

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Luckey v. Downing No. COPP 2020-CFP-046	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN FINANCE VIOLATION
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On October 23, 2020, Montana Democratic Party Executive Director Sandi Luckey filed a campaign practices complaint against Troy Downing of Bozeman. The complaint alleges that candidate Downing violated Montana campaign finance law by utilizing Primary election contributions to finance General election expenditures.

SUBSTANTIVE ISSUES ADDRESSED

Transfer of Primary election funds to General elections funds. The use of General election funds prior to the Primary election.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: Troy Downing filed a C-1 Statement of Candidate as a candidate for Montana State Auditor with the COPP on June 26, 2019. (Commissioner's Records.)

Finding of Fact No. 2: On July 5, 2019, candidate Downing filed his initial C-5 campaign finance report, dated June 26, 2019 through June 30, 2019. This report did not disclose any contributions received or expenditures made by candidate Downing in either the Primary or General elections. (Commissioner's Records.)

Finding of Fact No. 3: On October 7, 2019, candidate Downing filed a periodic C-5 campaign finance report, dated July 1, 2019 through September 30, 2019. This report disclosed candidate Downing as receiving \$63,930.00 in Primary election contributions, including a personal loan of \$10,000.00 made on August 2, 2019, and a personal loan of \$50,000.00 made on September 30, 2019; candidate Downing reported making \$6,951.55 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$56,978.45. This report also disclosed candidate Downing as receiving \$0 in General election contributions; candidate Downing reported making \$0 in General election expenditures, for a Cash in Bank balance in the General of \$0. This report was most recently Amended on October 24, 2020. (Commissioner's Records.)

Finding of Fact No. 4: On January 5, 2020, candidate Downing filed a periodic C-5 campaign finance report, dated October 1, 2019, through December 31, 2019. This report disclosed candidate Downing as receiving \$17,213.00 in Primary election contributions; candidate Downing reported making \$18,065.44 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$56,126.01. This report also disclosed candidate Downing as receiving \$4,200.00 in General election contributions; candidate Downing reported making \$0 in General election expenditures, for a Cash in Bank balance in the General of \$4,200.00. Candidate Downing did not report making payments on previously reported obligations. This report was most recently Amended on October 24, 2020. (Commissioner's Records.)

Finding of Fact No. 5: On March 20, 2020, candidate Downing filed a periodic C-5 campaign finance report, dated January 1, 2020, through March 15, 2020. This report disclosed candidate Downing as receiving \$17,855.00 in Primary election contributions, in addition to a personal In-kind loan of goods/services valued at \$3,254.90; candidate Downing reported making \$11,499.19 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$62,481.82. This report also disclosed candidate Downing as receiving \$6,300.00 in General election contributions; candidate Downing reported making \$0 in General election expenditures, for a Cash in Bank balance in the General of \$10,500.00. Candidate Downing did not report making payments on previously reported obligations. This report was most recently Amended on October 24, 2020. (Commissioner's Records.)

Finding of Fact No. 6: On April 20, 2020, candidate Downing filed a periodic C-5 campaign finance report, dated March 16, 2020, through April 15, 2020. This report disclosed candidate Downing

as receiving \$5,710.00 in Primary election contributions; candidate Downing reported making \$2,896.75 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$65,295.07. This report also disclosed candidate Downing as receiving \$500.00 in General election contributions; candidate Downing reported making \$0 in General election expenditures, for a Cash in Bank balance in the General of \$11,000.00. Candidate Downing did not report making payments on previously reported obligations. This report was most recently Amended on October 24, 2020. (Commissioner's Records.)

Finding of Fact No. 7: On May 19, 2020, candidate Downing filed a periodic C-5 campaign finance report, dated April 16, 2020 through May 14, 2020. This report disclosed candidate Downing as receiving \$13,850.00 in Primary election contributions, including a personal loan of \$8,000.00 made on May 13, 2020 in addition to a personal In-kind loan of goods/services valued at \$16,091.00; candidate Downing reported making \$76,023.08 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$3,121.99. This report also disclosed candidate Downing as receiving \$2,000.00 in General election contributions; candidate Downing reported making \$0 in General election expenditures, for a Cash in Bank balance in the General of \$13,000.00. Candidate Downing did not report making payments on previously reported obligations. This report was most recently Amended on October 24, 2020. (Commissioner's Records.)

Finding of Fact No. 8: Montana's Primary election was held on June 2, 2020. Candidate Downing advanced to the November 3 General election as the Republican candidate receiving the highest number of votes. (Commissioner's Records.)

Finding of Fact No. 9: On June 19, 2020, candidate Downing filed a periodic C-5 campaign finance report, dated May 15, 2020, through June 15, 2020. This report disclosed candidate Downing as receiving \$55,391.00 in Primary contributions, including a personal loan of \$25,000.00 made on May 20 in addition to two (2) personal In-kind loans of goods/services, one valued at \$38,396.00 and the other valued at \$11,453.00; candidate Downing reported making \$58,512.99 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$0. This report also disclosed candidate Downing as receiving \$9,365.40 in General election contributions; candidate Downing reported making \$74.00 in General election expenditures, for a Cash in Bank balance in the General of \$22,291.40. This report disclosed candidate Downing transferred \$4,795.40 from the Primary to General accounts

(reported as a Fundraiser contribution of \$4,795.40 received in the General and an expenditure of the same amount made in the Primary, both dated June 15, 2020). Candidate Downing reported making one (1) payment of \$25,000.00 on his May 20 loan, leaving the balance owed on that obligation as \$0. This report was most recently Amended on October 24, 2020. (Commissioner's Records.)

Finding of Fact No. 10: On August 20, 2020, candidate Downing filed a periodic C-5 report, dated June 16, 2020 through August 15, 2020. This report disclosed candidate Downing as receiving \$10,065.40 in Primary election contributions, including two (2) refunds: one from American Bank in the amount of \$4,895.40 dated August 15, with the original transaction dated July 15, and one from Troy Downing for Montana in the amount of \$350.00 dated August 3, with the original transaction dated May 8; candidate Downing reported making \$10,000.00 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$65.40. This report also disclosed candidate Downing as receiving \$42,582.00 in General election contributions; candidate Downing reported making \$17,241.52 in General election expenditures, including one of \$4,895.40 dated August 15 described as "Transfer of primary funds transferred to General prematurely", for a Cash in Bank balance in the General of \$47,631.88. Candidate Downing did not report making payments on any of his Primary election loans. Candidate Downing's one (1) expenditure in the Primary election of \$10,000.00 was made to an entity named The Prosper Group on July 22, 2020; Purpose was listed as "Social media and Website ads.", Platform "Facebook, Google, various websites, various websites as pre-roll in video.", Quantity "Facebook ads ran from 5/11 - 6/2, reach: 171,728. Google ads ran from 5/11 - 6/2, 7,449 impressions. Various websites ran from 5/12 - 6/2, 56,731 impressions. Various websites as pre-roll ran from 5/19 - 6/2, 36,266 impressions.", and Subject Matter "'Vote by mail' ad.". This report was most recently Amended on October 24, 2020. (Commissioner's Records.)

Finding of Fact No. 10A: In reviewing candidate Downing's June 16, 2020 through August 15, 2020 C-5 campaign finance report, COPP Compliance staff were able to determine that of the reported \$10,065.40 in Primary election contributions, only \$5,170.00 were new contributions directly placed in the Primary account; the remaining \$4,895.40 was the reported transfer of funds by candidate Downing from the General back into the Primary account. Candidate Downing's July 22 expenditure of \$10,000.00 to the Prosper Group left the Primary account with a reported \$65.40 Cash in Bank.

Had the campaign transferred \$4,795.40 from the Primary account to the General (the amount reported as transferred from the Primary to the General by candidate Downing) the Primary Cash in Bank balance after the July 22 expenditure would have been \$-34.60 (the campaign began this period with a reported \$0 Cash in Bank in the Primary account: \$5,170.00 in new contributions received + \$4,795.40 in transferred funds = \$9,965.40; \$9,965.40 - \$10,000.00 = \$-34.60). (Commissioner's Records.)

Finding of Fact No. 11: On September 21, 2020, candidate Downing filed a periodic C-5 report, dated August 16, 2020, through September 15, 2020. This report disclosed candidate Downing as receiving \$6,650.00 in Primary election contributions; candidate Downing reported making \$350.00 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$6,365.40. This report also disclosed candidate Downing as receiving \$21,204.00 in General election contributions; candidate Downing reported making \$8,438.66 in General election expenditures, for a Cash in Bank balance in the General of \$60,397.22. Candidate Downing did not report making payments on any of his Primary election loans. Candidate Downing's one (1) expenditure in the Primary election of \$350.00 was made to an entity named Remington Research Group on September 3, 2020; Purpose was listed as "Email append to a private data file.", Platform "email.", and Quantity "1934 records, 657 emails matched". This report was most recently Amended on October 24, 2020. (Commissioner's Records.)

Finding of Fact No. 12: On October 20, 2020, candidate Downing filed a periodic C-5 report, dated September 16, 2020, through October 14, 2020. This report disclosed candidate Downing as receiving \$5,100.00 in Primary election contributions; candidate Downing reported making \$80.00 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$11,385.40. This report also disclosed candidate Downing as receiving \$18,204.00 in General election contributions; candidate Downing reported making \$6,391.58 in General election expenditures, for a Cash in Bank balance in the General of \$72,209.64. Candidate Downing did not report making payments on any of his Primary election loans. Candidate Downing's one (1) expenditure in the Primary was made to an individual contributor and described as "Refund Excess Contribution". (Commissioner's Records.)

Finding of Fact No. 13: Candidate Downing did not provide the COPP with written notice or documentation that any of his nine (9)

Primary election loans had been forgiven. (Commissioner's Records.)

Finding of Fact No. 14: On October 26, 2020, candidate Downing (through campaign Treasurer Sam Loveridge) emailed the COPP his response to this complaint. The response stated that "A former third party treasurer...mistakenly transferred funds from the primary into the general account and this was reversed immediately upon discovery". It went on to state that "After working closely with members of your office to make sure this was done correctly, the funds were transferred back into the primary account and reported on the very next report filed on August 20, 2020". (Commissioner's Records.)

Finding of Fact No. 14A: In a September 9, 2020, email to COPP Compliance staff, Heather Downing (candidate Downing's Deputy Treasurer) stated that:

Two primary invoices remained unpaid when I took over the account. The two invoices were The Prosper Group in the amount of \$10,000.00 and Remington Research in the amount of \$350.00. They were not paid due to discrepancies that weren't settled in a timely manner. Once the dispute was settled, I paid the invoices. The payments were made in the general election, but both payments were allocated to the primary election, when the actual charges took place.

The email went on to state that "To cover these primary expenses I transferred \$4895.40 from the general to the primary. This amount was the ending primary balance of the prior treasurer and was transferred from the primary to the general at the end of the primary election". (Commissioner's Records.)

DISCUSSION

Transfer of Primary funds to the General election

The first allegation raised by this complaint is that candidate Downing improperly transferred campaign funds from the Primary to General election accounts. Specifically, the complaint alleges that candidate Downing violated 44.11.224(2)(e), Administrative Rules of Montana, by transferring Primary election funds into the General election account prior to satisfying all Primary election obligations.

The requirements and applicability of 44.11.224(2), ARM and its individual subsections are discussed in greater detail in Commissioner Mangan’s Decision in the matter of *Luckey v. Gianforte*, COPP-2020-CFP-044. Put simply, candidates may continue accepting Primary election contributions after the conclusion of the Primary election if they have outstanding debts or loans to pay off from that election as long as those funds are only used to pay off those Primary election obligations. In this matter, candidate Downing reported making nine personal loans to the campaign during the Primary election; of these, eight remained outstanding at the time this complaint was filed, totaling \$137,194.90 (see *Table 1*). Under 44.11.224(2), ARM, candidate Downing would be allowed to continue accepting Primary election contributions to pay off these debts.

Table 1: Primary election obligations (debts/loans) as reported by candidate Downing on his 2019-2020 C-5 campaign financial reports.

Entity	Election	Type (Debt/Loan)	Date incurred	Amount	Balance Due ¹
Downing, Troy	Primary	Loan	08/02/2019	\$10,000.00	\$10,000.00
Downing, Troy	Primary	Loan	09/30/2019	\$50,000.00	\$50,000.00
Downing, Troy	Primary	Loan*	03/15/2020	\$3,254.90	\$3,254.90
Downing, Troy	Primary	Loan	05/13/2020	\$8,000.00	\$8,000.00
Downing, Troy	Primary	Loan*	05/05/2020	\$16,091.00	\$16,091.00
Downing, Troy	Primary	Loan	05/20/2020	\$25,000.00	\$0
Downing, Troy	Primary	Loan*	05/21/2020	\$38,396.00	\$38,396.00
Downing, Troy	Primary	Loan*	05/29/2020	\$11,453.00	\$11,453.00
					\$137,194.90

*In-kind rather than monetary loan

On his May 16, 2020, through June 15, 2020 C-5 campaign finance report, candidate Downing reported a June 15 transfer of \$4,795.40 from the

¹ Reflects the primary debt obligations due as of October 26, 2020.

Primary election account to General election account (FOF No. 9).

Subsequently, on his June 16, 2020 through August 15, 2020 report, candidate Downing reported moving \$4,895.40 back to the Primary election account as a General election expenditure of the same amount and date described as “Transfer of primary funds transferred to General prematurely” (FOF No. 10). Candidate Downing’s response in this matter also stated that the campaign had moved all Primary funds back to the Primary election account after realizing some had previously been transferred into the General election account (FOF No. 14). The COPP investigation could find no evidence those Primary funds were used for General election activities during the time period the funds were transferred. As the campaign has corrected its error by transferring the funds back into the Primary account, the allegation is hereby dismissed.

Based on information included in its own finance reports, the Downing campaign has also violated the provisions of 44.11.224(2)(d), ARM. While the campaign reported transferring \$4,795.40 in ‘excess’ Primary election funds into the General election account on its May 16-June 15 report, the campaign reported transferring \$4,895.40 back into the Primary account on the June 16-August 15 report. In doing so, the Downing campaign transferred the original \$4,795.40 *plus* an additional \$100.00 of General election funds back into the Primary account.² Based on candidate Downing’s own finance reports,

² In the May 15, 2020, through June 15, 2020 period, the Downing campaign reported having \$58,512.99 cash in hand (after contributions totaled in). The campaign then reported making \$58,512.99 in expenditures: \$28,717.59 to third party vendors/entities, \$25,000.00 in

transferring \$4,794.40 in Primary election funds left the campaign with \$0 Cash in Bank for that election; transferring any more than that back to the Primary account meant General election funds were transferred as well. Once transferred to the Primary account, these funds were expended for a \$10,000.00 obligation owed by the campaign to The Prosper Group (\$10,000.00) (FOF Nos. 10, 14A). The use of General election funds to pay off Primary election obligations represents a violation of 44.11.224(2)(d), ARM. Alternatively, the Downing campaign failed to report \$100.00 in Primary election contributions received, a violation of §13-37-229(1), MCA.

Other issues

Once a complaint is filed, the Commissioner “shall investigate any other alleged violation” Mont. Code Ann. § 13-37-111(2)(a). This investigative authority includes authority to investigate “all statements” filed with COPP, inspect a variety of records and require their production for purposes of the investigation, and examine “each statement or report” filed with the COPP. *Id.*, §§ 13-37-111, -123. The Commissioner is afforded discretion in exercising this authority. *Powell v. Motl*, OP-07111, Supreme Court of Montana, November 6, 2014 Order.

On his C-5 report dated June 16, 2020, through August 15, 2020, candidate Downing reported making a July 22 Primary election expenditure to

a loan repayment to candidate Downing, and transferring \$4,795.40 to the General account. This left the campaign with a reported \$0 Cash in Bank in the Primary account at the end of the reporting period. Based in its own reporting, the Downing campaign simply did not have \$4,895.40 in Primary funds to transfer back. Either the campaign transferred \$100.00 in General election funds into the Primary account or the campaign failed to disclose \$100.00 in Primary election contributions received (FOF No. 10A)

an entity named The Prosper Group for “Social media and Website ads”; candidate Downing reported that the specific ads began airing on Facebook and Google on May 11 and on other “various websites” on May 19 (FOF No. 10). The Downing campaign admitted that this was an outstanding obligation in a September 9, 2020 email to the COPP (FOF No. 14A). “An obligation to pay for a campaign expenditure is incurred on the date the obligation is made, and shall be reported as a debt of the campaign until the campaign pays the obligation by making an expenditure.” ARM 44.11.502(2). Further, “[a]n expenditure is made on the date payment is made, or in the case of an in-kind expenditure, on the date the consideration is given.” *Id.*, at (3). “The date of each expenditure shall be reported in the reporting period during which it is made.” *Id.*, at 503(4).

In this matter, the specific ads being reported by candidate Downing were incurred prior to May 11, the earliest listed run date. Candidate Downing should have reported this activity as a debt owed on his April 16-May 14 finance report, with a subsequent payment on that debt being reported on the June 16-August 15 report. By instead reporting the activity as an expenditure on the June 16-August 15 report, the campaign violated 44.11.502(2), ARM.

Similarly, on his C-5 report dated August 16, 2020 through September 15, 2020, candidate Downing reported making a September 3 expenditure to an entity named Remington Research Group (FOF No. 11). The Downing campaign’s September 9, 2020 email to the COPP stated that this activity had also been incurred during the Primary election and was only paid at the time a

disputed invoice was settled (FOF No. 14A). Under the provisions of 44.11.502(2), ARM, this activity should have also been reported as a debt owed by the Downing campaign at the time the obligation was incurred.

FINDINGS

The Downing campaign reported transferring \$4,795.40 from its Primary account to its General election account on June 15, 2020. The campaign corrected its error and transferred \$4,895.40 from its General election account to its Primary account on August 15, 2020. The campaign reported \$5,170.00 in Primary contributions that same time period, a balance of \$10,065.40. The campaign subsequently expended \$10,000.00 of those funds towards Primary obligations (FOF Nos. 10, 10A).

Sufficiency Finding No. 1: Candidate Downing expended General election contributions to pay Primary election debt.

The Commissioner finds sufficient facts exist to support a determination that candidate Downing expended General election contributions for Primary election debts.

On its August 20 and September 20, 2020 campaign finance reports, the Downing campaign reported \$10,350.00 in Primary expenditures (FOF Nos. 10, 11). These Primary election obligations were not reported at the time they were incurred by the Downing campaign.

Sufficiency Finding No. 2: There are sufficient facts to show that the Downing campaign failed to timely report debts in the amount of \$10,350.00.

The Commissioner finds sufficient facts exist to support a determination that candidate Downing failed to report debts in the amount of \$10,350.00 during the 2020 Primary election cycle.

The Commissioner orders the Downing campaign to amend its reports accordingly within 14 days of the date of this decision. The Commissioner will take into consideration the corrective action taken by the Downing campaign in the settlement of this matter.

DECISION

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner “shall investigate” any alleged violation of campaign practices law. Mont. Code Ann. § 13-37-111(2)(a). The mandate to investigate is followed by a mandate to take action; where there is “sufficient evidence” of a violation the Commissioner must (“shall notify,” *see id.*, at § 13-37-124) initiate consideration for prosecution.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence to show that Troy Downing violated Montana’s campaign practice laws, including, but not limited to the laws set out in the Decision. Having determined that sufficient evidence of a campaign practice violation exists, the next step is to determine whether there

are circumstances or explanations that may affect prosecution of the violation and/or the amount of the fine.

The failure to fully and timely report and disclose cannot generally be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law as it relates to failures to file and report. *See Matters of Vincent*, Nos. COPP-2013-CFP-006, 009 (discussing excusable neglect principles). Likewise, the Commissioner does not normally accept that failures to file or report be excused as *de minimis*. *Id.* (discussing *de minimis* principles).


Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the above Sufficiency Findings, a civil fine is justified. Mont. Code Ann. § 13-37-124. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying a civil fine or civil prosecution of Troy Downing. Because of the nature of the violation, this matter is referred to the County Attorney of Lewis and Clark County for his consideration as to prosecution. *Id.*, at (1). Should the County Attorney waive the right to prosecute (*id.*, at (2)) or fail to prosecute within 30 days (*id.*, at (1)) this Matter returns to this Commissioner for possible prosecution.

Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that the Matter is waived back, this Finding and Decision does not necessarily lead to civil prosecution as the Commissioner

has discretion (“may then initiate” *see id.*) in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In setting that fine the Commissioner will consider matters affecting mitigation, including the cooperation in correcting the issue when the matter was raised in the Complaint.

While it is expected that a fine amount can be negotiated and paid, in the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of campaign practice law, including those of Mont. Code Ann. § 13-37-229. *See id.*, at § 13-37-128. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

DATED this 30th day of October 2020.



Jeffrey A. Mangan
Commissioner of Political Practices
Of the State of Montana
P.O. Box 202401
1209 8th Avenue
Helena, MT 59620
Phone: (406)-444-3919