

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Thomas v. Gianforte No. COPP 2016-CFP-001	DISMISSAL OF COMPLAINT BY APPLICATION OF PRINCIPLE OF EXCUSABLE NEGLIGENCE
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On January 25, 2016, Gerald Thomas, a resident of Anaconda, Montana filed a complaint against Greg Gianforte, a 2016 candidate for Governor of Montana. Mr. Thomas alleged in his complaint that Mr. Gianforte violated campaign practice laws.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this decision is whether a candidate for public office can lawfully mail campaign documents to public employees using the government mailing addresses for the employees.

SUMMARY OF RELEVANT FACTS:

The facts necessary for a determination in this matter are as follows:

Finding of Fact No. 1: On August 17, 2015, Greg Gianforte submitted a C-1 Statement of Candidate form to the Commissioner of Political Practices office (COPP). Mr. Gianforte listed himself as an “exploratory” Republican candidate for Governor of Montana in the 2016 election. On January 21, 2016, Candidate Gianforte submitted an “Amended” C-1 form to reflect

his intention to run for Governor in the 2016 election.
(Commissioner's records.)

Finding of Fact No. 2: Seven candidates have filed with the COPP as 2016 candidates for the office of Governor of Montana: Greg Gianforte (Republican), Steve Bullock, (Democrat and current Governor of Montana), Casey Filler (Non-partisan), Mark Perea (Republican), Ronald Vandevender (Libertarian), Christopher Zarcone (Independent) and Marcel Cote (Independent and has since withdrawn his filing). (Commissioner's records).

Finding of Fact No. 3: On January 21, 2016 Complainant (and Coroner for Anaconda-Deer Lodge County) Gerald Thomas, received an email to his government email address from the "Gianforte for Montana" campaign: (Complaint, Commissioner's records).

Finding of Fact No. 4: The email addressed in FOF No. 3 read as follows:

To: Thomas, Gerry
(coroner@anacondadeerlodge.mt.gov)

Fr: Greg Gianforte (info@gregformontana.com)

Subject line: *VIDEO: I'm in, and I need your help*

The Gianforte campaign logo (a graphic of the State of Montana in orange with written text in blue and white: "GREG Gianforte Governor") was centered at the top of the email.

The body of the email read:
Gerald, I'm writing today because I believe you're someone I can count on.

A sentence underlined in blue linked the recipient to the Gianforte campaign website: *I have officially launched my campaign to become the next governor of Montana, and I need you on my team!*

A VIDEO was embedded within the email with a screenshot of Candidate Gianforte shaking hands with a man sitting on a green tractor. A red "play" button on the

screenshot linked the email recipient to a one minute video titled "Bold". This video is also available on Candidate Gianforte's campaign website:
(<http://www.gregformontana.com/posts/video/bold>)

Below the video the email read: *Gerald, I say this without hesitation – Montana is the greatest state in the nation, and we have much to be proud of. But our way of life is under attack, and has been for some time. **A decade of ineffective, weak executive "leadership" has let Montanans down.***" (Commissioner's records, Gianforte Campaign Email #1, Investigative notes.)

Finding of Fact No. 5: On February 2, 2016, the Gianforte campaign responded to the complaint allegations and stated the following:

- Mr. Thomas' official county government email was obtained from the publicly published Montana Association of Counties (MACo) directory and was imported into a campaign contact email database. Mr. Thomas' email was added to a list used for campaign communications including fundraising solicitations.
- Candidate Gianforte retains a private, professional email service database program for distributing campaign communications and the email to Mr. Thomas did not originate from a "(dot) gov" email address.
- Candidate Gianforte's campaign paid for all costs, including staff time, associated with the email described in FOF No. 4. (Investigator's notes).

Finding of Fact No. 6: The Commissioner's Investigator reviewed the Montana Association of Counties (MACo) website and found an advertisement on the home page labeled "County Officials Directory – Order here" which links to another MACo webpage in which the public can pay \$15 to obtain the "Directory of County Officials" list. The investigator spoke to the MACo office and they confirmed that the list does contain the government email address of all "county officials" listed. (Investigative notes.)

Finding of Fact No. 7: The Commissioner's Investigator spoke to the Complainant and two other government employees who received an email from Candidate Gianforte and confirmed they did not submit their government email address to the Gianforte campaign. (Investigative notes.)

DISCUSSION

The facts show that Candidate Gianforte purchased a list of addresses of Montana governmental officials and employees (FOF No. 6) and then sent campaign material (FOF No. 4) to the public employees at their governmental address (FOF Nos. 3 and 7). The public employees had not supplied their address to the Gianforte campaign (FOF No. 7) and did not ask that Candidate Gianforte's campaign material be sent to them.

Commissioner Vaughey dealt with a comparable complaint during the 2000 Montana election for governor: *Mackin v. Mazurek*, June 10, 2000. Candidate Mazurek had mailed campaign literature to state employees at their state office building addresses and the complaint challenged the legality of this activity. Commissioner Vaughey determined that there was no campaign practice violation, pointing out that "Mazurek and Bradley did not use public facilities, equipment, supplies, personnel, or funds to make the mailing."¹ Further, Commissioner Vaughey determined that the state time involved in "processing and distributing unsolicited mail addressed to public employees" did not cause any state employee to engage in prohibited political activity while on state time.

¹ Section 2-2-121(13) MCA prohibits any use of state paid time or resources for political campaign purposes.

In part, Candidate Gianforte's actions falls under *Mackin* and are excused by the reasoning set out in *Mackin*. There was no use of public resources or public time because the campaign email was created and mailed by the Gianforte campaign using non-governmental campaign funds. (FOF No. 4). The public employee time involved in opening the Gianforte email on governmental addresses was no more than that involved in any junk email that slips into a governmental address and is therefore excused as *de minimis* under *Mackin*.

There is a difference between *Mackin* and this Matter, though. Mazurek was a state employee at the time he ran for governor, giving heightened focus on his campaign's use of state mail addresses. Nevertheless, the Mazurek campaign's use of state addresses for political purposes was excused as infrequent and accidental because the Mazurek campaign stated it "voluntarily restrict[ed] the practice" of mailing to governmental addresses and that it sought to purge governmental addresses from its campaign mailing lists.

The use of government addresses in this Matter is markedly different than the accidental and infrequent use involved in *Mackin*.² Candidate Gianforte's campaign purchased and used an email address list maintained by a governmental entity and sent campaign emails to the entire list (FOF Nos. 6 and 7). Unlike *Mackin*, this Matter presents the issue of whether planned and deliberate use of governmental email addresses by a candidate violates Montana's campaign practice laws. Montana has a long standing law that applies here: "a person may not coerce, command, or require a public employee

² The Commissioner's investigator interviewed a judge, a coroner and a county administrator from the MACo list, all of whom confirmed that they received the campaign mailing.

to support or oppose...the election of any person to public office” §13-35-226(3) MCA. The Gianforte campaign is such a “person” under Montana law. §13-1-101(28) MCA.

The Gianforte campaign being a covered person, the only remaining determination is whether the Gianforte campaign’s mailing to a list of public employee work addresses constituted coercion under §13-35-226(3) MCA. The COPP has considered this issue once before, finding that a letter to the editor published in support of a candidate by a director of a state agency was not coercion directed at employees of his agency. *Seher v. Galt*, (July 26, 2004, Commissioner Vaughey).³

The actions in this Matter involve a deliberate mailing by a campaign to the work addresses of public employees in the state of Montana. This is markedly different than the indirect contact with employees that was presented by the letter to the editor in *Seher*. Further, any campaign action involving public employees in Montana must be measured against explicit Montana law that both prohibits Montana public employees from carrying out campaign activity at work and protects those same public employees from being subjected to any suggestion or requirement of campaign activity while at work, §2-2-121(3) MCA, §13-35-226(4) MCA.

When measured against Montana’s explicit and careful workplace public employee campaign practice standards, the Commissioner determines that a deliberate, systemic campaign use of public employees’ work addresses is

³ The *Seher* Decision notes that “coerce” involves a forceful action: “dominate, restrain or control”.

coercion under §13-35-226(3) MCA. If this were not the case then the addresses of Montana public employees would be fair game for any political campaign, including the campaigns of the other six individuals who are running for election as Montana's governor in 2016 (FOF No. 2). This sort of activity is exactly what Montana law is designed to prevent.⁴

Turning now to Candidate Gianforte's particular situation, the Commissioner recognizes that the *Mackin* Decision did not find a violation for a certain political use of public employee work addresses. There is, however, a distinction between the limited accidental mailing discussed in *Mackin* and the deliberate mailing discussed in this Matter. That distinction was not made until this Decision. Accordingly, the Commissioner declines to find Candidate Gianforte in violation for the specific mailings discussed in this Complaint.⁵

Candidate Gianforte is hereby directed to immediately purge all public employee place-of-work addresses, whether electronic or other, from his 2016 campaign mailing lists. Candidate Gianforte and all other candidates are instructed to hereafter refrain from campaign use of public employee work addresses. If there is such a use in the future it will be a campaign practice violation unless it can be shown to fit under the *Mackin* test of an infrequent and accidental mailing or under another exception such as a public employee

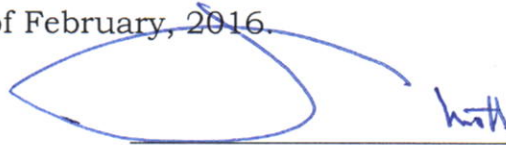
⁴ One of the 2016 candidates for Montana Governor is the sitting Governor who is seeking reelection. It would be jarring indeed for public employees to awaken to a campaign mailing at their work mailing addresses from a sitting public official. This Decision makes it clear that no candidate, including Candidate Gianforte, can engage in a systemic mail campaign involving the work addresses of public employees.

⁵ The Commissioner applies the principle of excusable neglect to dismiss the immediate action. The Commissioner applies this principle on the basis that the necessary distinctions were first made in this Decision. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

affirmatively consenting and directing a campaign to use his or her workplace address for campaign mailings.

Stated in plain English, Montana law does not allow political campaigns the use of workplace addresses of public employees for political purposes.

DATED this 9th day of February, 2016.



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