

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES  
STATE OF MONTANA

In Re the Ethics Complaint of DANIEL ZOLNIKOV v. TONY O'DONNELL, Montana Public Service Commissioner	CAUSE NO. COPP-2020-ETH-005  SUMMARY DECISION OF COMPLAINT WITHOUT INFORMAL CONTESTED CASE HEARING
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On May 8, 2020, Daniel Zolnikov filed a campaign finance complaint with the Office of the Commissioner of Political Practices (COPP), the Commissioner accepted as lodged a portion of the complaint as an ethics complaint against Tony O'Donnell, Public Service Commissioner, District 2.

On May 8, Commissioner Jeff Mangan notified Mr. O'Donnell and, in order to make an initial determination whether the Complaint stated a potential violation, pursuant to Mont. Code Ann. § 2-2-136(1)(a), requested further information from Mr. O'Donnell on the following issues:

1. Respond to the allegation that Commissioner O'Donnell "utilized his Public Service Commission office to film campaign videos" and "utilizing his Public Service Commission picture as well as the Public Service logo for his campaign".

On May 11, Mr. O'Donnell provided his response to the foregoing question.

Also on May 11, 2020, Commissioner Mangan issued a Notice that the Ethics Complaint filed by Daniel Zolnikov was accepted for filing and notice of intent to issue summary decision to both parties.

**JURISDICTION AND AUTHORITY**

The Commissioner of Political Practices has jurisdiction to hear and decide complaints filed under Montana's Code of Ethics against state officers, legislators, state employees and county attorneys. Mont. Code Ann. § 2-2-136. Mr. O'Donnell is an elected official and serves as State of Montana Public Service Commissioner, District 2. The Code of Ethics defines a public officer as "any state officer," Mont. Code Ann. § 2-2-102(8)(a). A state officer "includes all elected officers," Mont. Code Ann. § 2-2-102(12). Secretary O'Donnell therefore is a public officer and subject to the Montana Code of Ethics.

Unless a complaint is dismissed as frivolous, or for failing to state a claim of a potential violation of the code, the Commissioner "shall hold an informal contested case hearing[.]" Mont. Code Ann. § 2-2-136(1)(c). However, "[i]f the issues presented in a complaint have been addressed and decided in a prior decision and the commissioner determines that no additional factual development is necessary, the commissioner may issue a summary decision without holding an informal contested case hearing on the complaint[.]" *Id.*, at (1)(b).

Having reviewed the Zolnikov Complaint and Mr. O'Donnell's responses, Commissioner Mangan determines from the facts presented and admitted in the record that no additional factual development is necessary pursuant to prior decisions of this office in *Fox v. Molnar*, September 13, 2010 (Comm'r Unsworth)<sup>1</sup>; *Cooper v. Johnson*, COPP-2016-ETH-007 (Comm'r Mangan, July 10, 2017) and *Montana Democratic Party v. Stapleton* COPP-2019-ETH-001 (Comm'r Mangan January 2019). Therefore, the Commissioner issues the following summary decision without holding an informal contested case hearing on the complaint. *Id.*

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<sup>1</sup> Affirmed by the Thirteenth Judicial District Court in *Molnar v. Fox*, Cause No. DV-10-1718 (Waters, J.; Feb. 6, 2012); affirmed by the Montana Supreme Court in *Molnar v. Fox*, 2013 MT 132, 370 Mont. 238, 301 P.3d 824 (May 14, 2013).

## **CONTENTIONS**

Zolnikov's Complaint alleges that "Tony O'Donnell utilized his official Public Service Commission office to film campaign videos of his re-election campaign" and "his official Public Service Commission picture as well as the Public Service Logo for his campaign". The statute referenced by Zolnikov, Mont. Code Ann. § 2-2-121(3), is found in the Montana Code of Ethics, which provides that public officers are prohibited from using:

(a) ... public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office ... unless the use is:

(i) authorized by law; or

(ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.

(b) As used in this [section], "properly incidental to another activity required or authorized by law" does not include any activities related to solicitation of support for or opposition to the nomination or election of a person to public office ....

(c) This [section] is not intended to restrict the right of a public officer or public employee to express personal political views.

Mont Code Ann. § 2-2-121(3)(a)-(c).

Mr. O'Donnell emailed his response in which he states "I filmed a video at my office at the PSC, the office was simply used as a backdrop ... No PSC supplies, resources, staff, or equipment was used. If there is any violation of law, it is purely technical, inadvertent...". Commissioner O'Donnell did not respond to the allegation of use of the PSC seal or the PSC Commissioner's photograph.

## **FINDINGS OF FACT**

In order to apply the law to this matter, the following facts are necessary and expressly found by the Commissioner:

1. Tony O'Donnell won the November 8, 2016, General election to become Montana District 2 Public Service Commissioner.
2. In January of 2017, Mr. O'Donnell was officially sworn in as Montana Public Service Commissioner District 2 and he continues to serve in that position.

3. On February 13, 2020, Commissioner O'Donnell filed to run for re-election to the Montana Public Service Commission (MPSC) District 2 with the Montana Secretary of State.

4. On February 13, 2020, Commissioner O'Donnell filed a C-1 Statement of Candidate as a republican candidate for Montana Public Service Commission District 2 with the COPP.

5. On March 22, 2020, Commissioner O'Donnell filmed a campaign video in his Montana Public Service Commission office located at 1701 Prospect Ave., Helena, MT 59601.

6. A Montana Public Service Commission Commissioner's state office is not available to the general public for use or lease.

7. A photograph of Public Service Commissioner O'Donnell used by the MPSC was placed on Tony O'Donnell's campaign Facebook page.

8. The MPSC hires Helena Photography, Kevin Hudson, to photograph head shots of Montana Public Service Commissioners.

9. The MPSC uses the photographs taken by Helena Photography for use in the office, on its website, social media platforms, and media relations and press releases

10. The MPSC does not have an internal policy specifically referencing use of Commissioner's photos.

11. Helena Photography does not maintain the copyright of the photos it produces for state agencies.

12. The MPSC seal was placed on Tony O'Donnell's campaign Facebook page.

13. The MPSC does not have an internal policy regarding the use of the Montana Public Service Commission seal.

14. The MPSC seal/logo is in use on its website, social media platforms, video and livestreamed events, press and media releases, and various mediums for internal agency official use.

### **DISCUSSION**

Montana's constitution instructs that there shall be a code of ethics for state and local officers and employees and legislators "prohibiting conflict between public duty

and private interest[.]” Mont. Const., Art. XIII, sec. 4. The Montana Legislature enacted such a Code of Ethics, stating: “The holding of public office or employment is a public trust, created by the confidence that the electorate reposes in the integrity of public officers, legislators, and public employees ... [who] shall carry out the individual's duties for the benefit of the people of the state.” Mont. Code Ann. § 2-2-103(1). “A public officer ... or public employee whose conduct departs from the person's public duty is liable to the people of the state and is subject to the penalties provided ... for abuse of the public's trust.” *Id.*, at (2).

As noted above, having been elected to serve as a Montana Public Service Commissioner, District 2, Mr. O’Donnell is a “public officer” within the meaning of the Code. *Id.*, § 2-2-102(8)(a), (11). As an individual, Mr. O’Donnell has a right to express his own personal political views, including promoting his own candidacy for public office. *Id.*, § 2-2-121(3)(c); 51 Op. Att’y Gen. No. 1 (2005). Further, there are exceptions for the use of public resources by public officers, employees and agencies when the uses are “properly incidental to another activity required or authorized by law.” Mont. Code Ann. § 2-2-121(3)(a)(i)-(ii). For example, it is a proper use of state resources for a public officer or employee to determine the impact of the passage or failure of proposed of ballot issues on governmental operations. *Id.*, at (3)(b)(i).

However, the Code expressly states that “properly incidental” activities “[do] not include any activities related to solicitation of support for or opposition to the nomination or election of a person to public office or political committees organized to support or oppose a candidate or candidates for public office.” *Id.*, at (3)(b) (emphasis added). In other words, the use of state resources to solicit support for or opposition to a nomination or election to public office is prohibited.

In March of 2015, Montana Commissioner of Political Practices Jonathan Motl issued an Advisory Opinion, COPP-2015-AO-002, in response to a question regarding the use of a public facility to take photos for use in a campaign. Commissioner Motl determined a facility that allowed for a public use, such as a courtroom, could be used for, in answer to a specific question, campaign photographs in a way that does not violate ethics... law. Commissioner Motl noted “to allow someone who is not a public employee or officer to use a public facility to take photographs for use in a campaign,

while at the same time forbidding a public employee or officer from the same use would lead to absurd results.”

In this matter, Commissioner O’Donnell’s state office was used to film campaign media intended for use in the candidate’s campaign. Commissioner O’Donnell’s state office is not available to the public. A constituent, for example, could not enter and film or contract with the PSC/State of Montana for use of that office.

Official photographs of elected officials or state employees are taken and utilized for a variety of purposes, including for the use of identification, on agency websites, or for publicity and public relations use. In this case, a photograph of Mr. O’Donnell is utilized by the Public Service Commission in its facility, on its website, on its social media platforms, and provided with press releases. The photographer, Kevin Hudson of Helena Photography, does not maintain the copyright to State Agency officials’ photos he captures. The MPSC has not copyrighted the photograph. The Commissioner O’Donnell photograph has been disseminated for use through official channels to the public. The photograph is clearly available in public domain and there is an expectation for the image to be used in the public domain, including use and reuse. The general public, media, political opponents have access and can use the photograph. Just as Commissioner Motl concluded in his 2015 Advisory Opinion regarding the taking of photographs in a State facility accessible to all, the same sentiment is appropriate for those non-copyrighted images made available for public consumption by a State agency. In other words, to allow someone who is not a public employee or officer to use a publicly available non-copyrighted image for use in a campaign or other purpose, while at the same time forbidding a public employee or officer from the same use would lead to absurd results.

The Commissioner considers the artwork described by the Complainant as “Public Service Logo” as an official seal of the MPSC. The MPSC official seal is circulated and used on the MPSC website, social media platforms, and for use by the agency for official government purposes. While no policy for use exists within the agency, the Montana Secretary of State, who is the keeper of the Great Seal of the State of Montana, Mont. Code Ann. § 2-15-401, is also responsible to maintain “descriptions of seals in use by the different state officers”, Mont. Code Ann. 2-15-401(1)(i). Such seals are to be used for official government purposes only. The use of an agency seal for campaign

purposes provides the public a false impression of approval of O'Donnell's candidacy by the State of Montana, the agency, and in this matter, other Montana elected officials (as the MPSC seats five Commissioners).

**1. "Support for or opposition to"**

The Montana Code of Ethics does not provide a specific definition of the phrase "support for or opposition to," so it is reasonable for the Commissioner to look to other definitions in statute. Mont. Code Ann. § 1-2-107. The Disclose Act, passed by the 2015 Montana Legislature, defined "support or oppose" in the campaign finance reporting and disclosure realm, and the Commissioner has determined those definitions also apply to the Code of Ethics. *Cooper*, at 7; *Adams v. Board of Regents*, COPP-2018-ETH-001, at 16-17 (Comm'r Mangan).

"Support or oppose," including any variations of the term, means:

(a) using express words, including but not limited to "vote", "oppose", "support", "elect", "defeat", or "reject", that call for the nomination, election, or defeat of one or more clearly identified candidates, the election or defeat of one or more political parties, or the passage or defeat of one or more ballot issues submitted to voters in an election; or

(b) otherwise referring to or depicting one or more clearly identified candidates, political parties, or ballot issues in a manner that is susceptible of no reasonable interpretation other than as a call for the nomination, election, or defeat of the candidate in an election, the election or defeat of the political party, or the passage or defeat of the ballot issue or other question submitted to the voters in an election.

Mont. Code Ann. § 13-1-101(50).

Objectively and clearly, Mr. O'Donnell's March 22, 2020 use of his MPSC photo, state office, and MPSC seal to create political campaign material was in his capacity as a candidate for Public Service Commissioner, and is susceptible of no reasonable interpretation other than support for his nomination and election to be the republican nominee for Montana Public Service Commissioner, District 2.

Mr. O'Donnell's use of his PSC state office to create media for his political campaign cannot be and was not properly incidental to his duties as a State of Montana Public Service Commissioner under Mont. Code Ann. § 2-2-121(3)(a)(ii). Therefore, Mr. O'Donnell's use of his state office to create political material was a violation of the

Montana Code of Ethics if public "time, facilities, equipment, supplies, personnel, or funds" were used in the filming of the video on March 22, 2020. *Id.*, § 2-2-121(3)(a).

Mr. O'Donnell's use of the MPSC Commissioner O'Donnell photograph and use of MPSC seal affixed to election material for his political campaign cannot be and was not properly incidental to his duties as a State of Montana Public Service Commissioner under Mont. Code Ann. § 2-2-121(3)(a)(ii). Therefore, Mr. O'Donnell's use of the MPSC Commissioner O'Donnell photograph and use of MPSC seal on his campaign's political material was a violation of the Montana Code of Ethics if public "time, facilities, equipment, supplies, personnel, or funds" were used to solicit or support nomination and/or election. *Id.*, § 2-2-121(3)(a).

## **2. Facilities**

The Code of Ethics prohibits public officers from using public "facilities, [and] equipment" to promote or oppose the election of a candidate to office, Mont. Code Ann. § 2-2-121(3)(a). The images of the MPSC seal in use on campaign material attached to the Complaint and Mr. O'Donnell's response to the Complaint provide sufficient evidence to conclude that, as a Montana Public Service Commissioner, he authorized: the use of his Montana Public Service Commission office to film a campaign video (FOF No. 5); and the use of the MPSC's seal in campaign material (FOF No. 12).

The Commissioner determines that Commissioner O'Donnell improperly used state facilities in two separate violations to solicit support for the nomination and election of a person for public office in violation of Mont. Code Ann. § 2-2-121(3)(a). The Commissioner deems the use of Commissioner O'Donnell's state office for the filming of a campaign video as a violation. The Commissioner considers the MPSC seal part of the agency infrastructure, and therefore the use of the MPSC seal in campaign material is considered a facilities violation. *See also Fox v. Molnar*, at 24-26 (Comm'r Unsworth); *Molnar v. Fox*, at 12-16 (Waters, J.); *Molnar v. Fox*, 2013 MT 132, ¶¶35-46; *Cooper*, at 8 (§ 2, 3). *Fox v. Monar*, 2013 MT 132, P 45.

## **3. Funds**

Does the use of Commissioner O'Donnell's use of his MPSC photo constitute a use of state funds? The photograph was commissioned to serve a variety of purposes within the agency, including the public distribution for use by others. The photograph was not copyrighted by the photographer, Helena Photography, or the MPSC. The



MPSC has no policy for the use of Commissioner photographs. Commissioner O'Donnell's photograph is publicly distributed by the agency through its website and social media platforms. The photograph is publicly distributed as part of press/media releases across all mediums. While State funds were not used in the creation of the O'Donnell photograph specifically **to support** the nomination of Commissioner O'Donnell, they were used. Through the wide use and distribution of the photograph, however, the general public and other candidates can access and otherwise use the photograph for other, non-agency purposes, including political purposes. The Commissioner determines that Commissioner O'Donnell did not improperly use state funds to solicit support for the nomination and election of a person for public office in violation of Mont. Code Ann. § 2-2-121(3)(a).

### **SUMMARY**

Mr. O'Donnell has a right to express his personal political views. Mont. Code Ann. § 2-2-121(3)(c). Mr. O'Donnell does not have, however, a right to the use of state resources to express those personal political views. *Id.*, at (a). To be clear, had Mr. O'Donnell conducted the same activity using his personal resources, the Commissioner would have dismissed the complaint as frivolous on its face.

Tony O'Donnell's March 22, 2020 use of his PSC state office to film a political campaign video and the use of the Montana Public Service Commission seal on campaign material was in furtherance of a solicitation of support for his nomination and election to public office, and therefore violated Montana's Code of Ethics.

#### **Prohibited Use of State Resources**

Two violations involving facilities

It is incumbent on individual public employees and officers, and the agencies that they work for, to know the obligations that the Code of Ethics places on them while on the job, at the workplace, and in the use of state resources. Public employment and service comes imbued with the public trust. The public trust requires proper use of state resources by all public servants for the good of all Montanans. Mont. Code Ann. § 2-2-103(1).

### **CONCLUSIONS OF LAW**

1. Mr. O'Donnell's March 22, 2020, use of his MPSC office to film a campaign advertisement and the use of the MPSC seal on campaign material solicited support for his own nomination or election to public office within the meaning of Mont. Code Ann. § 2-2-121(3)(a).

2. Mr. O'Donnell's use of his PSC office to film a campaign video and the use of the MPSC seal was not properly incidental to his position as Montana Public Service Commissioner, District 2 and are not exempted communications under Mont. Code Ann. § 2-2-121(3)(c).

3. Mr. O'Donnell improperly used State facilities in filming a campaign video in his PSC office and the use of the MPSC seal to solicit support of his candidacy for public office in violation of Mont. Code Ann. § 2-2-121(3)(a).

### **ORDER**

The Code of Ethics provides that when the Commissioner has determined there has been a violation, "an administrative penalty of not less than \$50 or more than \$1,000" and "costs of the proceeding" may be imposed. Mont. Code Ann. § 2-2-136(2)(a), (c).

1. The Commissioner finds and decides that Mr. O'Donnell is liable for two (2) violations of the Code of Ethics, for improper use of facilities in two separate matters: the use of a state office to create a campaign video supporting his candidacy for public office on March 22, 2020; and the use of the Montana Public Service Commission seal on campaign material. For these violations, the Commissioner orders that Mr. O'Donnell is personally liable to the people of the State of Montana for a total of \$2000.00 for misuse of state resources<sup>2</sup>.

2. During these proceedings, Daniel Zolnikov did not retain an attorney, and it appears that the costs incurred would be minimal. Therefore, the Commissioner will not assess Daniel Zolnikov's costs against Mr. O'Donnell.

3. The Commissioner's office did incur costs in dealing with this matter, through the use of in-house and outside legal counsel, personnel, time, equipment,

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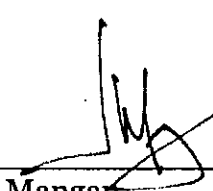
<sup>2</sup> Previous Commissioners have interpreted this statute differently, such as suggesting a separate fine for each radio station to which a public service announcement was sent. *See e.g., MT Republican Party v. Schweitzer*, Final Decision, at 3 (Dep. Comm'r Goetz, Mar. 1, 2012).

facilities and supplies. Given that the issues in this Complaint were addressed and decided in prior decisions and no additional factual development was needed, the Commissioner will not assess COPP's costs against Mr. O'Donnell for the Summary Decision proceedings.

### NOTICE

The Commissioner provides notice to the parties that this summary decision is a final agency order, and either party may seek judicial review of the Commissioner's determination pursuant to Montana Code Annotated, Title 2, Chapter 4, part 7. Mont. Code Ann. § 2-2-136(3). The parties are further informed that the Complaint, record established, and Decision are available for public inspection. Mont. Code Ann. § 2-2-136(4).

ORDERED this 20 day of July, 2020.



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Jeffrey Mangan  
Commissioner of Political Practices  
P.O. Box 202401  
Helena, MT 59620-2401

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing to be emailed and send by first class US mail to:

Daniel Zolnikov  
2812 2<sup>nd</sup> Street N, #2  
Billings, MT 59101

Montana Public Service  
Commissioner District 2  
Tony O'Donnell  
PO BOX 202601  
Helena, MT 59620-2601

DATED this 20<sup>th</sup> day of July, 2020.



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