BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES
STATE OF MONTANA

In the Matter of the Complaint of the	)	**SCHEDULING ORDER**
Montana Republican Party	)	**RE: COMPLETION OF PENALTY**
Concerning Governor Brian Schweitzer	)	**PHASE**

The March 07, 2011 Scheduling Order is withdrawn and this Scheduling Order is substituted.

I. History

By Order dated February 23, 2011, the Commissioner of Political Practices appointed this hearing examiner to "convene a conference of counsel for the purpose of issuing a scheduling order to complete the penalty phase of this proceeding and ...conduct a penalty phase hearing, if necessary." The current penalty phase proceeding was first ordered on November 14, 2008, by the then Commissioner of Political Practices. Since that date, the matter was reviewed and remanded to the Commissioner, and a new Commissioner has been appointed. This penalty phase proceeding arises out of, and is an extension, of that earlier proceeding.

The original November 14, 2008 Order determined that "the Governor unlawfully used or permitted the use of state funds to produce and distribute two PSAs [public service announcements] prominently featuring the Governor in violation of the candidate PSA prohibition in Section 2-2-121(4), MCA." [November 14, 2008 Order, p. 20, Para. 4.] That Order stated that four penalty issues remained to be decided: (1) the number of violations, (2) the amount of the administrative penalty to be assessed, (3) whether the costs of the proceeding should be assessed against the Governor, and (4) whether grounds exist for the disqualification of the then Commissioner. [November 14, 2008, Order, p. 20, para. 5.]

II. Current Direction by The Commissioner

The February 23, 2011, Order of the current Commissioner directs that the first three of the above cited issues are to be addressed in this proceeding: The number of violations, the amount of the administrative penalty, and whether the cost of the proceeding are to be addressed in this proceeding.[1] With regard to the disqualification issue, the Commissioner determined that

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[1]The Order notes that another proceeding, *the Matter of the Complaint of Mary Jo Fox against Brad Molnar,* determined several issues related to the assessment of cost of the proceeding.

issue was no longer relevant. Accordingly, this penalty proceeding is limited to the number of violations, the amount of the administrative penalty, and whether costs of the proceeding are to be assessed against the Governor, if so, what category of costs should be assessed.

Both the original 2008 Order and the current Order authorize the Complainant to conduct appropriate discovery on the penalty issue. To the extent the Complainant envisions discovery directed to the Governor or his staff, the original Order stated that it is "presumed and expected that MRP (the Montana Republican Party) will not make "unreasonable demands to depose the Governor and his staff," and "accommodate the Governor's busy schedule as he performs his important executive branch duties..."

In one effort to ensure that unreasonable demands are not made on the Governor or his staff, the Complainant is to limit its discovery inquiries to the Governor and staff to the number of violations (a topic that thus far has concerned the number of PSAs that were aired, and the number of PSA videos that were sent by state employees to television and radio stations), the amount of the administrative penalty to be assessed (the statute provides for an administrative penalty of not less than $50 or more than $1,000---Section 2-2-144 (2) MCA), and finally, whether the cost of proceeding should be assessed against the Governor, and if so, what items of cost are to be assessed.

III. Scope, Type and Amount of the Penalty

In determining the scope, type, and amount of the penalty, counsel is guided by the fact that these matters are governed by legislative intent. The Montana code of conduct for state public officers, legislators, and public employees, including the issuance of penalties, is a product of the state legislature. Determining scope, type and amount of penalty for any breach of the code of conduct must be made by inquiring as to the intent of the Legislature.

The scope, type, and amount of the penalty here is not governed by the remedies normally found in a civil personal injury case (to make the injured party whole), or breach of contract (loss of bargain resulting from the breach), or the scope, type, and amount of penalty's found in criminal law. Here, the scope, type and amount of penalty that is assessed against a Montana public official, legislator or employee who unlawfully uses state resources is to be determined by asking what the Montana State Legislature intended in the context of an administrative proceeding, not a civil tort or contract breach, or a criminal proceeding.

In his 2008 Order, the then Commissioner directed counsel, during the penalty phase, to "treat each other with respect and courtesy..... ," to avoid "[p]artisan rancor and conduct...," and "to remain focused on the important public policy issues to be decided..." because this case "will establish important precedent that will be applied to public officers and public employees regardless of political affiliation." Finally, the current Commissioner in following-up on the suggestion of the MRP that the penalty phase could proceed on some "equitable process short of hearing" or a "procedure that does not involve a final hearing," encouraged the parties and

counsel to work cooperatively to find an appropriate resolution of the matter here presented.

IV. Scheduling Order Dates

Given the narrow issue presented and admonition that counsel accord each other and the Governor and his staff with respect and courtesy, avoid partisanship, and remain focused on the important issue of public policy to be decided, the hearings officer and counsel for both parties enter into the following scheduling order:

1. The Claimant agrees to limit discovery to the number of PSAs sent to radio stations, the number of times the PSAs were run by the stations, and the approximate number of radio listeners that may have heard the PSAs.

2. Counsel for the Respondent agrees to assist counsel for the Claimant to identify the Montana state government person or persons who sent the PSA to the radio stations.

3. Absent exceptional circumstances, the Claimant does not intend to depose the Respondent or his staff (except as possibly as noted in No. 2 above, concerning staff).

4. It is anticipated, with the assistance of Respondent's counsel, that by March 17, 2011, the Claimant will have identified the Montana state government person or persons who sent the PSAs to radio stations.

5. All discovery will close on or before June 3, 2011.

6. The parties agree to waive any right to a hearing, and the matter of the appropriate penalty will be submitted upon written briefs.

7. The Claimant's opening brief is due 10 days after the close of discovery. The Respondent's brief is due 20 days after the date of the Claimant's brief. The Claimant's rebuttal brief is due 10 days after the date of the Respondent's brief.

Dated: March 11, 2011

/s/

William L. Corbett, Hearings Officer