v. Zook, COPP-2010-CFP-06/14/2011, the commissioner investigated the allegations in the complaint and issued a Summary of Facts and Statement of Findings. Fitzpatrick alleged a failure to include a proper disclaimer and the failure to include the proper party identifier by Zook on her website. In her response, Zook admitted to the violations. Zook promptly corrected the material. The commissioner determined that these were violations, but also determined it was not in the best interest of the state to pursue a civil penalty. Accordingly, the commissioner did not refer the matter to the county attorney, even though clear violations with sufficient evidence in support were determined.

I view CMRG, Murray, Fitpatrick, and similar cases as the correct and more comprehensive approach because they include the fundamental element of prosecution being justified, and because they are consistent with the statutes as a whole. That is, they are consistent with respect to all COPP authority, which includes investigating allegations contained in complaints, and the authority to independently inspect records and take steps with regard to noncompliance. It does not escape me,

and it did not escape some previous commissioners, that courts have the authority to take into account the seriousness of the violation and the degree of culpability of the defendant when the court determines liability. MCA § 13-37-129. I cannot substitute myself for the judge in this regard, but, like any prosecutor acting in good faith, I can factor in how a judge is likely to view a matter in light of all the circumstances associated with the case when I assess whether the action is justified. These are quintessential discretionary functions that anyone justifying whether to bring an action must perform.

Consistent with this approach and the statutory provisions of both MCA §§ 13-37-111 and 13-37-121, it makes sense to continue investigating allegations and issuing statements and findings as mandated by law, and to continue inspecting reports and notifying candidates and political committees of any failures to legally conform to law by directing corrective action, and issue noncompliance orders if they fail to comply. Like previous commissioners, it is within my discretion not to take formal prosecution actions when reporting and disclosure responsibilities are lax or may occur without penalty. Murray p. 4. Commissioners retain the right to prosecute actions and impose stiff penalties where prosecutions are justified by intentional acts, significant errors, and when a commissioner determines that the public was deprived of their right to disclosure, especially during an election. Murray p. 4, 5, and 6, and CMRG p. 10.

Clearly, at least with respect to when civil or criminal prosecution is deemed justified by sufficient evidence, the commissioner exercises discretion. The act involves judgment by the commissioner, and previous commissioners have taken the exact approach I intend to follow.

It is fundamentally unfair that candidates are treated differently for committing the same error depending upon whether the discovery occurs during the course of a complaint or during another review, such as MCA § 13-37-123. With that understanding, and on that basis, I will use the authority provided under MCA § 13-37-121 and the record keeping statute (MCA § 13-37-208) to make the following determination before referring matters to the Missoula County Attorney. I have already dismissed certain allegations as unsupported by law, but there are outstanding issues that were discovered during the course of the investigation. These will be addressed by the notice and corrective action provided below with respect to Rep. Zephyr's campaign. If Rep. Zephyr's campaign does not comply within the time provided, I will deem that prosecution is justified and present these findings and a noncompliance order to the Missoula County Attorney for formal action.

B. Corrective Action Approach as Applied to Rep. Zephyr's Campaign:

The 2024 Rep. Zephyr campaign treasurer or deputy treasurer must promptly update the C-1 Statement of Candidacy to reflect clearly who is authorized to act for the candidate to keep records and file reports. These records must be accurate within 10 days or 5 days depending on whether we are in close proximity to a reporting period. Regardless, records must always be accurate within 10 days. Even a cursory review of our records indicates the records being kept are not current. Rep. Zephyr's Treasurer or properly designated Deputy Treasurer is instructed to refund contributions in excess of established limits within five days, if these refunds have not already occurred. They have an additional five days to report and disclose the refunds to COPP via the Campaign Electronic Reporting System (CERS). Updates to the C-1 and other corrections to the reports should also be provided at this time.

If the campaign is unable to fulfill these obligations within the allotted time it must explain to COPP why it is unable to do so. While COPP is always willing to work through compliance issues we have an expectation that candidates and committees are actively engaged in quickly resolving any outstanding issues. Good faith efforts to meet reporting requirements will always be accommodated through extensions and compliance assistance so long as it is demonstrated that matters have not just been set aside. As is the case here, three months is simply unexplainable, and as such I felt compelled to address it.

If corrections are not made by November 27, 2023, I will rescind this portion of the decision and refer the matter to the Missoula County Attorney on November 28, 2023, or after if additional time is warranted.

VI. AGENCY DETERMINATION (Dismissal, Insufficiency and Sufficiency Findings)

The final agency determination is as follows:

After weighing all available evidence and applying the appropriate law with respect to my enforcement authority, I reach the final agency conclusion with respect to this complaint:

1. Rep. Zephyr's campaign was not required to close the 2022 campaign before opening a 2024 campaign. The allegations are dismissed.
2. Rep. Zephyr made good faith efforts to close the 2022 campaign before starting the 2024 campaign, which COPP encouraged it to do, since there were no outstanding expenses or debts still associated with 2022. These allegations are also dismissed.

3. Rep. Zephry is permitted to travel in the capacity as a Legislator where a public interest is served in the form of education or professional development so long as Rep. Zephyr receives no special personal benefit beyond what other speakers or attendees are provided. Accordingly, assertions to the contrary are dismissed.
4. If Rep. Zephyr holds a fundraiser while at the event all expenses directly associated with the fundraiser must be reported. This was not a direct allegation. Dismissal is not required, but the instruction is formally provided as part of this decision.
5. Rep. Zephyr may use campaign resources to facilitate attending these events, as long as those too are properly reported. Rep. Zephyr complied with these provisions and assertions to the contrary are accordingly dismissed.
6. Rep. Zephyr's campaign appears to have unauthorized individuals acting as either treasurer or deputy treasurer. These deficiencies must be addressed as a corrective action within 10 days, and if Rep. Zephyr fails to address them this violation will be referred to the Missoula County Attorney.
7. Rep. Zephyr's campaign did not adequately describe certain expenditures. These deficiencies must be addressed as a corrective action within 10 days, and if Rep. Zephyr fails to address them this violation will be referred to the Missoula County Attorney.
8. Rep. Zephyr's campaign received contributions in excess of limits established in law. These deficiencies must be addressed as a corrective action within 10 days, and if Rep. Zephyr fails to address them this violation will be referred to the Missoula County Attorney.

Rep. Zephyr's campaign will have until November 27, 2023, to correct the errors, which were identified during the agency review of the campaign's records. If these matters are not corrected by the deadline, I will refer the matter to the Missoula County Attorney together with all relevant information on November 28, 2023, as violations requiring imposition of penalty under MCA § 13-37-128.

DATED this 16th day of November, 2023.

Chris J. Gallus

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