

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Wemple v. Connell No. COPP 2014-CFP-041	Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act
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On October 7, 2014, Jon Wemple, a resident of Victor, Montana filed a complaint against Patrick Connell, a resident of Hamilton, Montana and 2014 candidate for election to the Montana Legislature from Senate District 43 (Ravalli County).

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this Decision are a candidate's: personal use of campaign funds, in-kind expenditures, deposit of funds into the campaign depository and cash payment of campaign expenses.

FOUNDATIONAL FINDING OF FACTS

The foundation facts necessary for this Decision are as follows:

Finding of Fact No. 1: Patrick Connell was elected to the Montana

legislature in 2010 and 2012, representing House District 87 (HD 87). (SOS Website).

Finding of Fact No. 2: Mr. Boulanger served as Senator representing SD 44 at the 2013 Montana legislature. (SOS Website).

Finding of Fact No. 3: Mr. Connell and Mr. Boulanger ran as opponents in the 2014 Republican primary election for nomination as the Republican candidate for SD 43. Mr. Connell won the 2014 Republican primary election and the general election for SD 43. Mr. Connell served as a state senator from SD 43 during the 2015 Montana legislative session. (SOS Website).

DISCUSSION

Mr. Connell was a 2014 candidate for election to the Montana legislature from SD 43 (FOF No. 3). As a candidate for election Mr. Connell prepared and filed certain statements and reports with the COPP. Mr. Wemple's complaint alleges that the reports filed with the COPP show that Candidate Connell improperly: applied campaign funds to personal use; did not deposit cash donations received by his campaign; made or reimbursed expenditures in the form of "loans" that were not transacted through Candidate Connell's campaign account; and, failed to keep accounts and records supporting contributions and expenditures.

Several of these complaints raise issues that have not previously been discussed by a Commissioner. Each of the four categories of complaint is discussed separately below.

I. Personal Use of Campaign Funds

The complaint alleges that Candidate Connell improperly used campaign funds for personal use when the Connell campaign paid:

- \$622.60 for Candidate Connell wife's plane ticket to Washington

DC;

- \$683.49 for attendance and participation by Candidate Connell and his wife in the State of Montana Chamber of Commerce golf event;
- \$229 to reimburse Candidate Connell;
- \$500 in fees to attend events related to the forestry industry;
- money spent to attend conferences in various locations, including Helena, Whitefish and Big Sky, outside of the boundaries of SD 43; . . .and,
- other general use of campaign funds for “spouse, meals, alcohol, lodging, travel, subscriptions, dues and conferences related to his profession.”

The Commissioner makes the following findings of fact relative to the complaint allegations of personal use of campaign funds:

Finding of Fact No. 4: On May 22, 2014, Candidate Connell filed his original C-5 campaign finance report for the pre-primary reporting period of December 21, 2012 through May 20, 2014. Under loans to the campaign, Candidate Connell listed three loans he made personally to his campaign through in-kind expenditures:

- \$622.60 - Flight cost for spouse to campaign meeting with Congressman Daines;
- \$118.18 - Expenses while at Washington DC, unreimbursed;
- \$50 - extra baggage charge, Washington DC round trip.

(Commissioner’s records).

Finding of Fact No. 5: On November 17, 2014, Mr. Connell filed an amended C-5 campaign finance report for the pre-

primary reporting period and listed three loans he made personally to his campaign through in-kind expenditures:

- \$0 - Flight cost for spouse to campaign meeting with Congressman Daines (with \$0 balance due);
- \$118.18 - Expenses -- Washington DC, unreimbursed;
- \$50 - extra baggage charge, Washington DC round trip.

(Commissioner's records).

Finding of Fact No. 6: Candidate Connell wrote campaign check# 1005 to himself in the amount of \$683.49 for payment of the loan he made to his campaign based on his personal in-kind payment of Governor's Cup related costs. (Connell campaign account bank records).

Finding of Fact No. 7: Candidate Connell made campaign payments of at least \$828 for events or actions tied to the forestry industry including: (8/31/13) \$120 MT Wood Products Assn (MWPA) annual meeting registration; (9/26/13) \$226 Treasure State Resource Industry Assn mileage--roundtrip Big Sky; (9/26/13) \$18.24 Treasure State Resource Industry Assn meal; (12/6/13) \$98.23 Lodging MT Logging Assn (MLA) meeting; (12/7/13) \$12.29 MLA meal; (12/7/13) \$31.10 MLA travel; (9/13/13) \$65 donation MT Wood PAC (sculpture) check; (10/15/13) \$31 Society of American Foresters (SAF) dinner; (7/18/14) \$61 Darby Logger Days dinner; (8/28/14) \$16 breakfast with MWPA Board; (8/28/14) \$150 registration fee for MWPA conference.
(Commissioner's records).

Finding of Fact No. 8: Candidate Connell is the registered agent of "Timberland Forestry Services, LLC", an active LLC managed by partners and registered with the SOS since June 2009. Mr. Connell further states in his response to the complaint that he is a "certified professional forester" and has served in the "Montana Forest Products Industry". (SOS Website and Candidate Connell response).

This Decision now addresses whether the expenses set out FOF Nos. 4-8 were properly paid as campaign expenses.

The complaint asserts that personal use or benefit has been defined by past Commissioners applying Montana law in a manner that makes the above expenses personal to Pat Connell rather than a campaign expense for Candidate Connell. The complaint points to the COPP's Decision in *Berry v. Fanning*, April 23, 2013 (Commissioner Murry) and cites to §13-37-240(2) MCA. Neither citation, however, provides an adequate definition of personal use. Section 13-37-240(2) MCA applies to "section 240" and is therefore limited to surplus campaign fund issues. The complaint against Candidate Connell does not concern surplus campaign funds so §13-37-240(2) MCA does not provide an appropriate legal standard in this Decision.

The *Berry v. Fanning* Decision is likewise of little use in this Decision. The *Berry v. Fanning* Decision does recite that "...payments from a campaign account must be used for campaign purposes and not for personal expenses unrelated to the campaign." However there is no reference to law other than the general expenditure definition of §13-1-101(11)(a) MCA and no explanation or identification of those expenses Commissioner Murry determined to be personal rather than campaign related. A search of COPP Decisions, regulations and the COPP's candidate accounting manual yielded no further definitions on this issue.¹ This Decision is therefore the first detailed substantive discussion by the COPP as to whether a particular expenditure constitutes a candidate's use of campaign funds to pay personal expenses.

¹ *Willhoff v. Cooney*, December 10, 2003 (Commissioner Vaughey) and *Frasier v. Simonich*, May 15, 2005 (Commissioner Higgins) raised issues of a public official's personal use of state resources, an issue unrelated to a candidate's personal use of campaign funds. *O'Hara v. Pinocci*, COPP-2014-CFP-027 (Commissioner Motl) referenced the candidate's repeated use of campaign funds to pay for meals but did not further frame or address personal use issues.

The Commissioner begins this discussion by noting that Candidate Connell's expenditures were fully reported and disclosed as campaign expenses. This is exclusively an analysis as to whether the expenses set out FOF Nos. 4-8 were properly paid as campaign expenses.

Montana law defines a permissible candidate campaign expenditure at §13-1-101(11)(a), MCA. While lacking a direct definition of a personal use, §13-1-101(11)(b)(ii) MCA excludes as a campaign expense: "payments by a candidate for a filing fee or for personal travel expense, food, clothing, lodging, or personal necessities for the candidate or the candidate's family." Logically, a campaign, including the campaign of Candidate Connell, cannot use campaign funds for something that is excluded as a campaign expense by §13-1-101(11)(b)(ii) MCA. The Commissioner will therefore apply the language of §13-1-101(11)(b)(ii) MCA as a measure of personal use.²

At the outset the Commissioner notes that the above interpretation of §13-1-101(11)(b)(ii) MCA requires a redetermination of the manner in which this office has treated a candidate's filing fee. Most candidates, including candidate Connell (who paid his \$15 filing fee with campaign funds), pay the cost of the filing fee as a campaign expense. A candidate filing fee expense has routinely passed inspection by COPP staff as a permissible allowed campaign expense under the following reasoning:

The fact that a filing fee need not be listed as a campaign expense does not mean that a candidate's

² The COPP is currently in rulemaking. The proposed rules will be published August 13, 2015 and include a rule defining "personal use." The proposed personal use rule is consistent with this Decision.

campaign committee cannot choose to pay the filing fee, at which point the payment does become a campaign expense that must be reported. In fact, many campaigns do list and pay the filing fee as a campaign expense.

Bomboy v. Todd, COPP-2014-CFP-030 (Commissioner Motl).

While candidate culture (and the COPP's acceptance of that culture) has heretofore regarded a candidate filing fee as a proper campaign expense, application of §13-1-101(11)(b)(ii) MCA as a measure of personal use requires the opposite determination. Accordingly the Commissioner determines that as a matter of law a contribution does not include "filing fees paid by the candidate." §13-1-101(7)(b)(iv) MCA. An expenditure does not mean "...payments by a candidate for a filing fee..." §13-1-101(11)(b)(ii) MCA. Stated another way, the Montana legislature has determined that the cost of filing for office has to be and is personal to the individual who, by filing, becomes a candidate. For the purposes of 2016 elections and thereafter the Commissioner determines that a candidate may not use campaign funds to pay the candidate's filing fee and any existing Decision or policy of the COPP to the contrary is hereby changed in conformance with this determination.³

The Commissioner now turns to the travel, event registration and event participation (including lodging and beverage) costs set out in FOF Nos. 4-8. The complaint argues that there is a personal element to these campaign expenses as Candidate Connell personally benefited from his wife's company, the food and beverages consumed, and the professional contacts made at the

³ Given COPP past policy of allowing campaign fund use to pay filing fees Candidate Connell is excused, as are all other similarly situated candidates, from any campaign practice violation based on this particular campaign practice.

events attended. In response Candidate Connell describes a campaign purpose for each activity. In particular Candidate Connell asserts that his status as a “true” Republican was challenged by some in SD 43 such that his campaign placed a priority of showing his Republican Party relationship with other Republican office holders or candidates.

Specifically, Candidate Connell demonstrated that the travel cost for his wife allowed his campaign the opportunity for a photo of Candidate Connell and his wife to be taken with Republican Congressman Steve Daines. Likewise, the cost of the Governor’s Cup charitable event attendance provided his campaign the opportunity for Candidate Connell and his wife to be seen in association with other Republican leaders. Finally, Candidate Connell asserts that the costs associated with conferences and events connected to the forest products industry allowed his campaign to maintain contact with a group of people who provided financial and political support for his candidacy.⁴

The Commissioner determines that there was a campaign purpose element to each campaign expense challenged by the complaint in that each expense was made “...for the purpose of influencing the results of an election.” §13-1-101(11)(a) MCA. The fact that there may also be a personal use or personal purpose to the campaign expense does not take the expenditure out of §13-1-101(11)(a) MCA and place it into the personal use reach of §13-1-101(11)(b)(ii) MCA. The Commissioner dismisses the part of the complaint against

⁴ The Commissioner notes that in the 2015 legislature session, Senator Connell sat on three legislative committees related to the forest products industry: Natural Resources, Energy and Telecommunications and Business, Labor and Economic Affairs.

Candidate Connell alleging personal use of campaign funds.

It is noted that in order to provide opportunity for Mrs. Connell's photo and contact with Congressman Steve Daines it was necessary to pay the entire cost of the plane ticket. Similarly indivisible are the costs for conference registration, meals and beverages. Those costs are fixed and need to be paid in full if the campaign is to engage in the desired campaign activity. In contrast, a divisible value (such as the campaign's purchase of an asset with value after the close of the campaign) should be allocated in value according to the amount applicable to the time period of the campaign. The remaining portion of value should be recovered by sale of the asset at the end of the campaign.

II. Separation of Campaign Accounts

Under Montana law any candidate, including Candidate Connell, is subject to a limit on the amount of contributions received from a political committee or individual. §13-37-216(1)(a) MCA. That limit applies per election with a contested primary and a general election counted as separate elections. §13-37-216(6) MCA.

Candidate Connell was involved in a contested primary election (FOF No. 3). Accordingly, Candidate Connell could accept up to \$340 (\$170 per election) from one individual during his primary election with \$170 of that amount to be held in trust in a separate account for use in the general election: "[g]eneral election contributions received prior to the primary election must be maintained in a separate account and shall not be used until after the primary election." 44.10.330(2)(c) ARM.

Finding of Fact No. 9: During the primary election Candidate Connell accepted \$940 in general election funds (\$160 from political committees and \$780 from individuals). (Commissioner's records).

Finding of Fact No. 10: Candidate Connell deposited the general election funds into the same depository account used for his primary election funds. Candidate Connell did not place the general election funds into a separate account. (Candidate Connell interview).

Based on Findings of Fact Nos. 9 and 10 the Commissioner determines the following:

Sufficiency Finding No. 1: There are sufficient facts to show that Candidate Connell acted in violation of Montana's campaign practice law by depositing primary and general election funds into the same bank account, thereby failing to establish the "separate" general election account required by law.

Candidate Connell may protest that he won the primary election (thereby entering the second or general election (§13-37-216(6) MCA) and was therefore under no obligation to return general election donations as only the losing candidate "must return the [general] election contributions to the donors." 44.10.330(3) ARM. The separate account requirement of 44.10.330(2)(c) ARM, however, applies to every primary election candidate, whether a winner or a loser.⁵ The fact that both Republican candidates in the 2014 SD 43 Republican primary election (*See Connell v. Boulanger*, COPP-2014-CFP-036) ran into problems with unsegregated primary and general funds shows that the

⁵ The COPP staff understands that the "separate account" requirement is likely being ignored by a number of candidates. The COPP, however, cannot condone or excuse this conduct as it is directly contrary to 44.10.330(2)(c) ARM. Further, a candidate who loses the primary election with general election contributions in his or her primary election account may create a repayment problem that may be difficult to resolve. *Connell v. Boulanger*, COPP-2014-CFP-036. At least part of the COPP's mission is to protect candidates and this ARM serves candidates as well as the public.

separate account requirement for primary and general election funds is a sound requirement.

III. In-kind Expenditures by the Candidate

Candidate Connell's 2014 SD 43 campaign reported primary election campaign activity that included over 40 campaign expenditures made by the candidate through use of personal funds. Each such expenditure became an "in-kind" transaction that created campaign value that a candidate must report and disclose as a loan or contribution to his or her campaign.

Candidate Connell individually listed each such personal campaign expenditure as an expense item that created a "loan" to his campaign. Candidate Connell's method of reporting, while producing a cumbersome campaign finance report, did fully report and disclose the amount, date, purpose and vendor information required for each expenditure.⁶ Still, for the reasons set out in this Decision, multiple personal in-kind campaign contributions through in-kind campaign expenditures by candidates is discouraged by Montana law. Further, such a practice leads to a hard to read campaign finance report that encourages a COPP complaint by a member of the public who has difficulty deciphering the information in the report.⁷

Montana law anticipates and requires a simple system of handling and reporting campaign transactions as it requires that a single campaign

⁶ Section 13-37-230 MCA requires the listing of the name of the vendor paid along with "amount, date and purpose of each expenditure."

⁷ Multiple instances of candidate personal payment of campaign expenses, such as involved in this Matter, when entered into the CERS reporting system will be displayed at three separate CERS reporting blocks: Candidate loans, debts and debt payments (if repaid). In contrast a normal campaign transaction is displayed once - either as a contribution or an expense and is much easier to understand.

depository be used "...for the purpose of depositing **all** contributions received and disbursing **all** expenditures made..." [§13-37-205 MCA (emphasis added)]. That same law adds that "...a candidate may not utilize the candidate's regular or personal account in the depository as a campaign account." *Id.* The COPP Candidate Green Book⁸ at page 6 states:

It is essential that all monetary receipts – including a candidate's own funds- be deposited in the campaign account and that all money spent by the campaign be by checks drawn on this account (the only exception is the petty cash fund). Proper use of the campaign checking account will make record keeping and reporting much easier.

Consistent with Green Book directives, past Commissioners have determined that use of a personal account and a personal credit card as a campaign account is a violation of Montana's campaign practice laws [*Welker v. Bennett*, (June 30, 1999; Commissioner Vaughey)] and that there can be no intra-account transfers of funds involving a campaign account. (*Wilcox v. Raser*, May 26, 2010; Commissioner Unsworth).

Candidate Connell's personal campaign expenditures, as described in this matter, require a nuanced analysis. A single personal campaign expenditure by the candidate, including Candidate Connell, does not violate Montana campaign practice law as it is an "in-kind" contribution created by expenditure and there is no money from this contribution that can be deposited into a campaign depository. A series of such personal in-kind campaign expenditures, however, can create an alternate campaign depository and

⁸ COPP Accounting and Reporting Manual for Candidates, December 2013.

therefore potentially violates the prohibitions of §13-37-205 MCA: "...a candidate may not utilize the candidate's regular or personal account in the depository as a campaign account".

This Commissioner has previously addressed this issue of repeated personal candidate campaign expenditures in *O'Hara v. Pinocci*, COPP-2014-CFP-027. The *Pinocci* Decision involved 2012 campaign issues but the Decision was dated September 23, 2014 and therefore could not provide guidance to Candidate Connell who had already made his personal in-kind expenditure/contribution use by that date. Accordingly, the Commissioner will apply the same treatment to Candidate Connell as afforded Candidate Pinocci. Thus there will be no separate campaign practice violation finding against Candidate Connell for his repeated personal in-kind expenditure/contribution transactions in his 2014 campaign. The Commissioner repeats the directive set out in the *Pinocci* Decision as follows:

As to future situations, based on the above discussion hereafter a candidate's repetitive use of personal in-kind expenditures/contributions, in place of use of the campaign bank account will by itself be a campaign practice act violation. The Commissioner, through this Decision, hereby establishes that a candidate can make only a limited use of in-kind contributions/expenditures in his or her own campaign with that use limited to instances when it is not practical or possible for the campaign to make the expenditure directly with campaign funds. Any such in-kind contribution/expenditure by a candidate and his or her campaign must be a small minority of campaign expenditures and must result in the expenditure being fully, understandably and timely disclosed and reported. The Commissioner notes that "practical or possible" includes financial necessity. That is, the Commissioner accepts that a candidate who has not yet

raised sufficient funds in his or her campaign account and who lacks the ability to make a cash loan to his campaign may find that the only practical or possible way to make campaign expenditures is through use of his or her personal credit card. A candidate should be prepared to make this showing if he or she engages in multiple and extended in-kind campaign expenditures through the use of personal funds or personal credit to finance campaign activity.

IV. Use of Cash To Make Campaign Expenditures

Under Montana law a candidate, including Candidate Connell, must use a campaign depository bank account to “deposit[ing] all contributions received and disburse[ing] all expenditures made by the candidate.” (§13-37-205 MCA). The Commissioner examined Candidate Connell’s campaign records for the purpose of determining whether his campaign properly used the campaign bank account and properly disclosed and reported contributions or expenditures.⁹

A candidate campaign, including Candidate Connell’s campaign, may accept a contribution in the form of cash or check. Candidate Connell’s pre-election campaign finance report disclosed such potential cash receipts from the sale of raffle tickets, pass the hat events and individual contributors of less than \$35 each. The complaint focuses on the use of cash to pay campaign

⁹ The Commissioner requested an examination of Candidate Connell’s pre-primary campaign accounts. Candidate Connell responded by boxing his records and driving to the COPP office in Helena where he met with the Commissioner and COPP investigator for three hours on July 17, 2014.

expenditures: a \$229 loan repayment and 8 payments (totaling \$400) from “from cash on hand”.

Finding of Fact No. 11: The pre-primary campaign finance report filed by Candidate Connell lists 8 expenses as follows:
2/12/14, \$50 to Pat Connell “Paid from cash on hand”;
2/17/14, \$16.96 to Pat Connell “from cash on hand”;
2/17/14, \$98.23 to Pat Connell “from cash on hand”;
2/17/14, \$5.71 to Pat Connell “Paid from cash on hand”;
2/17/14, \$6.50 to Pat Connell “Paid from cash on hand”;
2/17/14, \$24.37 to Pat Connell “Paid from cash on hand”;
2/17/14, \$98.23 to Pat Connell “Paid from cash on hand”;
2/18/14, \$100 to Pat Connell “Paid from cash on hand”.
These 8 expenses total approximately \$400.
(Commissioner’s records).

The Commissioner requested (and received) a copy of the complete Connell campaign bank account records. The Commissioner examined and compared Candidate Connell’s pre-primary campaign finance report and the campaign bank account records for the pre-primary election period. Based on that examination the Commissioner determines as follows:

Finding of Fact No. 12: Candidate Connell reported campaign receipts on his SD 43 pre-primary campaign finance report as follows:

- a. \$4,245.22 (\$229 cash and \$3588 in-kind) in Candidate Loans¹⁰
- b. \$1,650 from fundraisers
- c. \$ 2,440 from PACs
- d. \$11,760 from contributors over \$35 (includes \$930 general)
- e. \$1,283 from contributors under \$35

(Commissioner’s records).

Finding of Fact No. 13: FOF No 12 reports a total of \$17,133 in cash receipts by Candidate Connell’s campaign.¹¹ This

¹⁰ The Commissioner determines (based on later payments) that the \$229 cash listing is a listing error such that the entire \$4,245.22 is an in-kind amount resulting from over 40 expenditures by the candidate. Please see the discussion at pages 11-14 of this Decision as to the problems inherent in such use of in-kind expenses.

amount is derived by adding the amounts listed in FOF 12 (b-e). Any in-kind contribution is not included in the cash total.

Finding of Fact No. 14: A review of Candidate Connell's campaign bank records for the period of the pre-primary campaign finance report shows the following deposits into the campaign account: \$2,040 (May 2013); \$100 (June); \$380 (July); \$0 (August); \$605 (September); \$160 (October); \$160 (November); \$1,855 (December); \$704 (January 2014); \$1,259 (February); \$4,178 (March); \$1,946 (April); \$2,480 (through May 17).¹² These deposits total \$15,867. (Commissioner's records).

Finding of Fact No. 15: There is a difference of \$1,266 between the amount of contributions reported by Candidate Connell (FOF Nos 12 and 13) and the amount of contributions deposited by Candidate Connell into his campaign bank account during the time period of the report. (FOF No. 14).

Candidate Connell was required by law (§13-37-205 MCA) to deposit all contributions received into his campaign bank account. Based on FOF Nos. 12-15 the Commissioner makes the following finding:

Sufficiency Finding No. 2: There are sufficient facts to show that Candidate Connell acted in violation of Montana's campaign practice law by failing to deposit \$1,266 in the campaign depository.

The Commissioner next examines whether or not contributions to Candidate Connell's campaign (including the \$1,266 in undeposited contributions) were properly reported and properly supported by records.

An inspection of Candidate Connell's campaign finance report shows the required information properly listed as to each contribution. Further, the

¹¹ Candidate Connell placed general election and primary election contributions into the same campaign bank account.

¹² The reporting period ended May 17 but Candidate Connell reported through May 19 so the amount listed for May includes deposits through May 19.

Commissioner's investigator determined that each contribution shown by the campaign bank account records was properly listed in the campaign finance report. Even the cash contributions were properly reported and disclosed --- the only problem is that \$1,266 of the cash reported was not deposited into the campaign bank account.

Contributions, in addition to being reported properly, must also be supported by records kept by the candidate. Specifically Montana law requires that a candidate have a record consisting of a "deposit slip" or "[a] statement showing the amount received from or provided by each person..." §13-37-207(2) MCA and a ["...detailed accounts of all contributions received..." §13-37-208(1)(a) MCA]. The records inspection by the Commissioner and investigator showed that Candidate Connell's contribution recordkeeping was thorough. Candidate Connell had a record of every contribution which included the name and amount received from each contributor, even those who gave less than \$35.¹³

The Commissioner next examined the records of Candidate Connell's bank account, campaign finance report and campaign records to determine whether there were proper records and reporting of expenditures, including expenditure use of the \$1,266 in undeposited campaign funds.

Finding of Fact No. 16: A review of Candidate Connell's campaign bank records for the period of the pre-primary campaign finance report shows that his campaign wrote 92 checks and one automatic withdrawal (check printing

¹³ Candidate Connell's campaign took in contributions from the sale of raffle tickets for a chainsaw drawing at \$25 each. The stub for each raffle ticket included the name of each contributor.

charges of \$23.55 in May of 2013) making expenditures in the following amounts per month: \$23.55 (May 2013); \$00 (June); \$247.72 (July); \$703.49 (August); \$652.77 (September); \$744.30 (October); \$523.91 (November); \$241.59 (December); \$1618.82 (January 2014); \$2,058.59 (February); \$2,854.79 (March); \$2,636.11 (April); \$2,636.14 (May, through May 17)¹⁴; The total of expenses made through the campaign account for this time period is \$14,941.78. (Commissioner's records).

Finding of Fact No. 17: Candidate Connell's pre-primary campaign finance report disclosed \$15,863.18 in expenditures. (Commissioner's records).

Finding of Fact No. 18: Candidate Connell's campaign finance report disclosed \$921.14 more in expenditures than were made by checks issued through his campaign bank account. (Commissioner's records).

Candidate Connell, of course, had sufficient undeposited campaign funds (in the form of undeposited cash contributions of \$1,266) to use to cover the \$921.14 in reported pre-primary campaign report expenditures that were not made by checks issued through the campaign bank account.

Candidate Connell testifies that all undeposited cash was used for campaign expenses.¹⁵ Candidate Connell's representation is supported by fact as the COPP investigator determined that in the pre-primary reporting period alone \$672.20 of undeposited cash was used to repay debt owed to Candidate Connell:

Finding of Fact No. 19: Candidate Connell wrote 8 of the 92 checks issued by the campaign (see FOF No. 15) to himself: \$683.49 (check 1005); \$120 (check 1007); \$100 (check 1009); \$500 (check 1014); \$500 (check 1076); \$78.11 (check 1083);

¹⁴ The reporting period ended May 17 but Candidate Connell reported through May 19.

¹⁵ Candidate Connell's conversation with the Commissioner and COPP investigator on July 17, 2015.

and \$540.85 (check 1085)). These checks total \$2,522.45. (Connell campaign account bank records).

Finding of Fact No. 20: Candidate Connell's campaign finance report (Debts, payments only, CERS amended pre-primary report) lists \$3,194.65 in repayment to him for campaign debt created by in-kind expenses. These reimbursements include the \$400 listed in the complaint and identified in FOF No. 7. (Commissioner's records).

Finding of Fact No. 21: The difference between total debt paid (FOF No. 20) and debt paid by campaign check (FOF No 19) is \$672.22. Candidate Connell used undeposited campaign cash to pay this amount. (Commissioner's records).

Accepting that the undeposited cash was properly used for campaign expenses, it is still a violation as Montana law requires that: "[a]ll expenditures, except expenditures from a petty cash fund, shall be made by check drawn on the designated depository." 44.10.503 ARM, COPP Accounting Manual, p. 14.

Based on FOF Nos 16-21 the Commissioner makes the following finding:

Sufficiency Finding No. 3: There are sufficient facts to show that Candidate Connell acted in violation of Montana's campaign practice law by failing to pay \$1,266 in campaign expenses by check drawn on the designated depository.¹⁶

As with contributions Candidate Connell must disclose: "...all expenditures made..." (§13-35-208 MCA). The Commissioner and COPP investigator inspected Candidate Connell's archive of campaign records,¹⁷ including

¹⁶ The Commissioner's investigator compared expenses listed in Candidate Connell's campaign finance report with expenses paid by check. Nearly all listed expenses, other than debt, were paid by a check issued by the campaign finance account. There were, however, several listed expenses that were not paid by check but, instead, must have been paid by campaign cash.

¹⁷ Candidate Connell met with Investigator Sanddal and Commissioner Motl for about 3 hours on July 17, 2015. Candidate Connell brought a full banker's box of documents with him consisting of 28 file folders and 5 large manilla envelopes of information, including receipts supporting campaign expenditures.

expense records. Based on an inspection and comparison of Candidate Connell's campaign records with the expenses disclosed on Candidate Connell's campaign finance reports the Commissioner determines that campaign expenses were fully and properly supported by the candidate's campaign records, albeit that over \$1,000 of those expenses were paid with cash rather than with a check drawn on the campaign bank account.

This Decision therefore presents an odd circumstance of campaign practice violation. Candidate Connell fully reported and disclosed and therefore met the campaign reporting standards articulated by fellow Ravalli County Senator Fred Thomas:

*We [legislators] are to follow the [campaign practice] law to the N'th degree, report every dime to our campaign, report every expense that we incur in the time and manner that it's supposed to happen. I don't have any problem with that, that's our job as candidates. We are a citizen legislature and we owe it to our citizens, our voters in our district and the state voters as well.*¹⁸

Yet the facts show that Candidate Connell did not deposit funds or pay expenses in the form (that is through the depository) required by law. Indeed, Candidate Connell acknowledged that he used campaign cash directly to pay expenses when he met with the Commissioner on July 17, 2015.

Candidate Connell cannot be excused from violations of law but his cooperative production of records, forthright description of his campaign activity (even when it was not to his benefit), and full disclosure of campaign contributions and expenses will be factors in mitigation of a fine. Because there was full disclosure of contributions (even the cash not placed in the campaign bank

¹⁸ April 24, 2015 Senate floor debate on the confirmation of Commissioner Motl.

account) and full disclosure of expenses (even those paid with cash) there is no need for Candidate Connell to file a corrective campaign finance report.

Candidate Connell's closing report for his 2014 SD 43 campaign is accepted as complete. Candidate Connell can resolve his social debt in this Matter by payment of an appropriate fine.

ENFORCEMENT OF SUFFICIENCY FINDINGS

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must act on, an alleged campaign practice violation as the law mandates that the Commissioner ("shall investigate," *see*, §13-37-111(2)(a) MCA) investigate any alleged violation of campaign practices law. The mandate to investigate is followed by a mandate to take action as the law requires that if there is "sufficient evidence" of a violation the Commissioner must ("shall notify", *see* §13-37-124 MCA) 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 (see Sufficiency Findings, as set out in this Decision) to show that Candidate Connell's campaign may have violated Montana's campaign practice laws, including, but not limited to §13-37-205 MCA and all associated ARMs. 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 timely file cannot be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. Likewise, the Commissioner does not accept a failure to follow a clear directive of law as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

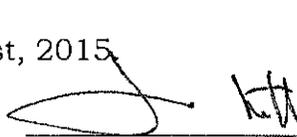
Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil/criminal prosecution and/or a civil fine is justified (See §13-37-124 MCA) as well as any other action the Commissioner is directed to take. In this Matter the Commissioner notes that the technical nature of the three violations makes this a matter that should be settled by a fine, with that fine mitigated by the disclosure and reporting actions of Candidate Connell.

The Commissioner hereby, through this Decision, also issues a “sufficient evidence” Finding and Decision justifying civil prosecution of Candidate Connell for failing to establish a separate general election campaign account and for improper use of campaign cash. Because the violations did not involve reporting and disclosure but only involved actions taken in Ravalli County, this matter is referred to the County Attorney of Ravalli County for his consideration as to prosecution. §13-37-124(1) MCA. Should the County Attorney waive the right to prosecute (§13-37-124(2) MCA) or fail to prosecute within 30 days [§13-37-124(1) MCA] this Matter returns to this Commissioner

for possible prosecution. *Id.*

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 this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil or criminal prosecution as the Commissioner has discretion ("may then initiate" See §13-37-124(1) MCA) in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. 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 law, including those of §13-37-226 MCA. (See 13-37-128 MCA). Full due process is provided to the alleged violator because the district court will consider the matter *de novo*. Should this Matter not settle the Commissioner reserves his right, upon return of the Finding by the County Attorney, to instigate an enforcement action on behalf of the people of Montana.

DATED this th 11 day of August, 2015



Jonathan R. Moti
Commissioner of Political Practices
Of the State of Montana