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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

BRAD MOLNAR,

Petitioner,

vs.

MARY JO FOX, Charging Party,

Respondent.

Cause No.: DV 10-1718

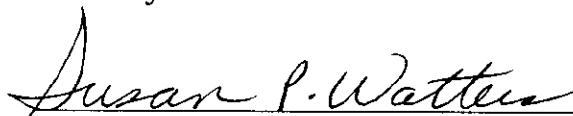
Judge Susan P. Watters

**ORDER AND MEMORANDUM
AFFIRMING DECISION OF THE
COMMISSIONER OF POLITICAL
PRACTICES**

This matter comes before the Court on Petitioner Brad Molnar's (hereinafter "Molnar") Petition for Judicial Review of the Commissioner of Political Practice's (hereinafter "the CoPP") Decision and Final Order finding that Molnar received unlawful gifts and improperly used state equipment. The parties have briefed the issues before the Court, and based upon the briefs and a review of the record, and good cause appearing therefore;

IT IS HEREBY ORDERED that the decision of the Commissioner of Political Practices is hereby **AFFIRMED**.

1 DATED this 6th day of February 2012.

2 
3 DISTRICT JUDGE

4
5 **MEMORANDUM**

6 **Background**

7 Respondent Mary Jo Fox (hereinafter "Fox") filed a complaint against
8 her Public Service Commissioner, Molnar, in June of 2008. Fox alleged that
9 Molnar violated Montana Code Annotated § 2-2-104 by accepting a gift of
10 substantial value or a substantial economic benefit tantamount to a gift that
11 would tend improperly to influence a reasonable person in the person's
12 position. Mont. Code Ann. § 2-2-104(1)(b)(i) (2008). Subsequent complaints
13 were filed in October of 2008 alleging that Molnar had used his Public Service
14 Commission (hereinafter "PSC") contact information for political purposes on
15 two occasions, in violation of MCA § 2-2-121(3)(a); that Molnar had used a
16 state supplied cell phone for personal purposes in violation of MCA § 2-2-
17 121(2)(a); and that Molnar improperly used his state email privileges for
18 political purposes in violation of MCA § 2-2-121(3)(a). After substantial pre-
19 hearing posturing on either side, a hearing was held November 4-6, 2009 in
20 front of hearings examiner William L. Corbett (hereinafter "Corbett"). Corbett
21 issued a proposed decision in March of 2010, finding Molnar to have been in
22 violation of MCA § 2-2-104(1)(b)(i) by receiving two personal checks of \$1000
23 each and to have registered five violations of MCA § 2-2-121. Penalties
totaling \$5750 were levied against Molnar for these infractions of the Montana

1 Code of Ethics. Corbett found Molnar's limited use of his state cell phone for
2 personal reasons to be *de minimus*. In September of 2010 Commissioner of
3 Political Practices Dennis Unsworth (hereinafter "Unsworth" or "Commissioner
4 Unsworth") affirmed Corbett's proposed order by adopting in part, modifying
5 in part, explaining, and expanding on the proposal. In addition to the
6 penalties levied by Corbett, Unsworth assessed some of the costs of the
7 proceedings against Molnar totaling \$14,945. In October of 2010 Molnar filed
8 the petition for judicial review of Unsworth's final written decision that is
9 currently before this Court.

10 Additional facts will be provided in the discussion section of this
11 Memorandum as necessary.

12 **Legal Standard**

13 A district court reviews an administrative decision in a contested case
14 to determine whether the findings of fact are clearly erroneous and whether
15 the agency correctly interpreted the law. *Clouse v. Lewis & Clark County*,
16 2008 MT 271, ¶ 23, 345 Mont. 208, 190 P.3d 1052 (citing *Ostergren v.*
17 *Department of Revenue*, 2004 MT 30, ¶ 11, 319 Mont. 405, 85 P.3d 738). The
18 review must be conducted by the court without a jury and must be confined
19 to the record. Mont. Code Ann. § 2-4-704(1) (2011). The court may not
20 substitute its judgment for that of the agency as to the weight of the evidence
21 on questions of fact. The court may affirm the decision of the agency or
22 remand the case for further proceedings. Mont. Code Ann. § 2-4-704(1)
23 (2011).

1 **Discussion**

2 In the matter currently before this Court, there are essentially six items
3 that both Molnar, as the Petitioner, and Fox, as the Respondent, would like to
4 have addressed. In an effort to be thorough and complete, each of these items
5 will be addressed individually below.

6 **A. Commissioner Unsworth did not err in Determining that Fox**
7 **Had Sufficient Standing to Bring the Underlying Action against**
8 **Molnar.**

9 As the thrust of this first "threshold" argument, Molnar asserts that in
10 order to establish standing to bring suit, the complaining party must (1)
11 clearly allege past, present, or threatened injury to a property right or a civil
12 right, and (2) allege an injury that is distinguishable from the injury to the
13 public generally, though the injury need not be exclusive to the complaining
14 party. *Fleenor v. Darby Sch. Dist.*, 2006 MT 31, ¶ 9, 331 Mont. 124, 128 P.3d
15 1048. It is well established that persons who fail to allege any personal
16 interest or injury, beyond that common interest of all citizens and taxpayers,
17 lack standing. *Id.* Following this logic, Molnar asserts that there was no
18 wrong done to Fox, which impeded on either her civil or property rights, that
19 distinguishes Fox from the public in general. Molnar correctly asserts that
20 the question of standing is a threshold question addressed by the judiciary in
21 American Jurisprudence, but fails to address the interest conferred by the
22 *Legislature* in allowing an individual to file a Code of Ethics complaint.

23 The legislative branch "may enact statutes creating legal rights, the
invasion of which creates standing, even though no injury would exist without

1 the statute." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 34, 360 Mont.
2 207, 255 P.3d 80 (citations omitted). Where the Legislature "'has authorized
3 public officials to perform certain functions according to law, and has
4 provided by statute for judicial review of those actions under certain
5 circumstances, the inquiry as to standing must begin with a determination of
6 whether the statute in question authorizes review at the behest of the
7 plaintiff.'" *Id* at ¶ 35 (citing *Druffel v. Bd. of Adjustment*, 2007 MT 220, ¶ 15,
8 339 Mont. 57, 168 P.3d 640). It is here, rather than within the confines of the
9 traditional "cases and controversies" analysis, where the standing analysis for
10 the matter currently before this Court will rest.

11 As stated above, statutes may create legal rights, the invasion of which
12 creates standing, even though no injury would exist without the statute.
13 *Heffernan* at ¶ 34. The following statutory excerpts are taken from the
14 Montana Code of Ethics:

15 Mont. Code Anno., § 2-2-103 (2008): (1) The holding of public
16 office or employment is a public trust, created by the confidence
17 that the electorate reposes in the integrity of public officers,
18 legislators, and public employees. A public officer, legislator, or
19 public employee shall carry out the individual's duties for the
20 benefit of the people of the state. (2) A public officer, legislator,
21 or public employee whose conduct departs from the person's
22 public duty **is liable to the people of the state and is subject
23 to the penalties provided in this part** for abuse of the public's
trust. (emphasis added)

Mont. Code Anno., § 2-2-136 (2008): (1) (a) **A person** alleging a
violation of this part by a state officer, legislator, or state
employee **may file a complaint with the commissioner of
political practices.** (emphasis added)

1 Fox is a resident of Molnar's PSC district and a customer of one of the
2 corporations from which Molnar received an allegedly unlawful gift. Fox
3 alleged two violations of MCA § 2-2-104 and six violations of MCA § 2-2-121
4 on four separate complaint forms made available by the CoPP. The statutes
5 reproduced above authorize the review of any state officer, legislator, or state
6 employee at the behest of **any person**. Accordingly and pursuant to the
7 analysis above, Commissioner Unsworth's decision that Fox had sufficient
8 standing to bring the underlying action against Molnar is hereby AFFIRMED.

9 **B. Commissioner Unsworth did not err in Determining that Fox's**
10 **Complaints were Sufficient to place Molnar on Notice.**

11 At several points throughout the briefing in this matter and during the
12 underlying proceedings Molnar suggests that the originally filed complaints
13 failed to provide him with adequate notice of the charges. On page 20 of
14 Unsworth's Final Decision the Commissioner stated that as "a matter of fact
15 and law, these complaints were adequate to place [Molnar] on notice of the
16 charges against him." In his briefing for the current matter, Molnar suggests
17 that by allowing Fox to file complaints based "completely on hearsay," Molnar
18 has been denied his equal protection under the law. See Molnar's Br. Supp.
19 Jud. Rev., p. 8 (June 1, 2011). Molnar's assertions to this effect are without
20 merit.

21 Section 44.10.604 of the "Code of Ethics and Guidelines" subchapter of
22 the "Commissioner of Political Practices" chapter of the Administrative Rules
23 of Montana reads as follows:

1 ARM § 44.10.604 COMPLAINT WHO MAY FILE: (1) A complaint may be
2 filed with the commissioner by any person alleging a violation of the
3 ethics code by a state officer, state employee, or a legislator, so long as
4 the alleged violation against a legislator does not pertain to a legislative
5 act. The complaint must: (a) be filed with the commissioner either by
6 certified mail or delivered in person; (b) be filed within two years of the
7 date of the alleged violation of the code. A complaint is considered filed
8 on the date it is received by the commissioner.

9 The CoPP has a form complaint, in effect since 2002, that requires the
10 name, mailing address, and telephone numbers of the person bringing the
11 complaint in addition to the name, mailing address, and telephone numbers
12 of the person (or organization) against whom the complaint is brought. The
13 form has a section entitled "statement of facts" wherein a complainant can
14 describe the ethics violation as he or she sees it. The bottom of this page
15 indicates that all complaints must be signed, notarized, and delivered to the
16 commissioner either personally or by certified mail. As stated above, Fox had
17 standing to bring the complaints against Molnar in the underlying action
18 pursuant to statute, case law, and the above reproduced administrative rule.
19 Further, Fox's complaints complied with the form prescribed by the
20 Commissioner of Political Practices.

21 In her June 12, 2008 complaint, Fox completed the section indicating
22 her own name, address, and telephone numbers. Fox completed the section
23 indicating Molnar's name, address, and telephone numbers. Fox attached a
24 typewritten statement of facts which contained facts pertaining to Molnar's
25 receipt of substantial gifts, the law pertaining to those gifts, and a purported
26 application of those facts to the law. This complaint was signed by Fox,
27 notarized, and delivered to the Commissioner. In her October 9, 2008

1 complaint, Fox completed the section indicating her own name, address, and
2 telephone numbers. Fox completed the section indicating Molnar's name,
3 address, and telephone numbers. Fox wrote a brief summary of Molnar's
4 improper use of his PSC contact information for political purposes, citing to
5 MCA § 2-2-121. In addition, Fox attached documents corroborating the
6 statements made in her statement of facts. This complaint was signed by
7 Fox, notarized, and delivered to the Commissioner. In both of Fox's remaining
8 complaints, on October 16th and 27th, the same level of detail was provided
9 and all of the requirements of the complaint documents were met. As stated
10 by commissioner Unsworth, reproduced above, "[a]s a matter of fact and law,
11 these complaints were adequate to place [Molnar] on notice of the charges
12 filed against him." Accordingly and pursuant to the analysis above,
13 Unsworth's decision that Fox's complaints were sufficient to place Molnar on
14 notice is hereby AFFIRMED.

15 **C. Commissioner Unsworth did not err in Determining that Molnar**
16 **Solicited and Received Unlawful Gifts.**

17 In the third subsection of Molnar's Brief in Support of Judicial Review,
18 entitled "So-Called Gifts," Molnar refutes Commissioner Unsworth's
19 determination that Molnar solicited and received unlawful gifts. In order to
20 give this discussion section some context, a brief background of the events
21 leading to the underlying complaint must be provided.

22 In an apparent effort to raise awareness about energy conservation,
23 Molnar began soliciting contributions for a Billings Brown Out event wherein
Molnar would advocate for residents of the city of Billings to extinguish there

1 electric lights for a specified amount of time on a specified date. Among the
2 organizations approached for a financial contribution were Northwestern
3 Energy and PPL Montana. Northwestern Energy wrote Molnar two personal
4 checks, each for \$1000, while PPL Montana only wrote Molnar one personal
5 check for \$1000. Subsequent to these contributions, Molnar produced a
6 number of Billings Brownout brochures, describing the event, and bearing his
7 picture and name. These checks are the subject of Fox's first complaint,
8 which resulted in Molnar being found in violation of the Montana Code of
9 Ethics.

10 Molnar first attacks Commissioner Unsworth's determination by
11 pointing the Court to three exceptions to the definition of a "gift of substantial
12 value" found in MCA § 2-2-102(3)(b). As stated above, Fox alleged that Molnar
13 violated Montana Code Annotated § 2-2-104 by accepting a **gift of**
14 **substantial value** or a substantial economic benefit tantamount to a gift that
15 would tend improperly to influence a reasonable person in the person's
16 position. Mont. Code Ann. § 2-2-104(1)(b)(i) (2008). A "Gift of substantial
17 value" means a gift with a value of \$ 50 or more for an individual. Mont. Code
18 Ann. § 2-2-102(3)(a) (2008). As Molnar points out, a gift of substantial value
19 does not include 1) a gift that is not used and that, within 30 days after
20 receipt, is returned to the donor or delivered to a charitable organization or
21 the state and that is not claimed as a charitable deduction for federal income
22 tax purposes, 2) educational material directly related to official governmental
23 duties, or 3) educational activity. Mont. Code Ann. § 2-2-102(3)(b)(i); (3)(b)(iii);

1 (3)(b)(v) (2008). Contrary to Molnar's assertions, however, two of the three
2 \$1000 checks received by Molnar do not qualify under any of these three
3 exceptions to the definition of a "gift of substantial value."

4 The record reflects that Molnar received three checks of \$1000, written
5 directly to him. Of these checks, one was returned to the drawer,
6 Northwestern Energy, within thirty days. As such, this check wasn't
7 considered a "gift of substantial value" by the hearings examiner or
8 Commissioner Unsworth. Neither of the two remaining checks, however, were
9 returned within thirty days.

10 The two remaining checks were written by Northwestern Energy and
11 PPL Montana. As stated above, neither one of these checks was returned
12 within thirty days, so neither check qualifies as an exception pursuant to
13 MCA § 2-2-102(3)(b)(i). In addressing the two remaining exceptions, a textual
14 reading of the language of the exception statutes reveals that neither
15 exception applies to the remaining checks. Neither check is "educational
16 material," or an "educational activity." These exception statutes do not read
17 to include "money personally received in exchange for the promise of
18 'educational material' or some 'educational activity,'" so they will not be
19 interpreted as such by this Court. The checks were written to Molnar
20 personally, after which he had sole discretion as to the disbursement of the
21 funds. Whether Molnar used some or all of the funds for the Billings Brown
22 Out event is immaterial at this time as the nature of the gifts received fit
23 squarely within the confines of the definition of a "gift with substantial value."

1 Molnar's next argument is that the money received from Northwestern
2 Energy and PPL Montana was received from each company's Universal
3 Systems Benefits funds, as proscribed by statute. This argument will gain
4 little traction from this Court and little explanation herein. Whether or not
5 the two utility companies were mandated to remit certain funds for certain
6 conservation programs is inapposite of the matter currently before the Court.
7 Failure by either company to do so would implicate the *companies* and not the
8 *commissioner* through whom the program was promulgated. Currently before
9 this Court is the matter of a PSC Commissioner accepting two \$1000 checks,
10 written to him personally, from two companies over which the commission
11 exerts considerable control. Molnar's effort to characterize the money received
12 as something other than a gift has not persuaded this Court.

13 Molnar's final argument is that the money received, some of which was
14 returned, would not tend "improperly to influence a reasonable person in the
15 person's position." As stated above, this Court may not substitute its
16 judgment for that of the agency (the CoPP) as to the weight of the evidence.
17 Mont. Code Ann. § 2-4-704(1) (2011). Both the hearings examiner and
18 Commissioner Unsworth, when presented with all of the evidence and after
19 considerable consideration, determined that the receipt of two \$1000 checks
20 would tend to improperly influence a PSC Commissioner. As stated on page
21 24 of Commissioner Unsworth's final decision, "[a]s the hearing officer aptly
22 noted, the instant case record is not sufficiently complete to support a broad
23 rule, but a fair question is whether there is *ever* a situation when an

1 individual regulator may solicit and receive money from an individual or entity
2 subjected to his regulation without some appearance of wrongdoing.”
3 Accordingly and pursuant to the above analysis, Commissioner Unsworth’s
4 determination that Molnar’s solicitation and receipt of monetary gifts was
5 unlawful is hereby AFFIRMED.

6 **D. Commissioner Unsworth did not err in Determining that**
7 **Molnar’s Use of State Facilities for Political Purposes was**
8 **Improper.**

9 In his final decision dated September 13, 2010, Commissioner
10 Unsworth stated the following:

11 The use of public facilities and equipment to solicit support for
12 his re-election, for campaign contributions, to state his opposition
13 to the election of his opponent, and to arrange accommodation
14 (sic) to attend a public event for campaign purposes are
15 prohibited by § 2-2-121(3)(a), MCA.

16 See Unsworth’s Final Decision, p. 24 (Sept. 13, 2010). Molnar vehemently
17 opposes this ruling.

18 In stating his opposition to Commissioner Unsworth’s above conclusion,
19 Molnar first attacks the complaint of October 9th, 2008. This complaint
20 alleges that Molnar violated the Code of Ethics “by offering a government
21 email address for campaign purposes and a government phone number for
22 campaign purposes,” which ultimately constituted two of the five violations
23 found by Commissioner Unsworth pursuant to § 2-2-121(3)(a), MCA. See Fox
Complaint of October 9th 2008, p. 2. These allegations were in reference to
Molnar’s use of his state PSC email and phone number at the end of a re-
election campaign letter as well the use of his state PSC email on his re-

1 election campaign contribution website. Molnar argues that these infractions
2 should have been handled informally instead of being fodder for a Code of
3 Ethics complaint. In response, Unsworth indicated that Molnar was
4 contacted on four occasions by the Commissioner's staff regarding his
5 political campaign.

6 As a general defense to the allegations of the October 9th complaint
7 Molnar stated that "[t]here cannot by definitions (sic) or logic be an ethics
8 violation when [Molnar] admits the error and corrects it. It would seem that
9 there should only be an ethics violation if there is an attempt to violate the
10 law and hide it." See Molnar's Br. Supp. Jud. Rev., p. 19. This argument is
11 not persuasive. The Court agrees with both the hearings examiner and
12 Commissioner Unsworth, the latter of which stated in his final decision that
13 "there is nothing minor about these violations. A re-election campaign
14 document and website that directs citizens to contact the candidate at their
15 official state office is exactly what the Code of Ethics was designed to
16 prohibit." See Unsworth's Final Decision, p. 25.

17 The remaining violations of § 2-2-121(3)(a), MCA were in relation to
18 three emails, sent from Molnar's state PSC email address and found on his
19 PSC issued computer. Molnar first responds to these violations by correctly
20 asserting that the Administrative Rules of Montana direct any violation of the
21 state's telecommunication policy to be "enforced by state agency." Admin. R.
22 Mont. § 2.13.103 (2011). The administrative rules contained in this section
23 do not, however, divest a concerned citizen's right to pursue a Code of Ethics

1 violation under the laws promulgated for such a purpose by the state
2 Legislature. Nowhere in the administrative rules cited by Molnar is it
3 suggested that regulation by state agency is the exclusive remedial measure
4 for misuse of the state telecommunication system. As such, Molnar's
5 argument that the administrative rules should govern for the email violations
6 is not persuasive.

7 As his next defense to the email violations, Molnar proclaims that none
8 of the emails supported a "declared candidate" for public office. While facially
9 correct, this Court finds this assertion to be disingenuous. The following are
10 excerpts from two of the three email exchanges found to be in violation of § 2-
11 2-121(3)(a), MCA:

12 Email from Brad Molnar to Kurt Baltrusch, dated August 17, 2007:

13 As you know, **my position is an elected one and I'm up next**
14 **election cycle.** And earned media is free media. Would it be
15 possible for you, or one of the others that seemed to enjoy my
16 talk, to drop an editorial to the papers listed below? Just a
simple thing about **how lucky they are to have a commissioner**
that is so darn knowledgeable and willing to travel on his own
dime to educate the public...Please?

17 Email from Brad Molnar to the Billings Outpost, dated May 13, 2008:

18 Dear Editor,
19 Mr. Tussing desires to **debate** me? OK. Perhaps two debates.
20 We can rent a phone booth to accommodate those that care about
21 his revisionist rant of "deregulation" legislation passed eleven
years ago and we can use the MSUB Theater to address those
that are concerned about future policies and how they will be
personally affected.

22 In the third email exchange, Molnar makes lodging arrangements for he and
23 his girlfriend in Miles City on the weekend of the Bucking Horse sale in May of

1 2008. While not political on its face, a photograph provided at the CoPP
2 hearing established that Molnar was indeed present at the event to participate
3 in political events. Among these events was a parade in which Molnar walked
4 while wearing a "Brad Molnar" campaign t-shirt. Additionally, Molnar
5 reported the gasoline expended in traveling to and from this event as a
6 campaign finance expenditure. See Fox's Br. Opp. Jud. Rev., p. 29. Even a
7 cursory reading of the emails at issue, taken with the context provided at the
8 administrative hearing, discredits Molnar's assertion that none of the emails
9 "support a declared candidate."

10 As a final attack on Commissioner Unsworth's decision that Molnar's
11 emails constituted improper use of state facilities for political purposes,
12 Molnar cites to the case of *In the Matter of the Complaint Against Mike Cooney*,
13 dated December 4, 2003, for the proposition that a violation of § 2-2-121(3)(a),
14 MCA can only occur "while on the job or at the place of employment." A
15 review of the record supports the conclusion that, as a matter of fact, all of
16 the emails sent out by Molnar were sent during normal business hours,
17 creating the assumption that they were sent while Molnar was "on the job."
18 Alternatively, a review of the applicable law supports the conclusion that, as a
19 matter of law, § 2-2-121(3)(a), MCA does not *require* that the actions be done
20 while on the job for the actions to be considered a violation. See Fox's Br.
21 Opp. Jud. Rev., p. 30. This defense, like the ones before it, will not gain any
22 traction with this Court.

1 As stated above, a district court reviews an administrative decision in a
2 contested case to determine whether the findings of fact are clearly erroneous
3 and whether the agency correctly interpreted the law. *Clouse* at ¶ 23. After
4 review of the particular facts and applicable law, it is hereby determined that
5 Commissioner Unsworth did not err in determining that Molnar improperly
6 used state facilities for political purposes. Accordingly and pursuant to the
7 analysis above, such decision is hereby AFFIRMED.

8 **E. Commissioner Unsworth did not err in Imposing Monetary**
9 **Penalties and Costs against Molnar.**

10 In his proposed final decision, hearings examiner Corbett levied two
11 \$1000 penalties against Molnar for the receipt of unlawful gifts and five \$750
12 penalties for the improper use of state facilities, all of which were discussed
13 above. After fully adopting this recommendation, Commissioner Unsworth
14 added partial costs of the proceedings of \$14,945 to the bill. The total
15 penalties and costs imposed on Molnar was \$20,695. Molnar opposed the
16 imposition of these penalties and costs by asserting that the penalty statute
17 was unconstitutionally vague, imposition of which has resulted in Molnar
18 being denied the equal protection of the law. This argument fails for several
19 reasons.

20 If the commissioner determines that a violation of the Code of Ethics
21 has occurred, the commissioner may impose an administrative penalty of not
22 less than \$ 50 or more than \$ 1,000. Mont. Code Ann. § 2-2-136(2)(a) (2010).
23 Additionally, the commissioner may assess the costs of the proceeding against
the person bringing the charges if the commissioner determines that a

1 violation did not occur or against the officer or employee if the commissioner
2 determines that a violation did occur. Mont. Code Ann. § 2-2-136(c) (2010).
3 A party that files a pleading, written motion, or other paper challenging the
4 constitutionality of a state statute must promptly file a notice of constitutional
5 question stating the question and identifying the paper that raises it, and
6 serve the notice and paper on the state attorney general either by certified or
7 registered mail or by sending it to an electronic address designated by the
8 attorney general for this purpose. Rule 5.1, Mont.R.Civ.P.

9 In his brief supporting judicial review, Molnar stated that “[r]eading the
10 penalty statute it is obvious it is vague,” further asserting that “it is vague and
11 must be struck down.” See Molnar’s Br. Supp. Jud. Rev., p. 25. Because
12 Molnar failed to file a notice of constitutional question stating the question,
13 identifying the paper that raises it, and serve both on the attorney general the
14 constitutional question is not properly before this Court. Any argument of
15 this nature will be disregarded in considering the review of this section of
16 Commissioner Unsworth’s final decision.

17 In determining that each ethical violation under the Code of Ethics was
18 entitled to its very own separate and distinct penalty, Commissioner
19 Unsworth stated the following:

20 My assessment of an administrative penalty against the
21 Respondent recognizes that each ethical violation committed, as
22 proven and determined in this proceeding, involves separate acts
23 of misconduct. Just as someone who violates a criminal law (e.g.,
driving while intoxicated) or a civil penalty statute (e.g.,
committing insurance or investment fraud) can be prosecuted
and punished for each separate offense, a public officer or public
employee who violates the Code of Ethics can be punished via

1 imposition of an administrative penalty of not less than \$50 or
2 more than \$1,000 for each separate act of unethical behavior.

3 See Unsworth's Final Decision, p. 30. Beyond this, Unsworth's imposition of
4 costs against Molnar is specifically authorized by the permissive language of §
5 2-2-136(c), MCA. The imposition of both penalties and costs is statutorily
6 supported. Because Molnar does not make any argument beyond the
7 argument that the statutes are "unconstitutionally vague," which was
8 disposed of above, this Court does not see any reason to disturb the decision
9 of Commissioner Unsworth. Unsworth's decision was arrived at after much
10 consideration of the factual record and the applicable law. Commissioner
11 Unsworth did not err in imposing monetary penalties and costs against
12 Molnar. Accordingly and pursuant to the analysis above, such decision is
13 hereby AFFIRMED.

14 **F. Commissioner Unsworth did not err in Refusing to Award Fox**
15 **Costs and Attorney's Fees.**

16 In his final decision, Commissioner Unsworth refused Fox's request for
17 costs and attorney's fees. In doing so, Unsworth gave a brief description of
18 the availability of attorney's fees and costs in ethical violation proceedings:

19 From 1995 until 2001, the Code of Ethics did allow attorney fees
20 and costs to be awarded to the prevailing party. The 1995
21 legislation authorized a district court but not the Commissioner
22 to award "costs and attorney fees to the prevailing party" if the
23 Commissioner's initial ethics decision and the subsequent
decision of the now defunct Ethics Commission was appealed.
(See § 16, subsection 4, Chapter 562, 1995 L. of Montana and §
2-2-137, MCA 1995). The attorney fees provision, which was
included in the statutes specifying the make-up and powers of the
Commission, was subsequently repealed by the 2001

1 amendments to the Code of Ethics. (See Senate Bill 205, 2001
2 Montana Legislature, and Section 6, Chapter 122, L. 2001).

3 See Unsworth's Final Decision, pp. 31-32. Fox's request, if granted, would
4 run counter to the legislative intent of the 2001 legislature, which abolished
5 the availability of attorney's fees and costs in these types of actions.

6 In support of her assertion that she is entitled to attorney's fees and
7 costs, Fox cites to the private attorney general doctrine. This doctrine "is
8 normally utilized when the government, for some reason, fails to properly
9 enforce interests which are significant to its citizens." *Montanans for the*
10 *Responsible Use of the School Trust v. State ex rel.*, 1999 MT 263, ¶ 64, 296
11 Mont. 402, 989 P.2d 800. There are three basic factors to be considered in
12 awarding fees on this theory. These are in general 1) the strength or societal
13 importance of the public policy vindicated by the litigation; 2) the necessity for
14 private enforcement and the magnitude of the resultant burden on the
15 plaintiff; and 3) the number of people standing to benefit from the decision.
16 *Id* at ¶ 66. Unsworth acknowledged this argument, while deferring its
17 analysis to this Court. The private attorney general doctrine is an "equitable
18 exception" to the American rule, putting its dispersal within the sole
19 discretion of the courts. While Fox alleged specific facts, which she contends
20 satisfy the elements above, this analysis will not be examined by this Court.

21 Subsection 4 of § 2-2-137, MCA (1995) provides that if the decision of
22 the Ethics Commission, a now-extinct intermediary between the CoPP and the
23 district courts, was overturned on judicial review, the prevailing party was
entitled to attorney's fees and costs. Mont. Code Ann. § 2-2-137(4) (1995).

1 This particular section, however, was repealed by Senate Bill 205 from the
2 2001 Montana regular legislative session. Where the legislature has spoken
3 of its intentions regarding a specific issue within its authority, it would be
4 improper for the Judiciary to circumvent that decision through the adoption
5 of a legal theory to the contrary. While Fox makes a well-reasoned argument
6 advocating for application of the private attorney general doctrine to the
7 matter at hand, adoption of such an argument would circumvent that which
8 the legislature has already addressed and determined. A determination of
9 this nature reaches beyond the purview of this Court in the current matter.
10 Commissioner Unsworth did not err in refusing to award Fox her attorney's
11 fees and costs. Accordingly and pursuant to the analysis above, such
12 decision is hereby AFFIRMED.

13 In addition to asking this Court to remand Commissioner Unsworth's
14 final decision as to the award of Fox's attorney's fees and costs, Fox also asks
15 this Court to award her the attorney's fees and costs incurred in the
16 proceedings before this Court. Judicial review of an ethics decision must be
17 confined to the record, after which time the reviewing Court can either affirm
18 the decision of the agency or remand for further proceedings. Mont. Code
19 Ann. § 2-4-704 (2011). Fox's request for attorney's fees and costs associated
20 with the review disposed of herein is outside the scope of this Court's
21 authority as the reviewing Court. As such, Fox's informal motion for
22 attorney's fees and costs incurred in these current proceedings is hereby
23 DENIED.

1 cc: Kenneth D. Peterson
2 Joel E. Guthals

3 CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail/hand
upon the parties or their attorneys of record at their last known
addresses this 6 day of February 2012.

4 BY Rubrica T. Schilling
Judicial Assistant to Hon. Susan P. Watters