

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Perkins v. Downing No. COPP 2020-CFP-023	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION
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On May 29, 2020, John Perkins of Helena, MT filed a campaign practices complaint against Troy Downing of Bozeman. The complaint alleged that candidate Downing failed to properly provide opposing candidates with a copy of a new campaign mailer specifically mentioning them within ten days of Montana's Primary election, and that candidate Downing failed to properly report this campaign expenditure activity.

**SUBSTANTIVE ISSUES ADDRESSED**

This decision addresses the Fair Notice Provision of Montana's Clean Campaign Act and the proper reporting of an expenditure.

**FINDINGS OF FACT**

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: The Complaint included a copy of a mailer supporting candidate Downing that utilized the name and image of both Scott Tuxbury and Nelly Nicol. The mailer's attribution statement indicated it was paid for by candidate Downing. (Exhibit 1), (Commissioner's Records).

Finding of Fact No. 2: Troy Downing filed a C-1 Statement of Candidate as a Republican candidate for State Auditor with the COPP on June 26, 2019. (Commissioner's Records).

Finding of Fact No. 3: Nelly Nicol filed a C-1 Statement of Candidate as a Republican candidate for State Auditor with the COPP on October 2, 2019. (Commissioner's Records).

Finding of Fact No. 4: Scott Tuxbury filed a C-1 Statement of Candidate as a candidate for State Auditor with the COPP on February 18, 2020. (Commissioner's Records).

Finding of Fact No. 5: Montana's 2020 Primary election was held on June 2, 2020. (Commissioner's Records).

Finding of Fact No. 6: The Fair Notice Period for Montana's 2020 Primary election was May 23 to June 2, 2020. (Commissioner's Records).

Finding of Fact No. 7: On June 1, 2020, candidate Downing (through campaign manager Sam Loveridge) emailed the COPP with his response to this Complaint. The response stated that the mailer in question:

“was paid for directly by Troy Downing in a wire to Axiom Strategies on May 27th and dropped that same day. Our treasurer then reported the in-kind donation to COPP on May 29th. It is the opinion of this COMMITTEE that the Clean Campaign Act was not violated in this instance. Tuxbury and the COMPLAINANT have had time to respond to the allegations made and have done so. The COMMITTEE did provide both the Tuxbury and Nicol campaigns copies of the mail piece on 05/29/2020”.

As presented, the mailer was new campaign material and not previously used or distributed by the Downing campaign (Commissioner's Records).

Finding of Fact No. 8: On May 29, 2020, candidate Downing filed a C-7 Notice of Pre-Election Contributions, dated for May 29. This C-7 disclosed candidate Downing as personally providing one in-kind Loan of \$11,453.00 to his campaign on May 29, described as “Loan for Axiom Strategies “Fox in Henhouse” Ad”. No quantity or ad medium information was provided. (Commissioner's Records).

## **DISCUSSION**

The Commissioner examines each of the allegations in this matter.

*Fair Notice Period*

The Complaint alleges candidate Downing failed to properly provide a copy of a new campaign mailer (exhibit 1) that identified his opponents and was distributed within ten days of Montana's Primary election to those opponents. The mailer included the name and image of both candidate Downing's Primary election opponents, Nelly Nicol and Scott Tuxbury (FOF No. 1).

§13-35-402, MCA, details Montana's Fair Notice period:

Fair notice period before election. (1) A candidate or a political committee shall at the time specified in subsection (3) provide to candidates listed in subsection (2) any final copy of campaign advertising in print media, in printed material, or by broadcast media that is intended for public distribution in the 10 days prior to an election day unless:

- (a) identical material was already published or broadcast; or
- (b) the material does not identify or mention the opposing candidate.

(2) The material must be provided to all other candidates who have filed for the same office and who are individually identified or mentioned in the advertising, except candidates mentioned in the context of endorsements.

(3) Final copies of material described in subsection (1) must be provided to the candidates listed in subsection (2) at the following times:

- (a) at the time the material is published or broadcast or disseminated to the public;
- (b) if the material is disseminated by direct mail, on the date of the postmark; or
- (c) if the material is prepared and disseminated by hand, on the day the material is first being made available to the general public.

(4) The copy of the material that must be provided to the candidates listed in subsection (2) must be provided by electronic mail, facsimile transmission, or hand delivery, with a copy provided by direct mail if the recipient does not have available either electronic mail or facsimile transmission. If the material is for

broadcast media, the copy provided must be a written transcript of the broadcast.

Montana's 2020 Primary elections were held on June 2, and the Fair Notice requirements went into effect on May 23, 2020 (FOF Nos. 5, 6).

Candidate Downing's response indicated that the mailer referenced by this Complaint was both paid for and distributed on May 27, 2020. The mailer was new campaign material not previously used or distributed, directly mentioned his opponents, and was distributed within ten days of the Primary election (FOF No. 7). Candidate Downing was required to provide a final copy of the material to candidates Nicol and Tuxbury at the time when the material was postmarked, Mont Code Ann. §13-35-402(3)(b). According to candidate Downing's response, the material was distributed on the 27<sup>th</sup>, however he did not provide a copy to candidates Tuxbury or Nicol until the 29<sup>th</sup> (FOF No. 7). By failing to provide candidates Nicol and Tuxbury a copy of the mailer on May 27, 2020, the date it was disseminated by mail, candidate Downing is in violation of Mont. Code Ann. §13-35-402(3)(b).

#### *Reporting the Expenditure*

The Complaint also alleges that candidate Downing failed to properly and timely report the May 27, 2020 mailer as an expenditure on finance reports filed with the COPP, stating "There is a severe lack of reporting of the purchase of the mailer...Pre-payment of postage and printing costs of the mailer is standard and should have been reported on a C-7, including an addendum. Still, no expenditure is reported for the sending of this mail piece".

Candidate Downing's response stated that this mailer was both paid for and distributed on May 27. The response also indicated that candidate Downing personally paid for the mailers. On May 29, candidate Downing filed a C-7 Notice of Pre-Election contributions disclosing his personal contribution of the mailers to his campaign as an in-kind loan (FOF No. 8). As the C-7 was filed within 48 hours after the mailer expense had been incurred, candidate Downing timely disclosed the activity under Mont. Code Ann. §13-37-226(1)(c).

While candidate Downing timely reported the mailer, the C-7 finance report form did not include all required information. The quantity of May 27, 2020 mailers produced and distributed, and the ad medium (type of ad) was not reported by candidate Downing on the C-7 as filed (FOF No. 8).

44.11.502(7), ARM, specifically requires candidates report the “purpose, quantity, subject matter” for all campaign expenditures, and that the information provided “must be detailed enough to distinguish among expenditures for similar purchases”.

At the time this self-described “Fox in Henhouse” May 27, 2020 mail piece was being distributed candidate Downing was running a similar ad also described on campaign finance reports as “Fox in Henhouse” via television (see Perkins v. Downing, COPP-2020-CFP-018). By failing to provide or describe the ad medium, interested individuals looking at candidate Downing’s May 29 C-7 report would have no way of knowing *mailers* were the item or service loaned in-kind to the campaign. The description provided by candidate Downing on the C-7 left these mailers indistinguishable from the “Fox in Henhouse” television commercial.

Candidate Downing failed to meet two separate requirements of 44.11.502(7) when reporting this mailer on the May 29 C-7 report. The quantity of mailers produced/distributed was not provided, and the mailers could not be distinguished from previously reported “Fox in Henhouse” advertisements, a violation of Montana campaign finance law.

### **FINDINGS**

Candidate Downing distributed a new mailer on May 27, 2020 which included the names and likenesses of his Primary election opponents Tuxbury and Nicols, who were not notified of the mailer until May 29, 2020.

Sufficiency Finding No. 1: Candidate Downing failed to notify opponents Scott Tuxbury and Nelly Nicols of the May 27, 2020 “Fox in the Henhouse” mailer distributed by his campaign.

The Commissioner finds candidate Downing violated Montana's campaign finance and practices law by failing to notify opponents Tuxbury and Nicols under the Fair Notice Provision of Montana's Clean Campaign Act.

While candidate Downing timely reported the May 27, 2020 campaign mailer, he did not provide information necessary to distinguish it from other campaign communications.

Sufficiency Finding No. 2: There are sufficient facts to show that Downing campaign finance report failed to disclose sufficient detail describing campaign the May 27, 2020 "Fox in the Henhouse" mailer expenditure.

The Commissioner finds candidate Downing violated Montana's campaign finance and practices law by failing to include sufficient detail to distinguish like expenditures. The Commissioner orders candidate Downing to file an amended campaign finance report within 10 days of this decision that properly discloses the expenditure and/or debt detailed in 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. §§13-35-402, 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 16 day of July 2020.



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# A PROVEN TAXPAYER WATCHDOG TO DEFEND MONTANA AGAINST SPECIAL INTERESTS

EXHIBIT  
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tabbles

MAIL FROM TROY DOWNING FOR MONTANA  
PO BOX 6666  
BOZEMAN, MT 59771



As a business owner, Troy puts Montana consumers and taxpayers first. **As Auditor, he'll work for you, not special interests.**

Troy is committed to lowering the costs of lifesaving medicine and making healthcare work for every Montanan.



Troy enlisted in the Air Force after 9/11. He's an 8-year combat veteran who faithfully served our Country.

Use of his military rank, job titles, and photographs in uniform does not imply endorsement from the D.o.D. or US Air Force/Air National Guard.

Helena, MT 59602-

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★ VOTE CONSERVATIVE REPUBLICAN TROY DOWNING ★  
MT STATE AUDITOR | JUNE 2ND

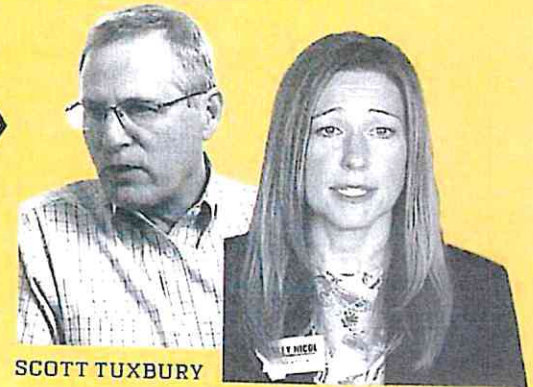
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THE STATE AUDITOR IS SUPPOSED TO PROTECT US FROM

# INSURANCE FRAUD

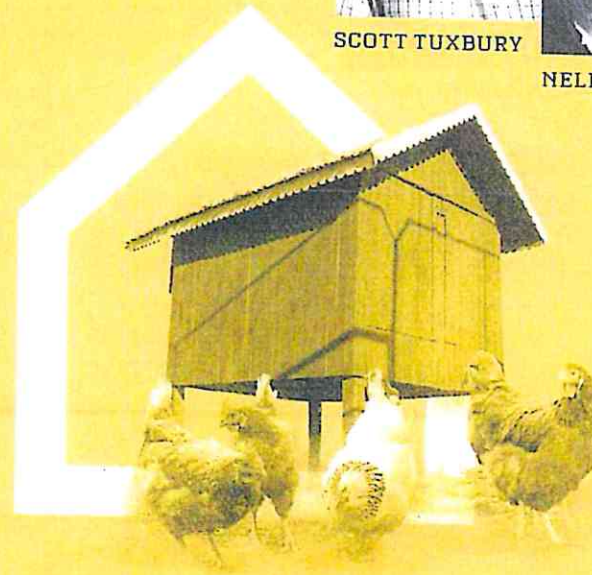
But insurance companies want to control the Auditor;

That's why they got **two**  
insurance insiders to run.  
And are secretly pouring  
big money into the race.



SCOTT TUXBURY

NELLY NICOL



Insurance insiders protecting us from insurance fraud?  
That's like **putting the fox in charge of the hen house.**