

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Luckey v. Gianforte No. COPP 2020-CFP-044	FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN FINANCE VIOLATION
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On October 7, 2020, Montana Democratic Party Executive Director Sandi Luckey filed a campaign practices complaint against Greg Gianforte, a candidate for the office of Montana Governor. The complaint alleges that candidate Gianforte violated Montana's campaign contribution limits by utilizing Primary election contributions to finance General election expenditures, and that candidate Gianforte failed to satisfy all Primary election obligations before transferring excess funds from the Primary to General election account.

SUBSTANTIVE ISSUES ADDRESSED

Transfer of Primary election funds to General elections funds. The use of General election funds prior to the Primary election.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: Greg Gianforte filed a C-1 Statement of Candidate as a candidate for Governor of Montana with the COPP on June 7, 2019. (Commissioner's Records.)

Finding of Fact No. 2: On July 7, 2019, candidate Gianforte timely filed his initial C-5 campaign finance report, dated June 1, 2019 through June 30, 2019. This report disclosed candidate Gianforte as receiving \$389,853.00 in Primary election contributions, including a personal loan of \$50,000.00 made on June 8, 2019; candidate Gianforte reported making \$138,699.34 in Primary election expenditures, for a Cash in Bank balance for the Primary of \$251,153.66. This report also disclosed candidate Gianforte as receiving \$194,720.00 in General election contributions; candidate Gianforte reported making \$1,517.77 in General election expenditures, for a Cash in Bank balance for the General of \$193,202.73. Candidate Gianforte reported owing one Primary election debt of \$24,830.00 to an entity named FP1. This report was most recently amended on September 21, 2020. (Commissioner's Records.)

Finding of Fact No. 3: On October 7, 2019, candidate Gianforte timely filed a periodic C-5 campaign finance report, dated July 1, 2019 through September 30, 2019. This report disclosed candidate Gianforte as receiving \$381,552.38 in Primary election contributions; candidate Gianforte reported making \$328,181.71 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$304,524.33. This report also disclosed candidate Gianforte as receiving \$125,775.00 in General election contributions; candidate Gianforte reported making \$82.00 in General election expenditures, for a Cash in Bank balance in the General of \$318,895.23. Candidate Gianforte did not report making payments on previously reported obligations. This report was most recently amended on September 21, 2020. (Commissioner's Records.)

Finding of Fact No. 4: On January 6, 2020, candidate Gianforte timely filed a periodic C-5 campaign finance report, dated October 1, 2019 through December 31, 2019. This report disclosed candidate Gianforte as receiving \$250,968.08 in Primary election contributions; candidate Gianforte reported making \$189,265.22 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$366,227.19. This report also disclosed candidate Gianforte as receiving \$94,530.94 in General election contributions; candidate Gianforte reported making \$296.98 in General election expenditures, for a Cash in Bank balance in the General of \$413,129.19. Candidate Gianforte did not report making payments on previously reported obligations. This report was most recently amended on September 21, 2020. (Commissioner's Records.)

Finding of Fact No. 5: On March 23, 2020, candidate Gianforte filed a periodic C-5 campaign finance report, dated January 1, 2020 through March 15, 2020. This report disclosed candidate Gianforte as receiving \$781,333.50 in Primary election contributions, including a personal loan of \$500,000.00 made on February 18, 2020; candidate Gianforte reported making \$781,696.53 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$365,864.16. This report also disclosed candidate Gianforte as receiving \$108,365.00 in General election contributions; candidate Gianforte reported making \$0 in General election expenditures, for a Cash in Bank balance in the General of \$521,494.19. Candidate Gianforte did not report making payments on any previously reported obligations. This report was most recently amended on September 21, 2020. (Commissioner's Records.)

Finding of Fact No. 6: On April 19, 2020, candidate Gianforte filed a periodic C-5 campaign finance report, dated March 16, 2020 through April 15, 2020. This report disclosed candidate Gianforte as receiving \$575,737.64 in Primary election contributions, including a personal loan of \$500,000.00 made on April 6, 2020; candidate Gianforte reported making \$541,189.17 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$400,412.63. This report also disclosed candidate Gianforte as receiving \$24,693.00 in General election contributions; candidate Gianforte reported making \$0 in General election expenditures, for a Cash in Bank balance in the General of \$546,187.19. Candidate Gianforte did not report making payments on any previously reported obligations. This report was most recently amended on September 21, 2020. (Commissioner's Records.)

Finding of Fact No. 7: On May 22, 2020, candidate Gianforte filed a periodic C-5 campaign finance report, dated April 16, 2020 through May 14, 2020. This report disclosed candidate Gianforte as receiving \$607,506.00 in Primary election contributions, including a personal loan of \$500,000.00 made on May 8, 2020; candidate Gianforte reported making \$626,719.58 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$381,199.05. This report also disclosed candidate Gianforte as receiving \$44,385.00 in General election contributions; candidate Gianforte reported making \$0 in General election expenditures, for a Cash in Bank balance in the General of \$590,572.19. Candidate Gianforte did not report making payments on any previously reported obligations. (Commissioner's Records.)

Finding of Fact No. 8: Montana's Primary election was held on June 2, 2020. Candidate Gianforte advanced to the November 3 General election as the Republican candidate receiving the highest number of votes. (Commissioner's Records.)

Finding of Fact No. 9: On June 22, 2020, candidate Gianforte timely filed a periodic C-5 campaign finance report, dated May 15, 2020 through June 15, 2020. This report disclosed candidate Gianforte as receiving \$75,529.09 in Primary contributions; candidate Gianforte reported making \$456,018.84 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$710.00. This report also disclosed candidate Gianforte as receiving \$353,577.51 in General election contributions; candidate Gianforte reported making \$351,078.94 in General election expenditures, for a Cash in Bank balance in the General of \$593,070.96. This report disclosed candidate Gianforte transferred \$180,729.09 from the Primary to General accounts (reported as a Fundraiser contribution of \$180,729.09 received in the General and an expenditure of the same amount made in the Primary). Candidate Gianforte did not report making payments on any previously reported obligations. This report was most recently amended on September 21, 2020. (Commissioner's Records.)

Finding of Fact No. 10: On August 20, 2020, candidate Gianforte timely filed a periodic C-5 report, dated June 16, 2020 through August 15, 2020. This report disclosed candidate Gianforte as receiving \$98,507.25 in Primary election contributions; candidate Gianforte reported making \$710.00 in Primary election expenditures, for a Cash in Bank balance in the Primary of \$98,507.25. This report also disclosed candidate Gianforte as receiving \$1,484,129.69 in General election contributions, including two personal loans of \$500,000.00 each (dated July 13 and August 10); candidate Gianforte reported making \$1,744,011.78 in General election expenditures, for a Cash in Bank balance in the General of \$333,188.67. Candidate Gianforte did not report making payments on any previously reported obligations. This report was most recently amended on September 21, 2020. (Commissioner's Records.)

Finding of Fact No. 11: On September 21, 2020, candidate Gianforte timely filed a periodic C-5 report, dated August 16, 2020 through September 15, 2020. This report disclosed candidate Gianforte as receiving \$38,725.84 in Primary election contributions; candidate Gianforte reported making \$0 in Primary election expenditures, for a Cash in Bank total in the Primary of \$137,233.09. This report also disclosed candidate Gianforte as

receiving \$1,294,862.51 in General election contributions, including a personal loan of \$1,000,000.00 made on September 2, 2020; candidate Gianforte reported making \$1,366,878.25 in General election expenditures, for a Cash in Bank balance in the General of \$261,172.93. Candidate Gianforte did not report making payments on any previously reported obligations. (Commissioner's Records.)

Finding of Fact No. 12: Candidate Gianforte did not provide the COPP with written notice or documentation that any of the four Primary election obligations from candidate Gianforte incurred by the campaign had been forgiven. (Commissioner's Records.)

Finding of Fact No. 13: On October 16, 2020, candidate Gianforte (through Jake Eaton) emailed the COPP with his response to this Complaint. The response repeatedly asserted that candidate Gianforte had not utilized any Primary election contributions to finance General election activities, and that the campaign had segregated Primary and General election contributions in separate bank accounts. The response stated that "The only transfer between the two accounts occurred on 6/15/20 when GFM [the Gianforte campaign] moved the remaining candidate loan proceeds from its primary to general account since it had no further expenses to pay related to the primary". (Commissioner's Records.)

Finding of Fact No. 14: As of October 7, 2020, the Gianforte campaign had not reported making any payments on its June 12, 2019 Primary election debt of \$24,830.00 owed to FP1 for "Media & Advertising Production (Video Recording & Creation of ads, not the broadcast of the ads See Expen.) - "Executive Experience & Flight". No expenditures made to FP1 as reported by the Gianforte campaign on the initial or any periodic C-5 campaign finance reports directly matched the date, amount, and description provided for this debt. While candidate Gianforte's October 7, 2019 finance report did disclose one Primary election expenditure of \$24,830.00 to FP1, this activity was dated July 10, 2019 and described as "Media & Advertising Production - Facebook Ads : Same Ad 5x from June 14th - July 12th 2019 "Greg Gianforte for Montana" 1 Min 10 Sec Ad". (Commissioner's Records.)

DISCUSSION

Part One: Contribution Limits

The first allegation made against candidate Gianforte in this complaint is that candidate Gianforte applied Primary election campaign contributions to General election obligations, violating contribution limits established under Mont. Code Ann. §13-37-216.

Candidate Gianforte participated in Montana's June 2, 2020 Primary election as one of three Republican candidates for the office of Governor. Candidate Gianforte advanced from the Primary to November's General election as the Republican candidate for that office (FOF No. 8). As disclosed on campaign finance reports filed with the COPP, candidate Gianforte continued to solicit and receive Primary election contributions after Montana's June 2 Primary election (FOF Nos. 9-12). Candidate Gianforte reported owing four separate Primary election obligations totaling \$1,574,830.00: three personal loans and one debt to a third party vendor (FOF Nos. 2, 5, 6)(Table 1). At the time this complaint was filed, none of these four obligations had been reported as paid off in full by candidate Gianforte, nor had the COPP received notice that any of them had been forgiven (reverting them to contributions received, 44.11.405(3), ARM) (FOF No. 12).

Under relevant Montana campaign finance rules, candidates may continue to accept Primary election contributions if the campaign still has outstanding Primary debts. Those Primary contributions could only be used for the purpose of paying off that campaign's Primary election obligations.

44.11.224(2)(d), ARM, specifies (emphasis added):

(d) all contributions received by a candidate after the day of the primary election are designated as general election contributions

and are subject to the aggregate contribution limit for the general election, except that a candidate may continue to receive contributions designated for the primary election subject to the limits after that election only for the purpose of paying primary election debts. General election contributions shall not be used to pay primary election debt.

In this matter, candidate Gianforte continues to owe \$1,574,830.00 in Primary election obligations. This allows the Gianforte campaign to continue accepting Primary election contributions so long as those contributions are used only to pay off these debts, 44.11.224(2)(d), ARM. These Primary contributions would still be subject to the Primary election contribution limit.

The investigation provided no evidence that candidate Gianforte has utilized Primary election contributions to finance General election activities. *Bolger v. Gianforte*, COPP-2020-CFP-REJ-007 was recently rejected for making substantially similar contribution limits violations without providing substantiating evidence. In dismissing that matter, Commissioner Mangan wrote that “The acceptance of contributions designated for the Primary election by candidate Gianforte is not by itself a violation of §13-37-216, MCA, as the complaint seems to assert”. The allegation is hereby dismissed.

Part Two: Transfer of funds from Primary to General

This complaint also alleges that candidate Gianforte improperly transferred campaign funds from the Primary to General accounts. As noted by the complainant, “a campaign committee must show all primary debts have been satisfied” before any leftover Primary election funds may be used for General election expenses.

44.11.224(2)(e), ARM, states that “leftover funds that were designated for the primary election may be used for general election purposes if all primary debt has been paid”. As noted in Part One, candidate Gianforte currently owes \$1,574,830.00 on four obligations incurred during the Primary election. While still owing on these obligations, candidate Gianforte reported transferring \$180,729.09 from the Primary to General accounts on his May 15, 2020 through June 15, 2020 C-5 finance report (FOF No. 9). This action violates the stated requirements of 44.11.224(2)(e), ARM, as candidate Gianforte had not paid off all Primary election debt at the time of this transfer.

Table 1: Primary election obligations (debts/loans) as reported by candidate Gianforte on his 2019-2020 C-5 campaign financial reports.

Entity	Election	Type(Debt/Loan)	Date incurred	Amount	Balance Due ¹
Gianforte, Greg	Primary	Loan	06/08/2019	\$50,000.00	\$50,000.00
FP1	Primary	Debt	06/12/2019	\$24,830.00	\$24,830.00
Gianforte, Greg	Primary	Loan	02/18/2020	\$500,000.00	\$500,000.00
Gianforte, Greg	Primary	Loan	04/06/2020	\$500,000.00	\$500,000.00
Gianforte, Greg	Primary	Loan	05/08/2020	\$500,000.00	\$500,000.00
					\$1,574,830.00

¹ Reflects the balance due as of October 14, 2020.

Table 2: General election obligations (debts/loans) as reported by candidate Gianforte on his 2019-2020 C-5 campaign financial reports.

Entity	Election	Type(Debt/Loan)	Date incurred	Amount	Balance Due
Gianforte, Greg	General	Loan	07/13/2020	\$500,000.00	\$500,000.00
Gianforte, Greg	General	Loan	08/10/2020	\$500,000.00	\$500,000.00
Gianforte, Greg	General	Loan	09/02/2020	\$1,000,000.00	\$1,000,000.00
Total					\$2,000,000.00

In response to the Complaint, the Gianforte campaign stated “The only transfer between the two accounts occurred on 6/15/20 when GFM [the Gianforte campaign] moved the remaining candidate loan proceeds from its primary to general account since it had no further expenses to pay related to the primary” (emphasis added) (FOF No. 13). The campaign, however, continued to raise Primary election contributions, reporting \$98,507.25 in Primary contributions on its August 30, 2020 report (FOF No. 10) and \$38,725.84 in Primary contributions on its September 30, 2020 report (FOF No. 11).

In order to accept Primary election contributions after the Primary, obligations must remain. As the Gianforte campaign has continued to raise and segregate Primary contributions into the General election cycle, they clearly understand they have remaining loan and debt obligations from the Primary election cycle. The campaign’s response seems to indicate they do not

view the candidate loans as a Primary obligation. Without that obligation, however, the Gianforte campaign would be unable to solicit and accept Primary election contributions. To do so would violate ARM 44.11.224(2)(e).

Part Three: Use of General Election Funds in the Primary

Once a complaint is filed, the Commissioner “shall investigate any other alleged violation” Mont. Code Ann. § 13-37-111(2)(a). This investigative authority includes authority to investigate “all statements” filed with COPP, inspect a variety of records and require their production for purposes of the investigation, and examine “each statement or report” filed with the COPP. *Id.*, §§ 13-37-111, -123. The Commissioner is afforded discretion in exercising this authority. *Powell v. Motl*, OP-07111, Supreme Court of Montana, November 6, 2014 Order.

In reviewing candidate Gianforte’s July 2019, October 2019, and January 2020 quarterly campaign finance reports, the campaign reported making \$1,896.75 in General election expenditures using General election contributions (FOF Nos. 2-4). The use of General election contributions in this manner is prohibited by Montana law.

44.11.224(2)(c), ARM (emphasis added).

general election contributions received prior to the day of the primary election must be maintained in a separate account and shall not be used until after the day of the primary election.

FINDINGS

The Gianforte campaign reported General election expenditures in the amount of \$1,896.75 on its July 2019 through January 2020 quarterly campaign finance reports.

Sufficiency Finding No. 1: Candidate Gianforte expended General election contributions prior to the June 2, 2020 Primary election.

The Commissioner finds sufficient facts exist to support a determination that candidate Gianforte expended General election contributions prior to the June 2, 2020 primary election.

Following the 2020 Primary election, the Gianforte campaign reported \$1,550,000.00 in Primary loans owed and a Primary debt in the amount of \$24,830.00, for total Primary obligations of \$1,574,830.00. The Gianforte campaign reported the transfer of \$180,729.09 in Primary campaign funds to its General election account.

Sufficiency Finding No. 2: Candidate Gianforte transferred Primary election funds to its General election and failed to designate those funds to its existing Primary election obligations.

The Commissioner finds sufficient facts exist to support a determination that candidate Gianforte transferred \$180,729.09 in Primary campaign funds to its General election account prior to applying those funds to existing Primary obligations.

Gianforte cannot claim that all Primary debts are extinguished and transfer the Primary election balance to his General election account, while at the same time raising money to extinguish Primary debt. Either the campaign corrects the error and applies the \$182,625.84 to its Primary election

obligations, or the campaign will have to refund all Primary election contributions received after the Primary election to the contributors who made them, a total of [at a minimum] \$137,233.09 from June 15 to September 30, 2020 plus any amount of Primary election contributions collected from June 3 to June 15, 2020 and October 1, 2020 to date. The Commissioner orders the Gianforte campaign to determine which course of action of correction to take and amend reports and accounts accordingly within 14 days of the date of this decision. The Commissioner will take into consideration the corrective action taken by the Gianforte campaign in the settlement of this matter.

DECISION

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner “shall investigate” any alleged violation of campaign practices law. Mont. Code Ann. § 13-37-111(2)(a). The mandate to investigate is followed by a mandate to take action; where there is “sufficient evidence” of a violation the Commissioner must (“shall notify,” *see id.*, at § 13-37-124) initiate consideration for prosecution.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence to show that the Gianforte 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).

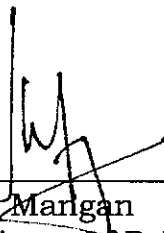
Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the above Sufficiency Findings, a civil fine is justified. Mont. Code Ann. § 13-37-124. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying a civil fine or civil prosecution of Candidate Gianforte. 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. *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 20th day of October 2020.



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