

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

O'Hara v. Pinocci No. COPP 2014-CFP-027	Final Decision and Findings of Sufficient Facts to Show a Campaign Practice Violation
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Randy Pinocci is a resident of Sun River, Montana. Mr. Pinocci was a candidate for the Republican nomination for election to the 2012 Montana legislature, House District No. 18 (HD 18). Jesse O'Hara was, at all times pertinent, a resident of Great Falls, Montana. Mr. O'Hara was also a candidate for the Republican nomination for 2012 election to the Montana legislature, HD 18. On May 28, 2014, Mr. O'Hara filed a complaint with the COPP alleging that Candidate Pinocci engaged in campaign practice violations related to the reporting of expenses and contributions in his 2012 election reports.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this Decision concern a candidate's reporting, disclosure and record keeping obligations under Montana law as well as the proper way to make campaign expenditures.

PRIOR DECISION

On June 18, 2014 the Commissioner issued a prior partial Decision in this Matter finding a late campaign violation by Candidate Pinocci. The partial Decision instructed Candidate Pinocci to hire an accountant and file an amended 2012 post-election report.¹ The partial Decision reserved for future consideration other issues concerning the adequacy of information reported in the 2012 campaign finance reports.

DISCUSSION

Mr. Pinocci was a 2012 candidate for election to the Montana legislature from HD 18 (FOF No. 1, Initial Decision). Mr. O'Hara's complaint alleges that Candidate Pinocci's 2012 campaign failed to properly make expenditures and failed to meet disclosure and reporting requirements set out in Montana law.

Candidate Pinocci was required to report and disclose as Montana's campaign finance report filing requirements are mandatory: "shall file" (*see* §§13-37-225, 226 MCA). Mr. Pinocci was also required to report certain information as a candidate's campaign must disclose all contributions received (§13-37-229 MCA) and all expenditures made (§13-37-230 MCA). Each of these issues is discussed further below.

1. Filing of Campaign Finance Reports.

Montana law requires that legislative candidates file their campaign finance report "on the 12th day preceding the date on which an election is held..." and on 20th day after the election §13-37-226(3) MCA. In 2012 the 12th

¹ The amended campaign finance report was filed by the accountant on August 4, 2014.
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day preceding the June 6 primary election was May 25, 2012 and 20th day after the election was June 26, 2012. (Commissioner's 2012 filing schedule).

Finding of Fact No. 4²: On May 24, 2012, Candidate Pinocci submitted his first (or pre-primary) 2012 campaign finance report to the COPP for the period of March 15, 2012 to May 24, 2012³. (Commissioner's records).

Finding of Fact No. 5: On June 12, 2014, Candidate Pinocci submitted his second (or post-primary) 2012 campaign finance report for the period May 20, 2012 to June 20, 2012. (Commissioner's records).⁴

The Commissioner will further discuss contribution and expense reporting obligations, below. For the purposes of campaign finance report filing the Commissioner finds sufficient facts to make a sufficiency finding:

Sufficiency Finding One: Sufficient facts exist (FOF No. 5) to show that Candidate Pinocci late failed his post-primary 2012 campaign finance report by about two years. (Commissioner's records).

2. Reporting of Contributions and expenses.

The money that supports (campaign contributions) and is spent by (campaign expenses) a candidate's campaign is subject to complete transparency, made useful to voters and the opposing candidate by an accompanying requirement of timely reporting. Montana law defines a simple, but complete, system of dealing with and accounting for contributions and

² FOF Nos. 1-3 are made in the initial Decision.

³ The report was due on May 24, 2012 but only required contribution reporting through May 19, 2012, the 5th day before the date of filing. §13-37-226(7) MCA. The May 24, 2012 report was amended by a report filed on August 4, 2014.

⁴ The June 12, 2014 report was amended by a report filed on August 4, 2014.

expenses:

- 1) Within 5 days of becoming a candidate, a candidate must file a certification with the COPP. (§13-37-201 MCA). That certification filing must include a designation of “one primary campaign depository.” (§13-37-205 MCA).
- 2) The campaign depository must be used to “deposit[ing] all contributions received and disburse[ing] all expenditures made by the candidate.” (§13-37-205 MCA).

Candidate Pinocci’s form C-1 (the document fulfilling the requirements of (§§13-37-201, 205 MCA) was filed March 14, 2012. Candidate Pinocci’s C-1 form designated Stockman Bank in Great Falls, Montana as his campaign’s depository.⁵

A. CONTRIBUTIONS

As described above, Montana law required that each and all of Candidate Pinocci’s 2012 campaign contributions must be deposited into his designated campaign depository, Stockman Bank. Further, Montana law requires that the contributions must be deposited “prior to the 5th business day following their receipt...” (§13-37-207(1) MCA). Still further, Candidate Pinocci’s campaign treasurer “shall keep detailed accounts of all contributions received...” (§13-37-208(1)(a) MCA). Candidate Pinocci then “shall file periodic reports of contributions...” (§13-37-225(1) MCA), according to the schedules set out

⁵ Candidate Pinocci opened a Stockman bank “Randy Pinocci for HD 18” account on March 15, 2012. The Commissioner received a complete set of the campaign bank records from the accountant Candidate Pinocci engaged to assist him in dealing with his campaign accounting.
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above. This system, if followed, provides transparency and fairness to the public, voters and the opposing candidate.

In investigating Mr. O'Hara's complaint the Commissioner looked to two sources of information: 1) the Stockman campaign account records and, 2) the Pinocci campaign finance reports to the COPP.⁶ These two sources should be consistent if the disclosure and reporting is done properly.

i) The Pre-Primary Contribution Reporting Period

The Commissioner first examines contributions listed by Candidate Pinocci in his March 12 to May 19 (24), 2012 pre-primary campaign finance reporting period:

Finding of Fact No. 6: Candidate Pinocci's pre-primary campaign finance report for the period March 15 to May 24, 2012 reported a total of \$8,639.35 in total contributions/receipts. This amount was reported as \$6,100.85 candidate loan, \$90 in below \$35 cash contributions, a \$30.50 contribution from Goodes Restaurant and \$2,418 in contributions from 21 individuals as follows:

\$160 on March 22	(\$160 Scott Sales)
\$160 on March 24	(\$160 Krayton Kerns)
\$160 on March 25	(\$160 Druann Kerns)
\$68 on March 26	(\$68 Rickey Linefelter)
\$150 on April 1	(\$50 Bradley Lotton, \$100 Nancy Marten)
\$320 on April 3	(\$160 Jim Grant, \$160 Roger Koopman)
\$50 on April 4	(\$50 Cole Marten)
\$160 on April 5	(\$160 Ladeine Thompson)
\$50 on April 6	(\$50 Dean Halse)
\$50 on April 18	(\$50 Chris Dobitz)
\$50 on April 23	(\$50 Svetlana Kodoehnikov)
\$100 on April 25	(\$100 Keith Ochs)
\$320 on April 26	(\$160 Lola Galloway, \$160 Steve Galloway)
\$50 on April 28	(\$50 Joe Briggs)

⁶ There is normally a third source of information, the campaign accounts maintained by the candidate's treasurer. Candidate Pinocci's campaign accounts, however, were so disorganized (as demonstrated with hours of conversation with COPP staff) that the Commissioner's office directed Candidate Pinocci to seek accounting help. See Initial Decision in this Matter.

\$160 on May 5	(\$160 Ray Thompson)
\$150 on May 8	(\$100 Richard Swenson, \$50 Jack Lien)
\$100 on May 17	(\$100 Joe Pinocci)
\$160 on May 18	(\$160 Ron Hepp)
\$160 on May 22	(\$160 Edward Butcher)

Finding of Fact No. 7: The Stockman Bank account records for Candidate Pinocci for the period of March 15 to May 24, 2012 show total deposits of \$5,359.70, with bank receipt records showing deposits from contributions by the candidate (\$3,000), cash (\$40), unknown sources (\$245.70) and 21 (\$2,074) individuals as follows:

\$3,000 on March 15	(\$3,000 Candidate Pinocci)
\$514 on April 2	(\$160 Scott Sales; \$160 Krayton Kerns; \$160 Druann Kerns and \$34 Rickey Linafelter) ⁷
\$210 on April 6	(\$160 Roger Koopman; \$50 K. Bradley Lotton)
\$150 on April 9	(\$100 Nancy Martin; \$50 Ann Halse)
\$198.45 on April 13	(No Deposit slip) ⁸
\$370 on April 25	(Ladeine Thompson, \$160; Ray Thompson, \$160; \$50 Svetlana Kodoehnikov) ⁹
\$47.25 on April 26	(No Deposit slip)
\$435 on April 30	(\$40 cash; \$160 Lola Galloway; \$160 Steve Galloway; \$50 Joe Briggs, \$25 Ramsey Offerdal) ¹⁰
\$125 on May 11	(\$100 Richard Swenson; \$25 Michael Spinti)
\$60 on May 16	(\$25 Harold Hamon; \$35 Adam Guernsery)
\$100 on May 18	(\$100 Joe Pinocci)
\$160 on May 22	(\$160 Ronald Hepp)

The May 22 contribution deposit is included as a pre-primary contribution even though it was made after May 19 because Candidate Pinocci listed the date of May 24 as the ending date of his pre-primary campaign finance report.

Finding of Fact No. 8: Candidate Pinocci's first campaign finance report listed contributions from Cole Marten (\$50), Chris Dobitz (\$50),

⁷ The contribution checks deposited on April 2 were dated between March 22 and March 26.

⁸ The Stockman bank records list this deposit as "direct public support" and there is no supporting deposit slip showing the source of the funds.

⁹ This contribution was made via a single check for \$320 drawn on the joint account of "R. or Ladeine Thompson." The check was signed solely by R. Thompson. The COPP accepts such a joint check as a proportional contribution of \$160 from each partner listed as joint account holder. *Landsgaard v. Peterson*, COPP-2014-CFP-008.

¹⁰ A single check for \$320 was used, signed solely by Lola Galloway. The COPP accepts such a joint check as a proportional contribution of \$160 from each partner listed as joint account holder. *Landsgaard v. Peterson*, COPP-2014-CFP-008.

Keith Ochs (\$100), and Edward Butcher (\$160)¹¹ that were not deposited into the campaign bank account.¹² (Commissioner's records).

Finding of Fact No. 9: Candidate Pinocci's campaign bank account has two anonymous deposits (\$198.45 and \$47.25, see FOF No. 7) for which no deposit/contributor information or campaign accounting was produced. (Commissioner's records).

Finding of Fact No. 10: Candidate Pinocci failed to maintain adequate campaign contribution records or accounts.¹³ (Commissioner's records).

The above findings of fact are sufficient evidence to find as follows:

Sufficiency Finding Two: Sufficient facts exist (FOF Nos. 8-10) to show that Candidate Pinocci failed to deposit reported 2012 pre-primary campaign contributions into his campaign bank account.

Sufficiency Finding Three: Sufficient facts exist (FOF Nos. 8-10) to show that Candidate Pinocci failed to properly keep and produce to the COPP the candidate's records or accounts of 2012 pre-primary campaign contributions.

Sufficiency Finding Four: Sufficient facts exist (FOF Nos. 8-10) to show that Candidate Pinocci failed to timely deposit pre-primary campaign contributions.

Montana law, as applied to Candidate Pinocci, require that Candidate Pinocci deposit "all contributions received" (§13-37-205 MCA) into his Stockman campaign account and that he make and keep a contribution "deposit slip" or "[a] statement showing the amount received from or provided by each person..." §13-37-207(2) MCA. Montana law further required that Candidate Pinocci:

¹¹ The Butcher contribution was deposited during the next reporting period.

¹² Candidate Pinocci, through an accounting firm, filed an amended campaign finance report on August 14, 2014. The amended report lumps the three under-\$35 contributions (Hamon, Spinti and Linefelter, see FOF No. 7) into an \$84 amount consistent with bank deposits. The amended report simply omits the contributions disclosed and reported in the first campaign finance report, but not deposited in the campaign bank account. (See FOF No. 8).

¹³ The amended report tracks bank records, not candidate records.

“shall keep detailed accounts of all contributions received...” (§13-37-208(1)(a) MCA).

The inspection of the first of Candidate Pinocci’s required campaign finance reports resulted in findings of sufficient facts (SF Nos. 2 & 3) to show that Candidate Pinocci breached these requirements of law. The facts show that Candidate Pinocci breached these laws from both directions. Candidate Pinocci reported contributions that he did not deposit and deposited anonymous contributions for which no accounts or records exist to show the source of the funds.

These deposit, accounting and record keeping requirements are not idle requirements as inspection rights are afforded to the opposing candidate during an election [§13-37-209 MCA] and the Commissioner, on behalf of the public, has *carte blanche* examination rights of any campaign finance report. (§13-37-123 MCA). In Candidate Pinocci’s case any such inspection would have been of no use as Candidate Pinocci’s accounts were incomplete and inaccurate.

ii) The Post-Primary Contribution Reporting Period

The Commissioner next examines contributions reported in the May 20 to June 20, 2012 post-primary campaign finance report filed with the COPP by Candidate Pinocci.

Finding of Fact No. 11: Candidate Pinnoci’s 2012 post-primary election report (late filed on June 12, 2014) lists \$500 in contributions deposited as follows:

\$160	NRA Victory Fund
\$100	Steve Benjamin
\$50	Daniel Keder

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\$40	Tom Marten
\$50	Hugh Sands
\$50	Rick Shannon
\$50	Jennifer Stetson

Finding of Fact No. 12: Candidate Pinocci's post-primary campaign bank account records show a total of \$918.88 in deposits as follows:

\$210 on May 25 ¹⁴	\$160, NRA Victory Fund; \$50, Hugh Sands
\$228 on May 29	\$160 Ed Butcher; \$34, J. Shockley; \$34 Marilee Schockley
\$70.88 on May 31	No bank deposit record
\$160 on June 1	\$160 Lee Randall
\$50 on June 5	\$50 Jennifer Stetson
\$200 on June 8	\$50 Daniel Keder, \$50 Svetlana Kadoshnikov, \$100 Steve Benjamin

Finding of Fact No. 13: Candidate Pinocci's post-primary campaign finance report listed contributions from Daniel Keder (\$50), Tom Marten (\$40), and Rick Shannon (\$50) that were not deposited into the campaign bank account. (Commissioner's records).

Finding of Fact No. 14: Candidate Pinocci's post-primary campaign bank deposit records show campaign finance deposits that were not listed in the post-primary campaign finance reports: \$34 J. Shockley, \$34 Marilee Shockley; \$160 Lee Randall; \$100 Steve Benjamin; and \$50 Svetlana Kadoshnikov. (Commissioner's records).

Finding of Fact No. 15: Candidate Pinocci's post-primary campaign bank deposit records show a campaign deposit (Ed Butcher \$160) that was reported by Candidate Pinocci in his pre-primary campaign finance report.

Based on the above facts the Commissioner makes sufficiency findings as follows:

Sufficiency Finding Five: Sufficient facts exist (FOF Nos. 11-15) to show that Candidate Pinocci failed to deposit reported 2012 post-primary campaign contributions into his campaign bank account.

Sufficiency Finding Six: Sufficient facts exist (FOF Nos. 11-15) to show that Candidate Pinocci failed to properly

¹⁴ The check is dated May 16.

keep and produce to the COPP the candidate's records or accounts of 2012 post-primary campaign contributions.

Sufficiency Finding Seven: Sufficient facts exist (FOF Nos. 11-15) to show that Candidate Pinocci failed to timely deposit 2012 pre-primary and post-primary campaign contributions.

B. EXPENDITURES

Montana law required that each and all of Candidate Pinocci's 2012 campaign expenditures must be "disbursed" from his designated campaign depository, Stockman Bank. (§13-37-205 MCA). Further, Candidate Pinocci's campaign treasurer is directed to: "...keep detailed accounts of all ... expenditures made by [candidate Pinocci] ..." (§13-37-208(1)(a) MCA). Candidate Pinocci then is directed to: "...file periodic reports of ...expenditures made by..." [(§13-37-225(1) MCA)], according to the schedules set out above. This system of reporting and disclosure is designed to insure transparency and fairness to the public, voters and the opposing candidate.

In investigating Mr. O'Hara's complaint the Commissioner looks to three sources of information as to expenditures: 1) Candidate Pinocci's campaign account bank records as each and all expenditures must be disbursed from the bank account; 2) the accounts maintained by the campaign treasurer; and, 3) the Pinocci campaign finance reports. All three of these sources should be consistent if the disclosure and reporting is done properly.

i) The Bank Records of Expenditures

The Commissioner first examines campaign expenses as shown by Candidate Pinocci's campaign bank records from the date of the first campaign

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transaction (March 15, 2012) through the date of the last campaign transaction (June 8, 2012).¹⁵ These dates spanned the pre and post 2012 primary reporting periods. The Pinocci campaign bank records show limited use of the campaign bank account as a method of meeting campaign expenses. During Candidate Ponte's primary campaign only 10 checks were written on the campaign account.

ii) Expenses Shown By Campaign Finance Reports

The Commissioner next reviews the expense portions of Candidate Pinocci's 2012 campaign finance reports. Candidate Pinocci filed an original (on May 24, 2012) and an amended report (August 4, 2014) for the pre-primary reporting period.

The information in the pre-primary reports raises substantial reporting and disclosure concerns. First, the two reports are not consistent as the total expenditures reported vary between these reports by over \$8,000. Second, the itemized expenditures listed in the reports reflect campaign expense activity largely occurring outside of the campaign banking account. For example, the May 24 campaign finance report shows as expenses 17 restaurant (meals), 4 gas, 3 event, 5 supplies, and 5 miscellaneous charges that were personally paid by Candidate Pinocci and then reported as in-kind donations to the Pinocci campaign. The initial June 12 report confuses accounting of these charges,

¹⁵ Candidate Pinocci kept his 2012 campaign account open with a cash balance of \$3,875.17 throughout 2013, paying some of those funds to himself in 2014 as partial repayment of loans he made to the campaign.

triple reporting most as “loans”, “contributions” and “debts not paid”.¹⁶ The August 4 amended report for the pre-election period eliminates the triple accounting, makes the expenditure flow more understandable and brings the reported cash balance on the campaign finance report in line with the bank.¹⁷

Candidate Pinocci first filed the post-election campaign finance report (due June 26, 2012) on June 12, 2014. That June 12, 2014 report includes expenditures previously reported on the pre-election report but adds some new expenditures, including \$1798.12 paid by Candidate Pinocci to General Consulting under invoices 424 and 483.¹⁸ The June 12 report does not remotely match reported cash in bank with what is actually in the campaign bank account. The August 4, 2014 amended post-election report matches reported cash in bank with what is in the account. It does so, however, at the cost of dropping expenses previously reported including the entire \$1798.12 General Consulting expenditure.

iii) Campaign Account Records

The Commissioner did not examine Candidate Pinocci’s campaign account records. Normally these records consist of an accounting ledger and receipts.

¹⁶ COPP staffers Baker and Trujillo tried, unsuccessfully, to work with Pinocci to correct this accounting.

¹⁷ The June 12, 2012 report remained the only source of campaign disclosure and reporting until the amended August 4, 2014 amended report was filed.

¹⁸ General Consulting is an assumed name used by Direct Mail Servicing and Processing, Inc., the Colorado for-profit corporation that worked in tandem with Western Tradition Partnership, a Colorado not-for-profit corporation in certain Montana 2008, 2010 and 2012 legislative elections. See the following Decisions regarding Direct Mail/WTP involvement in 2010 Montana legislative elections: *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Clark v. Bannan*, COPP 2010-CFP-023; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; *Bonogofsky v. Wittich*, COPP-2010-CFP-031; *Madin v. Sales*, COPP-2010-CFP-029; *Bonogofsky v. Prouse*, COPP-2010-CFP-033; and *Bonogofsky v. Wagman*, COPP-2010-CFP-035.

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Discussions by COPP staff with Candidate Pinocci determined that there was no accounting ledger and that receipts were disorganized or lost. The records were in disarray to the point that the accountant Candidate Pinocci finally hired in 2014 was unable to accurately report expenses, dropping, for example, the previously reported General Consulting expense.

Based on a review of Candidate Pinocci's campaign finance reports and campaign bank records, along with reasonable observations about the condition of the Candidate's own campaign records the Commissioner makes the following sufficiency findings:

Sufficiency Finding Eight: Sufficient facts exist to show that Candidate Pinocci failed to properly account for, disclose and report his 2012 primary election campaign expenditures.

Sufficiency Finding Nine: Sufficient facts exist show that during the 2012 primary election reporting periods Candidate Pinocci failed to maintain a system of accounts as required by 44.10.501 ARM and as specified by the COPP accounting and reporting manual for candidates, page 6.

At the heart of Candidate Pinocci's accounting, reporting and disclosure problems are his repetitive use of in-kind personal expense spending to make contributions to his own campaign. In general, Montana law requires that "[a]ll expenditures, except expenditures from a petty cash fund, shall be made by check drawn on the designated depository." 44.10.503 ARM, COPP accounting manual, p. 14. In turn, Candidate Pinocci was required to report and disclose all: "contributions received and all expenditures made..." (§13-35-208 MCA).

Had Candidate Pinocci made his contributions in the form of cash to his campaign account and conducted all expenditures through his campaign account it seems unlikely that his large scale campaign accounting issues would have occurred. COPP custom, and the need for common sense accommodation to a candidate, does allow an exception from payment through the campaign bank account for expenditures made in the form of an in-kind contribution. See 44.10.321(2) ARM and page 10 of the COPP Accounting and Reporting Manual for Candidates. There is no indication, however, that in-kind use is to be anything other than a limited use or exception.

The in-kind reference in the COPP “Frequently Asked Questions”¹⁹ focuses on instances of value (such as office use or fundraising items) provided by a third party to a candidate. Likewise, the Accounting and Reporting Manual for Candidates, at page 10, describes in-kind in the context of specific goods or services donated by a 3rd party to a campaign. ARM 44.10.321(2) also describes in-kind as “the furnishing of services, property or rights without charge ...to a candidate”. Further, Decisions issued by Commissioners approving in-kind expenditures deal with 3rd party provision of specific goods or services to a campaign. See *Daubert v. Montanans for Clean Water*, (February 27, 1997, Commissioner Argenbright) and *Hardin v. Skinner*, (December 17, 2012, Commissioner Murry).

A candidate cannot expect more than a narrow use of in-kind

¹⁹ Frequently Asked Questions is a publication available for public review on the COPP homepage website.

expenses to his or her campaign, given the following directive provided by the COPP to Montana candidates for public office:

It is essential that all monetary receipts – including a candidate’s own funds- be deposited in the campaign account and that all money spent by the campaign be by checks drawn on this account (the only exception is the petty cash fund.) Proper use of the campaign checking account will make record keeping and reporting much easier.

COPP Accounting Manual for Candidates and Campaign Treasurers, page 6.

Under Montana law “...a candidate may not utilize the candidate’s regular or personal account...” for campaign purposes. §13-37-205 MCA. Past Commissioners have determined that use of a personal account and a personal credit card for campaign purposes is a violation of Montana’s campaign practice laws [Welker v. Bennett (June 30, 1999; Commissioner Vaughey)] and there can be no intra-account transfers of funds involving a campaign account. Wilcox v. Raser (May 26, 2010; Commissioner Unsworth).

This Matter presents the issue of whether or not (and to what extent) a candidate’s use of in-kind expenditures, thereby creating an in-kind contribution by the candidate, is allowed an exception to the directives that all expenditures be made through the campaign account. Before deciding this issue the Commissioner notes that Candidate Pinocci’s 2012 campaign accounting and reporting is deemed deficient (See Sufficiency Findings Nos. 8 and 9) for additional reasons than repetitive use of in-kind contributions. Accordingly, the Commissioner will use those other reasons (such as omission,

failure to keep accounts and late reporting) as the basis for sufficiency findings against Candidate Pinocci in this Matter.

As to future situations, based on the above discussion hereafter a candidate's repetitive use of personal in-kind expenditures/contributions, in place of use of the campaign bank account will by itself be a campaign practice act violation. The Commissioner, through this Decision, hereby establishes that a candidate can make only a limited use of in-kind contributions/expenditures in his or her own campaign with that use limited to instances when it is not practical or possible for the campaign to make the expenditure directly with campaign funds.²⁰ Any such in-kind contribution/expenditure by a candidate and his or her campaign must be a small minority of campaign expenditures and must result in the expenditure being fully, understandably and timely disclosed and reported.

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 as the law requires that if there is "sufficient evidence" of a violation the Commissioner must ("shall

²⁰ Candidate Pinocci is directed to use his 2014 campaign bank account as the means to pay expenses of his 2014 campaign for election.

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 (see Sufficiency Findings, as set out in this Decision) to show that Candidate Pinocci’s 2012 primary election campaign violated Montana’s campaign practice laws, including, but not limited to §§13-37-126, 208, 225, 226, 228, 229, 230 MCA and all associated ARMs. 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 many violations set out in this Decision cannot be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. Likewise, the violations are too substantial 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, also issues a “sufficient evidence” Finding and Decision justifying civil prosecution of Candidate Pinocci for late filing, failing

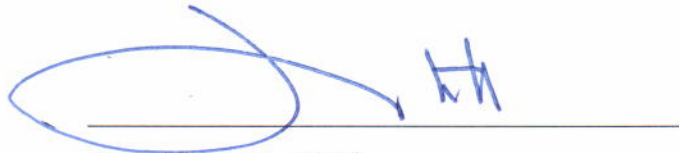
to report, improper accounting, improper use of campaign funds and general improper campaign practices implicating the full reach of chapters 35 and 37 of Title 13 MCA. Because of the nature of violations (the failure to timely and adequately report and disclose occurred in Lewis and Clark County) this matter is 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 prosecute within 30 days [§13-37-124(1) MCA] this Matter 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 resolved, 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*.

In addition to the remedies and processes set out above the Commissioner

directs Candidate Pinocci to immediately file a closing report on his 2012 campaign. Candidate Pinocci can accomplish this by distributing any remaining funds to himself as he is carrying a substantial amount of “debt” from his in-kind and cash contributions to his 2012 campaign. While Candidate Pinocci may wish to keep the 2012 campaign open and continue fundraising to repay debt the Commissioner determines that the accounting and record keeping is too chaotic and uncertain to allow the campaign account to remain open for acceptance and disbursement of funds. The only acceptable transaction left is the final distribution of funds and closing of the account. Candidate Pinocci should take this action as soon as possible.

DATED this 23rd day of September, 2014.



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