

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Foundation for Accountability and Civic Trust v. Democratic Governors Association No. COPP 2020-CFP-036B	FINDING OF SUFFICIENT FACTS SUPPORT A CAMPAIGN FINANCE VIOLATION
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On September 3, 2020, the Foundation for Accountability and Civic Trust (FACT) filed a campaign practices complaint against the Democratic Governors Association (DGA). The complaint alleged that the DGA coordinated campaign activities with Montana Gubernatorial candidate Mike Cooney in violation of Montana campaign finance law.

SUBSTANTIVE ISSUES ADDRESSED

Proper and timely reporting of contributions and coordinated expenditures.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: The Democratic Governors Association (DGA) is a national Democratic political organization

...organized to support Democratic governors and candidates across the nation.

As the only organization dedicated to electing Democratic governors and candidates, the DGA participates at all levels of

campaigns, from providing resources to fund operations to helping articulate and deliver their messages.¹ (Commissioner's Records.)

The Federal DGA organization has not registered as a political committee in the State of Montana with the COPP or provided the COPP with any committee financial reports (on FEC or Montana reporting forms) disclosing any contributions received or expenditures made in conjunction with Montana's 2020 Primary or General elections. The Democratic Governors Association lists its address as 1225 Eye Street NW Suite 1100, Washington, DC 20005.

Finding of Fact No. 1A: The website referenced in this complaint, <https://www.greggianfortax.com/>, references Republican Gubernatorial candidate Greg Gianforte in both name and image. The website includes a disclaimer of "paid for by the Democratic Governors Association". As of September 24, 2020, the site was no longer accessible. The Greg GianforTAX web domain was registered on July 8, 2020 and expires on July 8, 2021. (Commissioner's Records.)

Finding of Fact No. 1B: An August 6, 2020, the DGA added a post to their website titled "DGA Launches "Greg GianforTAX" website": <https://democraticgovernors.org/news/dga-launches-greg-gianfortax-website/>. The post states that "The Democratic Governors Association launched a new website today highlighting Gianforte's support for a statewide sales tax".² The post contained a link to the Greg GianforTAX website. (Commissioner's Records.)

Finding of Fact No. 1C: The specific Twitter profile referenced by this Complaint, Greg GianforTAX (@gianforTAX) was created in August of 2020, with the first post being made on August 6: <https://twitter.com/gianfortax>. No paid advertisements or other paid material appears to have been posted by this profile since its creation. Creation and use of a Twitter profile are both free. (Commissioner's Records.)

Finding of Fact No. 2: The Democratic Governors Association-Montana (DGA-MT) is a registered Independent political committee in the State of Montana. Sean Smith of Anaconda, MT is listed as the committee Treasurer, Noam Lee of Washington, DC is listed as the Deputy Treasurer, and the committee bank is also listed with a Washington, DC address. Treasurer Smith and Deputy Treasurer Lee share a listed email address of compliance@@dga.net. DGA-

¹ <https://democraticgovernors.org/about/>

² <https://democraticgovernors.org/news/dga-launches-greg-gianfortax-website/>

MT's listed address is 1225 Eye Street NW Suite 1100, Washington, DC 20005. The only entity that DGA-MT reported receiving financial contributions from in election years 2019 or 2020 was the DGA. DGA-MT did not disclose making any expenditures in conjunction with the Greg GianforTAX website on finance reports filed with the COPP. (Commissioner's Records.)

Finding of Fact No. 2A: DGA Action is a Federally registered Super PAC with the Federal Election Commission (FEC).³ DGA Action lists 1225 Eye Street, NW Suite 1100 in Washington, DC as its address. DGA Action has not provided copies of any Federally filed finance reports with the COPP for election year 2020.

Finding of Fact No. 3: Mike Cooney filed a C-1 Statement of Candidate as a Democratic candidate for the office of Governor of Montana with the COPP on July 2, 2020. Edward Tinsley is listed as the campaign Treasurer, and Emily Harris is listed as the Deputy Treasurer. (Commissioner's Records.)

Finding of Fact No. 3A: As referenced by FACT in its complaint, on August 4, 2020, candidate Cooney's Facebook page posted a video referencing "Greg GianforTAX". Candidate Cooney posted the same video on his campaign Twitter account and to his campaign's YouTube channel that day as well. Each version of this video contained an attribution message indicating it had been paid for by the Cooney campaign. (Commissioner's Records.)

Finding of Fact No. 3B: On August 15, 2020, candidate Cooney timely filed a periodic C-5 campaign finance report, dated June 16, 2020 through August 15, 2020. This report disclosed candidate Cooney's receipt of two monetary contributions from the DGA: one of \$710.00, dated June 16, 2020, and one of \$710.00 dated July 28, 2020. Each contribution was listed as a General election contribution. No in-kind contributions of items or services from DGA or DGA-MT were included.

This report disclosed candidate Cooney as making one expenditure to an entity named Mothership Strategies LLC for "Digital Fundraising- Facebook Post Promotion Gianfortax running from 8/1/20-8/23/20" at \$4,347.83. This report did not disclose any campaign expenditures related to the greggianfortax website. (Commissioner's Records.)

Finding of Fact No. 3C: On September 21, 2020, candidate Cooney timely filed a periodic C-5 campaign finance report, dated August

³ <https://www.fec.gov/data/committee/C00503789/?tab=about-committee>

16, 2020 through September 15, 2020. This report disclosed candidate Cooney as making one expenditure to an entity named Dixon/Davis Media Group, LLC for “Production of GianforTAX 2 min digital video” at \$5,843.00. (Commissioner’s Records.)

Finding of Fact No. 4: On a periodic committee finance report dated June 26, 2020 through August 25, 2020, DGA-MT reported making one direct financial contribution on July 28 of \$710.00 to candidate Cooney. DGA-MT did not report making any additional contributions, either monetary or in-kind, to candidate Cooney on this or any other C-6 committee finance report filed with the COPP. (Commissioner’s Records.)

Finding of Fact No. 4A: DGA-MT did not report any expenditures associated with the Greg GianforTAX website on C-6 committee finance reports filed with the COPP. Records previously provided to the COPP indicate that domain name was purchased on July 8, 2020. (Commissioner’s Records.)

Finding of Fact No. 5: On September 21, Perkins Coie emailed the COPP a response to this complaint from the DGA. The response argued that the Greg GianforTAX website represents a “de minimus” activity carried out by the DGA because it cost less than \$35.00. As de minimis activity, the response argues, the Greg GianforTAX website “does not constitute a reportable contribution” made by the DGA to candidate Cooney. The response also states that “DGA removed the website on September 4, 2020, meaning that it has not aired during the “electioneering communication” period. As such, it likely is not even “reportable election activity” under COPP regulations. The response also denied any DGA involvement in the establishment or control of the @gianfortax twitter profile.

Also on September 21, 2020, candidate Cooney (again through Perkins Coie LLP) emailed the COPP his response to the FACT complaint. The response argued that the Greg GianforTAX video posted by the Cooney campaign could not be considered coordinated under Montana campaign finance law because “the Campaign paid for it...The Video cannot be a contribution to the campaign, or constitute a coordinated expenditure between the Campaign and another party, when the expenditure for the Video was itself made by the campaign”. This response makes no mention of the Cooney campaign’s involvement (or lack thereof) in the creation of the Greg GianforTAX website. (Commissioner’s Records.)

DISCUSSION

Part One: Coordination

The first allegation raised against the Democratic Governors Association (DGA) is that it coordinated multiple expenditure activities with candidate Cooney in violation of Montana campaign finance law. It is important to note that coordination itself is NOT a violation of Montana campaign finance law⁴. Any coordinated activities must be treated (and reported) as an expenditure by the person funding the activity and a contribution received by the candidate, 44.11.602(5), ARM. Expenditure activities that are coordinated with a candidate would also be subject to Montana's contribution limits.

Greg GianforTAX website

As discussed at length in the matter of *Merwin v Cooney, COPP-2020-CFP-034* and *Foundation for Accountability and Civic Trust v Cooney, COPP-2020-CFP-036A*, the Greg GianforTAX website would qualify as a coordinated activity, 44.11.602(1), ARM. First, the website qualifies as an electioneering communication as the term is defined under §13-1-101(16), MCA, as it represents a paid communication that was publicly distributed by internet website, was made within sixty days of the initiation of voting in Montana's General election (having been publicly accessible between August 6, 2020 and September 4, 2020; the electioneering period in Montana for the General election began on August 6, 2020), did not directly support or oppose any candidates in that election but referenced Republican gubernatorial candidate

⁴ Excluding coordination with corporations, Mont. Code Ann. §13-35-227.

Greg Gianforte in both name and image, and was easily available to more than 100 recipients in the district voting on the candidate (FOF Nos. 1A, 1B). The DGA acknowledged it was the entity responsible for bearing the costs associated with the website (FOF No. 5). Finally, at no point did either the DGA or the Cooney campaign provide any argument or information asserting that the Greg GianforTAX website was not made by the DGA “in cooperation with, in consultation with, under the control of, or at the direction of, in concert with, at the request or suggestion of, or with the express prior consent” of the campaign (FOF No. 5). They argued that the website did not qualify as a contribution received by candidate Cooney because it was *de minimis* or otherwise not reportable activity. As found in Merwin v Cooney, COPP-2020-CFP-034 and Foundation for Accountability and Civic Trust v Cooney, COPP-2020-CFP-036A the GregGianforTAX.com website is considered coordinated activity under 44.11.602(1), ARM.

In this matter, the DGA argues that the Greg GianforTAX website qualifies as *de minimis* because “the DGA has paid less than \$35 in fees for the website. Further, the speech itself lacks “an ascertainable fair market value”... Finally, the Website did not contain express advocacy and DGA removed it on September 4, “meaning that it has not aired during the “electioneering communication” period. The COPP examines each of these arguments below.

The DGA argues that the Greg GianforTAX website qualifies as *de minimis* because “the DGA has paid less than \$35 in fees for the website” and that it lacks “an ascertainable fair market value”. The DGA or DGA-MT has not

disclosed any expenditure information regarding this website on finance reports filed with the COPP or in response to this complaint. The COPP notes that the purchase of the domain name; hosting fees paid to keep the site active; production of the site; and any ongoing costs associated with the finished product would also need to be included and considered. It is also important to note that “services with a cumulative fair market value of \$35” may be considered de minimis, 44.11.603(2)(b), ARM. Candidate campaign websites, for example, historically have been treated as reportable election activity. See *Wafstet v. McDermott*, COPP-2018-CFP-009, *Gallatin County Democrats v. Buchanan*, COPP-2018-CFP-055, and *Chadwick v Rivera*, COPP-2020-CFP-033 for recent examples. This same principal applies in this matter.

Finally, the DGA argues that the Greg GianforTAX website “did not contain express advocacy and DGA removed” it on September 4, “meaning it had not aired during the “electioneering communication” period. As such, it likely is not even “reportable election activity” under COPP regulations”. This argument is also flawed. The DGA in no way disputes that the Greg GianforTAX website represented a paid communication distributed by internet website, referred to one candidate in a Montana election (Greg Gianforte) by name and image, and was available to more than 100 recipients in the voting district (as a Statewide elected office, the entire State of Montana would be the district voting), all elements of an electioneering communication. Instead, the DGA seems to be arguing that because the site was available starting on August 6

and was taken down by September 4, it was not made within “60 days of the initiation of voting” in Montana’s General election, §13-1-101(16), MCA.

44.11.605(2)(a) and (b), ARM defines the ‘initiation of voting’:

(2) In (1)(b) the phrase "made within 60 days of the initiation of voting in an election" shall mean the following:

(a) in the case of mail ballot elections, the initiation of voting occurs when official ballot packets are mailed to qualified electors pursuant to 13-19-206, MCA;

(b) in other elections the initiation of voting occurs when absentee ballot packets are mailed to or otherwise delivered to qualified electors pursuant to 13-13-214, MCA.

The 2020 General Election date is November 3, 20210. Under Montana law, initiation of voting for this election would be October 5, 2020, the date by which absentee ballots must be available for voting in person.⁵ This means that Montana’s electioneering period began on August 6, 2020, the date sixty (60) days prior to October 5, 2020. The electioneering period continues through the November 3 General election, meaning material does not qualify as not electioneering material simply because it was removed from the internet prior to the General election. As the Greg GianforTAX website debuted on August 6, 2020 and was publicly accessible through September 4, 2020, it fell within the electioneering period and qualifies as an electioneering communication under Montana law.

The DGA’s insistence that the website represents *de minimis* activity or is otherwise not reportable election activity is unsupported by law.

⁵ <https://sosmt.gov/wp-content/uploads/2020-Election-Calendar.pdf>

44.11.501(1)(h) and 44.11.602(5), ARM, both clearly define coordinated expenditure activities as reportable expenditure activity. Similarly, electioneering communications are included as “Reportable Election Activity” as defined under 44.11.103(31), ARM. The Greg GianforTAX website constituted reportable election activity undertaken by the DGA as both a coordinated expenditure and an electioneering communication. The DGA did not report the costs associated with the greggianforTax.com website as an in-kind contribution to the Cooney campaign, a Montana campaign practices violation.

Greg GianforTAX video

As discussed at length in *Merwin v Cooney*, COPP-2020-CFP-034, and *Foundation for Accountability and Civic Trust v Cooney*, COPP-2020-CFP-036A, the Greg GianforTAX video referenced in this complaint cannot be considered coordinated activity because it was an expenditure of the Cooney campaign, not the DGA. As it was paid for by the Cooney campaign, not the DGA, the activity would not constitute a coordinated expense under 44.11.602(1), ARM. The allegation is hereby dismissed.

Greg GianforTAX Twitter profile

This complaint also notes the existence of the Greg GianforTAX (@gianfortax) Twitter profile (FOF No. 1C). The profile was created in August of 2020, with its first public post being made on August 6. Twitter itself a platform that is free to use (i.e. users are not charged to create a profile or publish content on the site), and the profile does not appear to have run any

paid posts or otherwise paid to publish content on the site. The DGA denied any involvement in the creation of this Twitter profile or in its operations (FOF No. 5).

Neither the creation of the @gianfortax Twitter profile nor posting of content to the profile would qualify as an expenditure of the DGA under §13-1-101(18), MCA. Unless or until the @gianfortax profile pays for campaign advertising or otherwise pays to display campaign posts, the entity responsible for the profile's creation would have no registration or reporting requirements with the COPP. Any allegation that the DGA has failed to report expenditures associated with this Twitter account is hereby dismissed.

Other Issues

In investigating this matter it was determined that the federal DGA organization had not directly filed any finance reports with the COPP disclosing the organization's Montana contribution or expenditure activity. COPP was able to locate finance reports filed by a political committee named DGA-MT, a registered Independent committee in the State of Montana (FOF No. 2). The DGA-MT committee shares a Washington, DC address with the federal DGA organization, lists the committee bank as being located in Washington, DC, lists a treasurer and deputy treasurer whose email account ends in @dga.net, and lists the DGA as the sole source of contributions received in election years 2019 and 2020 (FOF No. 2). It appears the DGA-MT exists under the umbrella of the DGA for the sole purpose of reporting DGA's Montana election activity.

An examination of finance reports filed by the DGA-MT committee and candidate Cooney show that the DGA has failed to disclose a monetary contribution of \$710.00 made to candidate Cooney. Candidate Cooney reported receiving two identical \$710.00 contributions from the DGA on C-5 finance reports filed with the COPP (FOF No. 3B). While the federal DGA organization in Washington, DC has not disclosed any contribution or expenditure activity in Montana, including direct monetary contributions made to candidate Cooney, the DGA-MT committee did report making one monetary contribution of \$710.00 to candidate Cooney (FOF Nos. 1, 4, 4A). One contribution of \$710.00 made by the DGA to candidate Cooney (as reported by the Cooney campaign) remains undisclosed by the DGA.

FINDINGS

The Democratic Governors Association produced and launched the GregGianforTAX.com website, including a press release from the organization and linked from the DGA website on August 6, 2020. The Commissioner finds the website is an electioneering communication and reportable election activity under Montana law. The website included an attribution “Paid for by the Democratic Governors Association”.

Mont. Code Ann. §13-37-225 requires political committees file periodic finance reports that disclose “expenditures made” by that committee, including the disclosure requirements provided in §13-37-229(2), MCA. The DGA has not reported making any expenditures associated with the Greg GianforTAX website as an in kind contribution to Montana gubernatorial candidate Mike

Cooney's campaign (FOF Nos. 1, 2). The DGA failed to disclose making a June 16, 2020 monetary contribution of \$710.00 to the Cooney campaign on finance reports provided to the COPP (FOF No. 4).

Sufficiency Finding No. 1: There are sufficient facts to show DGA failed to disclose the costs associated with the GregGianforTAX website as an in-kind contribution to the Cooney campaign.

Sufficiency Finding No. 2: There are sufficient facts to show DGA failed to disclose a \$710.00 contribution to the Cooney campaign.

The Commissioner finds sufficient facts to support a determination the DGA failed to disclose its reportable election spending. As a coordinated expenditure, the costs associated with the website are considered an in kind contribution and subject to campaign finance limits. The Commissioner orders the DGA to provide the Cooney campaign and the COPP with all costs in total for the website in order for the Cooney campaign to determine any and all excess amount/s amount to be returned from the Cooney campaign to the DGA in this matter. It is further ordered the DGA to amend all relevant committee finance reports to accurately reflect contribution and expenditure activity as discussed in this Decision up and through its October 30, 2020 committee finance report.

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 Democratic Governors Association 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 the Democratic Governors

Association. 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 10 day of October, 2020.



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