

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Merwin v. Cooney No. COPP 2020-CFP-034 Foundation for Accountability and Civic Trust (FACT) v. Cooney No. COPP 2020-CFP-036A	FINDING OF SUFFICIENT FACTS SUPPORT A CAMPAIGN FINANCE VIOLATION
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On August 20, Montana Republican Party Executive Director Spenser Merwin filed a campaign practices complaint against Mike Cooney, a candidate for the office of Montana Governor. On September 3, 2020, the Foundation for Accountability and Civic Trust (FACT) filed a similar campaign practices complaint against candidate Cooney. Both complaints alleged that candidate Cooney coordinated campaign activities with the Democratic Governors Association but failed to report the activity as contributions received, and that the value of the coordinated activity exceeds Montana's contribution limits.

SUBSTANTIVE ISSUES ADDRESSED

Coordination between a candidate and a committee, the reporting of in-kind contributions, and over the limit contributions.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: 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. The Cooney campaign has not filed any firewall policies with the COPP for election year 2020. (Commissioner's Records.)

Finding of Fact No. 2: 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

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 its 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. (Commissioner's Records.)

Finding of Fact No. 3: The Democratic Governors Association-Montana (DGA-MT) is a registered independent political committee in the State of Montana. Sean Smith 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. DGA-MT's listed address 1225 Eye Street NW Suite 1100, Washington, DC 20005. (Commissioner's Records.)

Finding of Fact No. 3A: 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. The election listed for this contribution was the General. DGA-MT did not report making any expenditures related to the Greg GianforTAX website on this or any previous 2020 C-6 committee finance reports. The only entity that DGA-MT reported

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

receiving financial contributions from in election years 2019 or 2020 was the DGA Federal PAC. (Commissioner's Records.)

Finding of Fact No. 4: The website identified in Mr. Merwin's complaint, <https://www.greggianfortax.com/>, references candidate Cooney's Republican opponent for the office of Governor, 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. (Commissioner's Records.)

Finding of Fact No. 4A: The Greg GianforTAX web domain was registered on July 8, 2020 and expires on July 8, 2021. (Commissioner's Records.)

Finding of Fact No. 4B: The Greg GianforTAX website was published on August 6, 2020. (Commissioner's Records.)

Finding of Fact No. 4C: A Greg GianforTAX twitter social media account, @gianfortax, was established in August 2020, the 1st tweet recorded August 6, 2020. (Commissioner's Records.)

Finding of Fact No. 5: As referenced by FACT in its complaint, on August 4, 2020, candidate Cooney's Facebook page posted a video ad referencing "Greg GianforTAX". Candidate Cooney posted the same video on his campaign Twitter account and to his campaign's YouTube channel August 4th. 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. 6: 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". The post contained a link to the Greg GianforTAX website. (Commissioner's Records.)

Finding of Fact No. 6A: The Mike Cooney for Governor Facebook page posted a link to the greggianfortax website on August 6, 2020. (Commissioner's Records.)

Finding of Fact No. 6B: The Mike Cooney for Governor twitter page posted a link to the greggianfortax website on August 6, 2020. (Commissioner's Records.)

Finding of Fact No. 7: 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 reported. (Commissioner's Records.)

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 8/1/20-8/23/20²" at \$4,347.83. This report did not disclose any campaign expenditures related to the greggianfortax website, including domain registration. While the campaign reported making no fewer than fifty-six (56) expenditures described as "Over the limit contribution refund" the DGA was not included as an entity to whom a refund had been provided. (Commissioner's Records.)

Finding of Fact No. 7A: The Cooney campaign did not report a monetary or in-kind contribution from the Democratic Governors Association for the Primary Election. (Commissioner's Records.)

Finding of Fact No. 8: On September 21, 2020, candidate Cooney timely filed a periodic C-5 campaign finance report, dated August 16, 2020 through September 15, 2020. This report did not disclose candidate Cooney as receiving any contributions, monetary or in-kind, from the DGA or DGA-MT. 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. While the campaign reported making no fewer than sixty-three (63) expenditures described as "Over the limit contribution refund" the DGA was not included as an entity to whom a refund had been provided. (Commissioner's Records.)

Finding of Fact No. 9: On August 28, 2020 candidate Cooney (through Perkins Coie LLP) emailed the COPP his response to the Merwin complaint. The response argued the greggianfortax website "constitutes a "de minimis act" under Montana's campaign finance law" because the DGA spent less than \$35 on it. As a *de minimis* activity, the response argues, the website "does not constitute a reportable contribution" received by the Cooney campaign. This

² The Cooney campaign's official Facebook page Ad Library dates the start of the 'Greg Gianfortax' election communication as 8/4/2020.

response makes no mention of the Cooney campaign's involvement (or lack thereof) in the creation of the Greg GianforTAX website. (Commissioner's Records.)

Finding of Fact No. 9A: 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 cannot 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.

Also on September 21, Perkins Coie emailed the COPP a response from the DGA. The DGA's response argued that the Greg GianforTAX website represents a "*de minimus*" activity under Montana campaign finance law because it cost the DGA less than \$35.00 and therefore "does not constitute a reportable contribution". 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. (Commissioner's Records.)

Finding of Fact No. 10: The 2020 General Election date is November 3, 2020. 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.³ 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, 2020 General election. (Commissioner's Records.)

DISCUSSION

Both the Merwin and Foundation for Accountability and Civic Trust (FACT) complaints include allegations of coordination between the Cooney campaign and the DGA, failure to properly report coordinated activity as a

³ <https://sosmt.gov/wp-content/uploads/2020-Election-Calendar.pdf>

contribution to the Cooney campaign, and the receipt of contributions from the DGA by the Cooney campaign over the campaign finance limit. The Commissioner examines each of these allegations.

Part One: Coordination

The first allegation raised in the complaints filed by Mr. Merwin and FACT concerns what is described as impermissible coordination of campaign activities. Specifically, each complaint alleges that candidate Cooney coordinated several campaign activities with the Democratic Governors Association (DGA) in violation of Montana campaign finance law.

§13-1-101(10), MCA defines the term coordinated:

"Coordinated", including any variations of the term, means made in cooperation with, in consultation with, at the request of, or with the express prior consent of a candidate or political committee or an agent of a candidate or political committee

Coordination is described in more detail by 44.11.602, ARM. Subsection (1) states that:

A "coordinated expenditure" means any election communication, electioneering communication, or reportable election activity that is made by a person 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 a candidate or an agent of the candidate. The coordination of an expenditure need not require agreement, cooperation, consultation, request, or consent on every term necessary for the particular coordinated expenditure, but only requires proof of one element, such as content, price, or timing, to be met as a fact of a coordinated expenditure.

It is important to note that coordination itself is NOT a violation of Montana campaign finance law⁴. In the event an activity is coordinated between a candidate for election and a political committee, each entity would be required to disclose the activity on the relevant finance report filed with the COPP. All coordinated activity “shall be treated and reported as an in-kind contribution from and expenditure by the person funding, facilitating, or engaging in” the activity, 44.11.602(5), ARM. Coordinated activities would be subject to Montana’s contribution limits but are not by themselves a violation of any Montana campaign finance rule or law.

An examination of the terms contribution and expenditure before considering each alleged instance of coordination is also warranted. §13-1-101(9), MCA defines a contribution:

(a) "Contribution" means:

(i) the receipt by a candidate or a political committee of an advance, gift, loan, conveyance, deposit, payment, or distribution of money or anything of value to support or oppose a candidate or a ballot issue;

(ii) an expenditure, including an in-kind expenditure, that is made in coordination with a candidate or ballot issue committee and is reportable by the candidate or ballot issue committee as a contribution;

(iii) the receipt by a political committee of funds transferred from another political committee; or

(iv) the payment by a person other than a candidate or political committee of compensation for the personal services of another person that are rendered to a candidate or political committee.

(b) The term does not mean services provided without compensation by individuals volunteering a portion or all of their

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

time on behalf of a candidate or political committee or meals and lodging provided by individuals in their private residences for a candidate or other individual.

(c) This definition does not apply to Title 13, chapter 37, part 6.

Conversely, expenditure is defined by §13-1-101(18) as:

(a) "Expenditure" means a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value:

(i) made by a candidate or political committee to support or oppose a candidate or a ballot issue; or

(ii) used or intended for use in making independent expenditures or in producing electioneering communications.

(b) The term does not mean:

(i) services, food, or lodging provided in a manner that they are not contributions under subsection (9);

(ii) payments by a candidate for personal travel expenses, food, clothing, lodging, or personal necessities for the candidate and the candidate's family;

(iii) the cost of any bona fide news story, commentary, blog, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication of general circulation; or

(iv) the cost of any communication by any membership organization or corporation to its members or stockholders or employees.

(c) This definition does not apply to Title 13, chapter 37, part 6.

Greg GianforTAX website

Both complainants Merwin and FACT point to the Greg GianforTAX website as evidence that the Cooney campaign and the DGA are coordinating campaign activity meant to support candidate Cooney. Because of the Greg GianforTAX website's similarity to materials distributed by candidate Cooney

(discussed in detail below), each complainant argues the DGA coordinated this activity with the Cooney campaign.

According to the DGA, the 'GregGianforTAX' website was launched on August 6, 2020 (FOF No. 4). The website contains an attribution message indicating that it was paid for by the DGA. While the site does not directly support or oppose any Montana candidates for elected office, it depicts Republican gubernatorial candidate Greg Gianforte in both name and image. Publicly available domain registration records indicate the 'GregGianforTAX' internet domain was registered on July 8, 2020 (FOF No. 4). Candidate Cooney did not report receiving any in-kind contributions or making any campaign expenditures in conjunction with this website and internet domain. The DGA's response in this matter indicated that they were responsible for financing the Greg GianforTAX website; neither of candidate Cooney's responses disputed that assertion. At the same time, neither stated that the Cooney campaign was not involved in the conception or creation of the Greg GianforTAX website (FOF Nos. 9, 9A).

Was the Greg GianforTAX website coordinated between the Cooney campaign and the DGA? The COPP analyzes the established facts in this case against the criteria established in 44.11.602(1), ARM.

- The Cooney campaign released a 'Greg GianforTAX' digital video ad on August 4, 2020 as a paid election communication in the month of August (FOF No 5).

- The Cooney campaign reported a \$4,347 expenditure for an election communication, ‘Greg GianforTAX’ digital video ad, running August 4 to August 23, 2020 (FOF No. 7).
- The Cooney campaign reported a \$5,843 expenditure for creating a ‘Greg GianforTAX’ digital video ad (FOF No. 8).
- The DGA launched the ‘Greg GianforTAX’ website, greggianfortax.com on August 6, 2020 (FOF No. 6)
- The GregGianforTAX.com website qualifies as an electioneering communication under Mont. Code Ann. §13-1-101(16). The website clearly depicts a Montana candidate (Greg Gianforte), could be accessed by more than 100 recipients in the voting district (in this case, the entire State of Montana), and began online distribution on August 6, 2020, within sixty days of the initiation of voting in Montana’s General election (FOF No. 10).
- Publicly available domain registration records indicate greggianfortax.com was registered on July 8, 2020. (FOF No. 4A)
- The Cooney campaign did not report an expenditure for a July 8, 2020 domain registration for greggianfortax.com (FOF Nos. 7, 8)
- The DGA did not report an expenditure for a July 8, 2020 domain registration for greggianfortax.com or production of the website (FOF No. 3A)
- Both the DGA and the Cooney campaign argue that the website does not represent a contribution because it is a “de minimis” activity that the DGA spent less than \$35.00. (FOF Nos. 9, 9A)
- A Greg GianforTAX twitter social media account, [@gianfortax](https://twitter.com/gianfortax), was initiated in August 2020, the 1st tweet recorded August 6, and active to October 2020 (FOF No. 4C)

Neither the Cooney campaign nor the DGA specifically deny that the Greg GianforTAX website was coordinated between the Cooney campaign and the DGA. Rather, both the DGA and the Cooney campaign responded that the contribution was not a reportable contribution, as it was *de minimis*.

The Greg GianforTAX website replicates material financed and distributed by candidate Cooney (the Greg GianforTAX video) “in substantial part”, a consideration for coordination under 44.11.602(2)(d), ARM.

(d) the communication or reportable election activity replicates, reproduces, republishes or disseminates, in whole or in substantial part, any material designed, produced and paid for, or distributed by the candidate, except as set forth in (3)(e).

44.11.602(3)(e), ARM, however, does provide an exception for “the independent use of statements, images, or other information that is appropriated from a public source”. The DGA did not claim, however, that it appropriated the information for its website independently from the Cooney campaign’s social media posting of the Greg GianforTAX digital advertisement.

The most notable fact remains that the ‘greggianfortax.com’ domain was registered on July 8, 2020. Neither the Cooney campaign or the DGA has reported an expenditure for the domain registration, however the DGA has taken full responsibility for the website and its creation. Given the Cooney campaign’s ‘Greg GianforTAX’ digital ad was posted 27 days after the domain registration and 2 days before DGA published the ‘GregGianfortax’ website, timing indicates coordination between the DGA and Cooney campaign.

The Commissioner examines the assertion that the 'Greg GianforTAX' website is "*de minimis*" and therefore not reportable election activity. The term *de minimis* is provided the following definition under Mont. Code Ann. §13-1-101(11):

"an action, contribution, or expenditure that is so small that it does not trigger registration, reporting, disclaimer, or disclosure obligations under Title 13, chapter 35 or 37, or warrant enforcement as a campaign practices violation under Title 13, chapter 37".

44.11.603(2)(a) and (b), ARM, add that (emphasis added):

(2) Acts, contributions, or expenditures that may, depending on the circumstances, be considered *de minimis* include:

(a) the creation of electronic or written communications or digital photos or video, on a voluntary (unpaid) basis by an individual, including the creation and outgoing content development and delivery of social media on the internet or by telephone;

(b) the provision by an individual or political committee of personal property, food, or services with a cumulative fair market value of less than \$35 in the aggregate for any single election

In this matter, the DGA asserted it was responsible for the website (FOF No. 9A), not an individual volunteering his or her time under which the *di minimis* rule may apply. Candidate campaign websites historically have been treated as reportable election activity, no matter the cost of obtaining a domain name. 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 matter⁵.

The Cooney campaign and/or the DGA did not file a firewall policy with the COPP (FOF No. 1). Firewall policies meant “ to prevent the flow of information about the candidate's campaign plans, projects, activities, or needs from the persons providing services to the candidate to persons involved in the creation, production, or dissemination of the communication or activity” is another consideration for coordination, 44.11.602(2)(f)(i), ARM. Despite his past participation in a call with the DGA (see *Merwin v Cooney*, COPP-2020-ETH-007), candidate Cooney did not file a firewall policy detailing how his campaign would prevent information from freely flowing to/from the DGA. Taken together, there are sufficient facts in this matter to determine the Greg GianforTAX website was a coordinated election activity, and therefore a coordinated expenditure.

44.11.602(5), ARM:

“A "coordinated expenditure" shall be treated and reported as an in-kind contribution from and expenditure by the person funding, facilitating, or engaging in the election communication, electioneering communication, or reportable election activity. Both the candidate and the committee shall report the coordinated expenditure and/or in-kind contribution as the case may be”.

In this matter, candidate Cooney failed to report the “GregGianforTAX’ website as an in-kind contribution received.

⁵ Also keep in mind that the Greg GianforTAX website included design work to create the contents of the website. Had the Cooney campaign itself paid to register the domain and build such a website from scratch it is inconceivable that the cost would have fallen below the \$35.00 amount noted by the DGA.

Greg GianforTAX video

The complaint filed by FACT also focuses on a Greg GianforTAX video posted by the Cooney campaign to its campaign Facebook and Twitter pages as well as its YouTube channel (FOF No. 5). FACT argues that because this video was similar in nature to the Greg GianforTAX website and released around the same time, the Cooney campaign likely coordinated the video with the DGA.

On C-5 campaign finance reports filed with the COPP, candidate Cooney reported making one expenditure of \$4,347.83 to run the Greg GianforTAX video on his campaign Facebook page from August 1 to August 23 (FOF No. 7). Similarly, the campaign reported an expenditure of \$5,843.00 for the production of the Greg GianforTAX video (FOF No. 8). In its September 21 response to this complaint the Cooney campaign again took responsibility for all costs associated with the Greg GianforTAX video noted by FACT (FOF No. 9A).

Based on this information, the Greg GianforTAX video noted by FACT would qualify as an expenditure of the Cooney campaign. The production and distribution of this video was clearly a “purchase” made by the campaign (using campaign funds) to “support” candidate Cooney, conforming with the definition of an expenditure provided §13-1-101(18), MCA. Additionally, the video included an attribution message indicating the Cooney campaign had financed the material.

As a campaign expenditure made by candidate Cooney, the Greg GianforTAX video could not be considered coordinated. In his Decision in the

matter of *Montana Democratic Party v. Chase Reynolds, Montana Republican Legislative Committee, and The Political Company*, Commissioner Mangan wrote of similar allegations that:

Because the mailers in question cannot be classified as an expenditure activity of a third party working “in cooperation with, in consultation with, at the request of, or with the express prior consent” of candidate Reynolds, they cannot be considered coordinated activity under either Mont. Code Ann. §13-1-101(10), or 44.11.602(1), ARM.

Because candidate Cooney, not the DGA, paid to produce and distribute the Greg GianforTAX video, it would not be considered a coordinated expenditure under relevant Montana campaign finance rules or laws. The allegation the GianforTax digital video advertisement was a coordinated expenditure is hereby dismissed.

Part Two: Contribution Limits

Both the Merwin and FACT complaints allege that the value of the campaign activity coordinated between candidate Cooney and the DGA exceeds the relevant \$710.00 contribution limit. By coordinating the activity, the complainants argue, candidate Cooney willingly and knowingly accepted contributions exceeding Montana’s established contribution limits.

As noted in *Part One*, the term contribution is defined in campaign finance law under Mont. Code Ann. §13-1-101(9). 44.11.227(1)(a), ARM, states that individual donors and political committees (excluding political party committees) can contribute a maximum of \$710.00 to a Montana gubernatorial candidate per election (election being a contested Primary and/or the General election). This would mean that the Cooney campaign could accept a maximum

of \$710.00 from any individual donor or political committee (political party committees excluded) for the Primary election, and another \$710.00 for the General.

On C-5 campaign finance reports filed with the COPP, candidate Cooney reported receiving two separate contributions from the DGA, each for \$710.00 and designated each for Montana's General election (FOF No. 7). The Cooney campaign did not report or designate a contribution from the DGA for the Primary election (FOF No. 7A). Combined, those two cash contributions total \$1,420.00, double the per-election contribution limit established under 44.11.227(1)(a), ARM. Candidate Cooney did not report returning any over-contribution limit funds to the DGA prior to receipt of either the Merwin or FACT complaints. (FOF Nos. 7, 8).

Candidate Cooney's designation of \$1,420.00 in monetary contributions from the DGA to the General election constitutes an over-limits contribution received by the campaign, a Montana campaign practices violation.

The value of the Greg GianforTAX website would also count towards the DGA's \$710.00 contribution limit per election for candidate Cooney. As a coordinated expenditure activity, it qualifies as a contribution received by the campaign, 44.11.602(5), ARM. Candidate Cooney did not report the value of the GianforTAX website as an in-kind contribution.

Unlike the Greg GianforTAX website, the Greg GianforTAX video would represent a campaign expenditure made by candidate Cooney. As an expenditure made directly by the Cooney campaign, the video would not qualify

as a contribution received from the DGA under Mont. Code Ann. §13-1-101(9). The value or cost of the video would not count toward the DGA's \$710.00 contribution limit per election.

Part Three: Other

As identified in part two, the Cooney campaign reported the advertising cost of the Greg GianforTAX video on its August 20, 2020 periodic campaign finance report and the production costs for the gianforTAX video on its September 20, 2020 campaign finance report (FOF Nos. 7, 8). The video was run as a paid digital advertisement from August 4 to August 23, 2020 (FOF No. 7). Candidate Cooney was obligated to report the production costs at the time the expense was incurred, 44.11.502(2), ARM. As this service was provided prior to August 4, 2020, candidate Cooney should have reported the production costs as a debt owed to the on the August 20, 2020 campaign finance report.

FINDINGS

The Commissioner finds the GregGianforTAX.com website is a reportable electioneering communication. The Commissioner finds the Cooney campaign and the DGA coordinated the GregGianforTAX.com website activity. The Commissioner finds the costs related to the GregGianforTAX.com website represents an in-kind contribution from the DGA to the Cooney campaign.

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

The Commissioner finds sufficient facts exist to support a determination that candidate Cooney failed to report an in-kind contribution from the DGA.

The Cooney campaign reported receiving two \$710 contributions from the DGA and designated the contributions to the General election. Montana law limits a campaign contribution from an independent political committee to \$710 to a 2020 Montana gubernatorial candidate per election.

Sufficiency Finding No. 2: There are sufficient facts to show the Cooney campaign accepted a contribution over the campaign finance limit for the General election.

The Commissioner finds sufficient facts exist to support a determination that candidate Cooney accepted an over the limit contribution from the DGA.

Sufficiency Finding No. 3: There are sufficient facts to show that the Cooney campaign failed to timely report a debt in the amount of \$5843.00 on the August 20, 2020 periodic campaign finance report.

The Commissioner finds sufficient facts exist to support a determination that candidate Cooney failed to timely report a debt as required by Montana law.

The Commissioner notes while the expenditure was ultimately reported on the subsequent periodic finance report, it was not reported as a debt when incurred.

The Commissioner orders the Cooney campaign to amend its campaign finance reports to include the value of the website as an in-kind contribution from the DGA, refund any amount over \$710 from DGA contribution activity in the General election to the DGA, and properly designate the second \$710 as a primary contribution should obligations remain or refund the amount to the DGA.

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 the Cooney campaign 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).

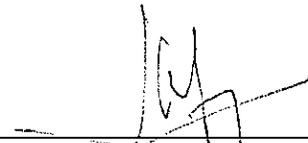
Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the above Sufficiency Findings, a civil fine is justified. Mont. Code Ann. § 13-37-124. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying a civil fine or civil prosecution of the Cooney campaign. 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. §§ 13-37-216(1)(a)(i), 229(1)(g). *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 16th day of October, 2020.



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