BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Monforton v. Lindeen No. COPP 2016-CFP-002 (B)	Finding of Sufficient Facts to Show a Campaign Practice Violation

On February 11, 2016, Matthew Monforton, a resident of Bozeman, Montana filed a complaint against Monica Lindeen, 2012 candidate for State Auditor and Jesse Laslovich, 2012 candidate for Attorney General. Mr. Monforton alleged in his complaint that Ms. Lindeen and Mr. Laslovich violated campaign practice laws.

Mr. Laslovich and Ms. Lindeen have each filed as a candidate for statewide office in the 2016 elections. The Commissioner has split the complaint into Part A and Part B to allow a separate discussion and a separate Decision as to Mr. Laslovich and Ms. Lindeen. This (B) Decision applies solely to Ms. Lindeen. The accompanying (A) Decision applies solely to Mr. Laslovich.

DISCUSSION

The Complaint allegations are first identified and addressed. An additional campaign practice issue is then raised and discussed.

I. The Treasurer and State Employee Issue

The Complaint alleges that certain actions of an individual, Lynne Egan, violate Montana campaign practice laws governing conduct of a campaign treasurer. The Complaint further alleges that Ms. Egan, a state employee, violated Montana campaign practice laws governing political activity of public employees.

A. Campaign Deposit Issue

The following facts apply to an analysis of whether a campaign contribution can be deposited by a person other than the campaign treasurer.

> Finding of Fact No. 1: On January 7, 2011, Monica Lindeen, a resident of Helena, Montana submitted a C-1 (Statement of Candidate) form to the Commissioner of Political Practices office (COPP). Candidate Lindeen listed herself as a Democratic candidate for State Auditor of the State of Montana. (Commissioner's records.)
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> Finding of Fact No. 2: The C-1 form (See FOF No. 1) filed by Candidate Lindeen listed Margaret Novak as the campaign treasurer. There was no deputy treasurer listed. (Commissioner's records.)
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> Finding of Fact No. 3: During 2011 and 2012 Lynn Egan made some deposits of campaign contributions for the Lindeen campaign. Her involvement was limited to delivery of the deposit. (Investigator's notes.[1] Egan deposition excerpt.[2])

[1] The COPP's investigator interviewed Ms. Egan on February 17, 2016.
[2] An excerpt of pages 88-100 of Ms. Egan's deposition, taken August 14, 2012 in a separate

Candidate Lindeen was a candidate for Montana statewide office (FOF No. 1). Candidate Lindeen appointed Margaret Novak as her campaign treasurer (FOF No. 2). Lynne Egan was not listed as a campaign treasurer or deputy treasurer (*Id.*) but did assist the Lindeen campaign by making deposits of campaign contributions. (FOF No. 3). The Complaint asserts that by making deposits of campaign contributions Ms. Egan violated Montana law governing actions of a campaign treasurer.

As explained further below, there is no statutory language that directly determines this Decision. Instead, this Decision is based on an administrative interpretation of statute. In making such an interpretation the Commissioner will, if necessary, consider and apply basic principles of constitutional law applicable to such a Decision.[3]

This Commissioner has, in the *Landsgaard* Decision (FN 3), previously quoted University of Montana law professor Anthony Johnstone, to the effect that "Montana's campaign finance laws are relatively simple, stable, and (until recently) rarely adjudicated."[4] The "recent" litigation referred to by Professor Johnstone began with the 2010 U.S. Supreme Court decision in the famous *Citizens United* case.[5] The holdings and comments in the *Citizens United*

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proceeding, accompanied the Complaint.

[3] *See* Discussion in *Landsgaard v. Peterson*, COPP 2014-CFP-008 (Commissioner Motl).

[4] Anthony Johnstone, associate professor (constitutional law) University of Montana *Republican Form of Government in Montana,* Montana Law Review, Vol. 74, p. 701 at p. 723 (2013).

[5] *Citizens United v. Fed. Election Comm,* 130 S. Ct. 876 (2010).

decision were followed by three years of federal court litigation in Montana leading to a massive judicial dissection of Montana's campaign practice laws by federal courts. Judicial intervention by federal courts into Montana's campaign practice laws was observed to be extensive so as to become "the most significant federal constitutional intervention in Montana politics…" in the last 50 years.[6] The constitutional concerns established by federal courts apply in this Matter and require an examination of the reporting and disclosure interest that is constitutionally necessary to preserve a campaign practice requirement.

There are two particular sources of Montana law, §13-37-207 MCA and 44.10.503 ARM, that regulate the manner of deposit of campaign contributions into a campaign account. Prior Commissioners have addressed reporting (including accounting) and timeliness aspects of §13-37-207 MCA or 44.10.503 ARM: determining that only a treasurer or deputy treasurer may write (sign) campaign checks, *Little v. Bullock*, October 25, 2012 (Deputy Commissioner Dufrechou); determining that checks must be deposited within five days of receipt, *Wilcox v. Raser*, May 26, 2010 (Commissioner Unsworth), *Hart v. Bullock*, November 23, 2012 (Deputy Commissioner Dufrechou); determining that the treasurer must keep an accounting of contribution deposits, *O'Hara v. Pinocci*, COPP 2014-CFP-027 (Commissioner Motl), *O'Hara v. Ponte,* COPP 2014-CFP-014 (Commissioner Motl). Each of these Decisions articulates current campaign reporting and disclosure practices that are encouraged and, if necessary, enforced by the staff of the COPP. The Commissioner determines

[6] Johnstone, Montana Law Review, Vol. 74, p. 707.

that all of these Decisions discuss and approve regulation that serves a constitutionally permissible purpose in advancing Montana's reporting and disclosure interest in ensuring that campaign finance information is promptly and accurately reported and disclosed to the people of Montana.

This Complaint, however, demands a rigid application of regulatory action that is not directly linked to a reporting or disclosure purpose. The Complaint alleges a violation based on a technical act: the physical act of delivering a campaign contribution for deposit in the campaign bank account. This complaint allegation is not based on Montana statutory law. The applicable statute (§13-37-207 MCA) requires that all funds received by a campaign be promptly deposited[7] into the campaign bank account. The statute further requires that a campaign treasurer must keep the records of the deposit. *Id.* In contrast, there is no requirement in the statute that the physical deposit of the contribution into the campaign bank account must be personally made by the treasurer. *Id.*

Given the lack of statutory requirement, the complaint allegation calls for a particular administrative interpretation of §13-37-207 MCA. In 2012 the applicable administrative regulation read "no contribution received shall be deposited …except by the appointed campaign treasurer." 44.10.503(1) ARM.[8] That ARM subsection language was followed by a subsection stating that "all

[7] Within five days of receipt.

[8] The Accounting and Reporting manual for 2012 candidates also stated that "only an appointed and certified treasurer or an appointed and certified deputy treasurer may make deposits to or draw checks on the campaign account."

funds received by the campaign treasurer shall be deposited as specified in section 13-37-207 MCA." 44.10.503(2) ARM. The COPP has made one applicable Decision and it noted that a contribution deposit by the political committee's accountant is "in violation of the rule [44.10.503 ARM]" because the accountant is not a treasurer or deputy treasurer.[9] There was no discussion in the 1996 Decision of any reporting or disclosure purpose advanced by requiring campaign deposits be limited to the treasurer or deputy treasurer.

This Decision requires a COPP administrative interpretation of the requirements regarding deposit of campaign contributions as applied to a 2012 campaign.[10] Accordingly, the Commissioner interprets §13-37-207 MCA and 44.10.503(2) ARM to require that campaign contribution deposits for a 2012 campaign must be made under the control of the campaign treasurer. The Commissioner, however, does not interpret §13-37-207 MCA and 44.10.503(2) ARM to require that each contribution deposit be made in person, solely by the campaign treasurer or deputy treasurer.

In making this determination the Commissioner notes that reporting and disclosure is served by accounting, recordkeeping and timeliness requirements placed on a campaign treasurer by §13-37-207 MCA and the Decisions listed above. In contrast, there is no reporting and disclosure purpose served by

[9] *Motl v. Committee against I-125* October 11, 1996 (Commissioner Argenbright).
[10] The administrative regulation applicable to 2016 campaigns is 44.11.409 ARM and it simply requires that "all funds received by the campaign treasurer shall be deposited as specified in 13-27-207 MCA."

interpreting 44.10.503(1) ARM to append an unnecessary burden on the treasurer to personally make deposits that he or she is separately required to account for. It does not matter who performed the ministerial act of making a campaign contribution deposit, so long as the treasurer ensures the deposit is timely made and fully accounted for, reported and disclosed. In making this Determination, the Commissioner notes that COPP staff has consistently provided this same advice to candidates and treasurers since 2010.[11]

With the above in mind, the Commissioner dismisses the portion of the complaint alleging a campaign practice violation based on a deposit of campaign contributions by a person other than the treasurer or deputy treasurer.

B. The Public Employee Issue

The Complaint makes reference to Ms. Egan performing actions "during working days." The Commissioner interprets this reference as being an allegation of improper use of public time for campaign purposes.

An allegation of improper use of public time requires an assessment of facts measured against two statutes: one prohibiting a public employee from using public time or resources to solicit support or opposition of a candidate's campaign (§2-2-121(3)(a) MCA) and another preserving a public employee's right to engage in personal political expression (§2-2-121(3)(c) MCA). These statutes trigger Title 13 review, with the review taking place under the language

[11] Interview with Mary Baker. *See* also Footnote 10.

of §13-35-226(4) MCA: "[a] public employee may not solicit support for or opposition to …election of any person to public office … while on the job or at the place of employment" and the authority vested in the COPP by § 13-35-226(5) MCA. This statute incorporates the standards of § 2-2-121 MCA.

This Office has applied § 13-35-226(4) MCA to measure the propriety of election related activity engaged in by public officials and entities: *Roberts v. Griffin*, November 19, 2009 (Commissioner Unsworth); *Hansen v. Billings School District* #2, COPP-2013-CFP-027 (Commissioner Motl); *Essmann v. McCulloch,* COPP-2014-CFP-053 (Commissioner Motl); *Nelson v. City of Billings,* COPP-2014-CFP-052 (Commissioner Motl); *Grabow v. Malone,* COPP-2014-CFP-060 (Commissioner Motl); and *Botchek v. Target Range School*, COPP-2015-CFP-001 (Commissioner Motl).

The facts necessary for this assessment are as follows:

> Finding of Fact No. 4: At all times discussed in this Decision Ms. Eagan was an employee of the State of Montana, employed by Office of the Montana State Auditor and Insurance Commissioner. (Investigator's notes; State Website.)
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> Finding of Fact No. 5: During 2011 and 2012, Ms. Egan assisted in preparing and filing Lindeen campaign finance reports. This work involved meetings that took place in Ms. Egan's office. This work also involved Ms. Eagan leaving work to deposit Lindeen campaign contributions, delivered into her possession at her State office. (Investigator's notes; Egan deposition excerpt.)
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> Finding of Fact No. 6: Ms. Egan states that she was careful that any campaign activity was conducted during personal time and states that no state resources of any sort (including time) were used during these activities. (Investigator's notes; Egan deposition excerpt.)

The complaint painted a picture of generally undisciplined actions by Ms. Egan. Upon examination, the complaint used too broad a brush as the facts, when detailed, show that Ms. Egan understood her obligations as a public employee and carefully designed and structured her campaign-related actions so as not to violate law.

Turning first to the public time issue, the attorney general has determined that "although 'public time' is not defined, a reasonable construction would be those hours for which an employee receives payment from a public employer." AG Opinion Vol. 51, No. 1 (January 31, 2005). Here, Ms. Egan was careful to use unpaid or personal time (breaks, after hours, lunch time) to perform any actions related to the Lindeen campaign. (FOF No. 6.) There are no facts supporting the Complaint's claim that Ms. Egan engaged in a use of public time for campaign activity.

Turning next to use of public resources, on occasion Ms. Egan incidentally used her office space for protected personal speech made during lunch or break time, but that use of space did not involve any resource output by the State of Montana. There was no additional rent paid, electricity paid or resource use of any sort. There are no facts supporting the Complaint's claim of a use of public resources.

Finally, the Commissioner turns to the separate language of §13-35-226(4) MCA which prohibits solicitation of "support for or opposition to" any candidate "while on the job or at the place of employment." Again, this

section of law "does not restrict the right of an employee…to express personal political views." *Id.* Ms. Egan did engage in actions supporting the candidacy of Ms. Lindeen while at her place of employment in a state building. (FOF No. 5.) But there is no evidence at all that those acts were anything but private between Ms. Egan and Ms. Lindeen. In particular, there is no evidence that Ms. Eagan solicited "support for" Candidate Lindeen from anyone, including co-workers, while on the job or at her place of employment. In fact, the evidence shows that opposite -- that is, that Ms. Egan was very discrete in her activity. As a matter of normal statutory interpretation, without solicitation there can be no violation of the separate language of §13-35-226(4) MCA.

The Complaint, however, urges a special or enhanced review of Ms. Egan's actions, based solely on the nature of the engaged-in activity (campaign support). As explained further below, the Commissioner cannot engage in such a special review. By adding language to §13-35-226(4) MCA protecting the expression of "personal political views", the legislature has made it clear that it wants a normal (non-political) review of a public employee's acts, such as those by Ms. Egan.

In the normal course of a day at work public employees, through judicious and discrete use of personal time, take phone calls, messages, packages, and personal visits from friends, relatives, medical care offices, schools, soccer clubs, and veterinary offices. These contacts, although personal to the public employee, are generally not considered improper so long as there is no use of

state time or involvement of state resources. Public employees meet these criteria through judicious use of personal break and lunch time to cover any such unplanned interruption in the work day. Ms. Egan's use of her personal time to cover actions connected with her "personal political views" must be considered in the same light as any other activity engaged in a public employee. So long as Ms. Egan does not solicit support, does not use public time and does not use public resources, the content of her personal contact (an act of personal political view versus dealing with a child's school schedule) cannot be dug out and considered. This is a sound principle, set in law by the Montana legislature, as it protects all employees in their personal political views whether those views are consistent or inconsistent with others who may share the office with the employee.

Because there was no public time or public resources used and because there was no solicitation regarding a candidate, any allegation of improper conduct by a state employee is dismissed in regard to these issues. In making this Decision the Commissioner notes a public employee may use his or her personal title (or even a uniform) while expressing personal political beliefs, AG Opinion Vol. 51, No. 1 (January 31, 2005). In this instance, the facts establish that Ms. Egan was careful and appropriate in separating public work from personal political speech.

II. Reporting Obligations

Once a complaint is filed the Commissioner "shall investigate any other

alleged violation …" §13-37-111(2)(a) MCA. This investigative authority includes authority to investigate "all statements" and examine "each statement or report" filed with the COPP. §13-37-111, 123 MCA. The Commissioner is afforded discretion in exercising this authority. *Powell v. Motl*, OP-07111, Supreme Court of Montana, November 6, 2014 Order.

Candidate Lindeen filed as a candidate for statewide office (FOF No. 1) and was accordingly required to file campaign finance reports on the schedule set for 2012 statewide candidates. The Commissioner's investigator reviewed all campaign finance reports filed by the Lindeen campaign. The following findings and discussion are made.

A. Lack of Required Report Information

Under Montana law, the Lindeen campaign must file "periodic reports of contributions and expenditures" (§13-37-225(1) MCA.) These reports must disclose "the full name, mailing address, occupation and employer" of each contributor (§13-37-229(2) MCA) and "the full name and mailing address of each person to whom expenditures have been made" §13-37-230(1)(a) MCA.

> Finding of Fact No. 7: On April 5, 2011, the Lindeen campaign submitted its first (initial) C-5 campaign finance report for the period of January 1, 2011 to March 31, 2011 listing $12,440 in primary contributions and $360 in general contributions with $1,034.64 in expenditures. (Commissioner's records.)
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> Finding of Fact No. 8: On July 5, 2011, the Lindeen campaign submitted a C-5 campaign finance report for the period of April 1, 2011 to June 30, 2011 listing

$14,214 in primary contributions and $0 in general contributions with $2,493.79 in expenditures. (Commissioner's records.)

Finding of Fact No. 9: On October 5, 2011, the Lindeen campaign submitted a C-5 campaign finance report for the period of July 1, 2011 to September 30, 2011 listing $14,175 in primary contributions and $210 in general contributions with $1,984.01 in expenditures. (Commissioner's records.)

Finding of Fact No. 10: On January 5, 2012, the Lindeen campaign submitted a C-5 campaign finance report for the period of October 1, 2011 to December 31, 2011 listing $7,960 in primary contributions and $350 in general contributions with $6,809.20 in expenditures. (Commissioner's records.)

Finding of Fact No. 11: On March 12, 2012 , the Lindeen campaign submitted a C-5 campaign finance report for the period of January 1, 2012 to March 5, 2012 listing $16,531 in primary contributions and $130 in general contributions with $3,775.91 in expenditures. (Commissioner's records.)

Each of the above described campaign finance reports was inspected by COPP staff, as required by §13-37-121.[12] COPP staff wrote to the Lindeen campaign after inspecting the first three reports (FOF Nos. 7-9), requesting that the campaign provide missing occupation and/or employer information for contributors.[13] Combined, the three reports listed a total of 16 contributors for whom the occupation and/or employer information was not provided. The remaining reports filed by the Lindeen campaign disclosed the complete information required by §13-37-229(2) MCA, either directly or by correction.[14]

[12] All inspections and follow-up e-mails were made by COPP staffer, Mary Baker.
[13] On January 12, 2012, following inspection of the fourth Lindeen report (FOF No. 10), COPP re-sent copies of the earlier inspection requests to the Lindeen campaign.
[14] On March 29, 2012 following inspection of the fifth campaign finance report (FOF No. 11),

Candidates commonly fail to provide the full range of information for each contributor or expense vendor, as required by statute.[15] Surprisingly few complaints have been filed over this infraction. But, when such a complaint is filed the COPP must investigate, apply law and, if appropriate, find a violation: *Essmann v. Patients for Reform*, No. COPP-2012-CFP-034 (Commissioner Motl); *Adams v Brown,* No. COPP 2015-CFP-005 (Commissioner Motl).

> Sufficiency Finding No. 1: The Commissioner determines that sufficient facts exist to show that Candidate Lindeen' campaign failed to meet Montana campaign practice standards when it did not provide all required information as to contributors on its first three campaign finance reports.

Having made this sufficiency finding, the Commissioner notes that campaign practice enforcement "may not be brought…more than 4 years after the occurrence of the facts that give rise to the action." §13-37-130 MCA. The facts that "give rise to the action" for this reporting violation occurred no later than October 5, 2011 (FOF Nos. 7-9). The Complaint was filed on February 11, 2016, well after the four-year statute of limitations. The Commissioner hereby dismisses Sufficiency Finding No. 1 as barred for enforcement by the statute of limitations.

B. Failure to Timely Report

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the COPP staff wrote to the Lindeen campaign detailing 18 missing items of information that needed to be added or corrections that needed to made with the campaign finance reports. That same night the Lindeen campaign (through Ms. Egan) responded by supplying the missing information or making the necessary corrections.

[15] All campaign finance reports are required to include "the full name, mailing address, occupation and employer" of each contributor. §13-37-229(2) MCA.

Candidates for Montana public office are required to report and disclose all campaign contributions and expenses through reports that are be filed on the dates specified by §13-37-226 MCA. In Candidate Lindeen's case that obligation continued into 2013 and 2014 because Ms. Lindeen did not file a closing report until October 3, 2014. Under Montana law, the Lindeen campaign was required to file a campaign finance report "on the 10th day of March and September of each year following an election" until the closing report is filed. §13-37-226(1)(f) MCA.

> Finding of Fact No. 12: The Lindeen campaign filed the 2013 campaign finance report due September 10, 2013 on October 6, 2013.
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> Finding of Fact No. 13: The Lindeen campaign filed the 2014 campaign finance reports due March 10 and September 10, 2013 through a single report filed on October 3, 2014. The October 3, 2014 report was filed as a closing report terminating the campaign.

Based on the above findings of fact the Commissioner determines as follows:

> Sufficiency Finding No. 2: The Commissioner determines that sufficient facts exist to show that Candidate Lindeen failed to meet Montana campaign practice standards when she did not timely file campaign finance reports as required by law.

Sufficiency Finding No. 2 involved facts that occurred within the past four years. There is no statute of limitations barrier to enforcement of this sufficiency finding.

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: 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, as set out in this Decision, to show that Candidate Lindeen's campaign has, as a matter of law, violated Montana's campaign practice laws, including those set out in this 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 timely file reports was due to lack of diligence. Excusable neglect cannot be applied to lack of diligence. (*See* discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.) Likewise the harm to the public caused by a delay in reporting and disclosure is substantial and obvious so as not to be excused 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). The Commissioner hereby, through this decision, issues a "sufficient evidence" Finding and Decision justifying civil prosecution under §13-37-124 MCA. Because of the nature of the violations (the failure to timely report and disclose occurred in Lewis and Clark County), this Matter, upon issuance of the final Decision, will be referred to the County Attorney of Lewis and Clark 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 timely prosecute (§13-37-124(1) MCA), this Matter then 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 is unresolved, 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*.

_DATED this 6th day of March, 2016.

Jonathan R. Motl
Commissioner of Political Practices
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