

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES (COPP)

KEPHART	COPP-2023-CFP-001
v.	COMMISSIONER GALLUS
BUTTE SILVER BOW DEMOCRATIC CENTRAL COMMITTEE & FAITH SCOW	PARTIAL DISMISSAL AND FINDING OF SUFFICIENT FACTS TO SUPPORT VIOLATIONS

I. Complaint

On March 16, 2023, James Kephart of Butte, MT filed a campaign practices complaint against the Butte Silver Bow Democratic Central Committee “BSBDCC” and Faith Scow in her official capacity as chairwoman. The complainant alleges that the BSBDCC failed to timely file numerous finance reports as required by MCA §§ 13-37-225, 226, 228 and 229, and on one occasion filed an inaccurate and deceptive finance report. This complaint was properly submitted through the Office of Political Practices’ established procedures and was subsequently accepted as filed by the Commissioner.

Following receipt of the proper complaint in this matter, on April 13, 2023, I acknowledged its acceptance to the parties and communicated how matters pertaining to the complaint would proceed. At this time, I also requested a response from BSBDCC. Respondent updated their filing on May 22, 2023, and following a meeting with the Commissioner and a COPP compliance specialist on June 21, 2023, filed a response on July 10, 2023. The complaint, BSBDCC’s response and all filings are available to the public on COPP’s website.

Prior to the filing of this complaint, following unanswered requests for information, COPP closed BSBDCC’s registration with COPP. This process requires a committee to re-register, at which time any delinquencies must be addressed. Following the closing of the committee, BSBDCC contacted COPP and began the process of re-registering as a committee and reconciling their reports. I met with the COPP investigator and a compliance specialist who both reviewed the records provided by the respondent as well as all previous and updated records filed with COPP

pursuant to MCA §§ 13-37-201, 225, 226, and 229. Following these actions, I concluded that no additional investigation is necessary as the record is established. The basis for this decision is as follows:

II. Discussion

Complainant alleges numerous reporting violations, including untimely reporting, failure to file, and deceptive filing. *See Complaint*. As a preliminary matter, and as I indicated in *VanFossen v. Missoula County Central Comm.*, I do not address or give credence to matters where I lack authority. COPP-2023-CFP-008. This includes personal judgments with respect to motivation or behavior expressed by the parties. COPP is primarily staffed with compliance specialists rather than prosecutors, and we favor education and cooperation over punishment. “Got you” complaints designed to enhance respective political positions or garner media attention are disfavored because such complaints deplete COPP limited resources unnecessarily and dilute decisions and authority. *Landsgaard v. Peterson*, COPP-2014-CFP-008 at 12. However, as Commissioner, I will address substantive allegations in any complaint. Despite certain hyperboles this complaint does contain some substantive allegations, which I now address.

This complaint addresses the filing obligations of political party committees. “Political party committee” refers to a political committee (including all county central committees) formed by a political party organization. MCA § 13-1-101(33) (2023). A political party organization is any political organization that “was represented on the official ballot in either of the two most recent statewide general elections.” MCA § 13-1-101(36)(a). Once a state political party committee meets either the voting threshold or signature petition requirement its associated central committees are automatically created, as a matter of law. Local central committees organize and then file their rules with the appropriate county election administrator (MCA § 13-38-105), hold elections to establish their membership (precinct committee posts), and conduct their affairs. While local central committees have a certain status in law to conduct their affairs and assist their candidates, they are not exempt from campaign finance disclosure laws. From the point of their very first expenditure local central committees have campaign finance reporting requirements. These obligations are continuous. This includes filing a Statement of Organization (C-2) with COPP and updating the C-2 when changes occur. Local central committees then regularly report

their financial activity (C-6). BSBDDCC is included in this definition and is obligated to meet all of these reporting responsibilities, including timely reports and timely amending its reports when necessary. Courts have upheld their Montana reporting requirements as fair, simple and reasonable as a matter of law. *National Gun Ass'n. For Gun Rights, Inc. v. Mangan*, 933 F.3d 1109 (9th Cir. 2019).

As a political party committee, BSBDDCC's purpose is to support democratic candidates, platforms, policies, and ideas. ARM 44.11.203. An essential function of a central committee is to fundraise and make contributions to the candidates of their political party. In accordance with that activity, BSBDDCC was clearly obligated to file financial disclosures that meet the requirements of MCA §§ 13-37-225, 226, 229, and 231. *Van Fossen*, 3, (political party committees are unique in some respects but must comply with campaign finance reporting laws).

This decision first examines BSBDDCC's lack of timely reporting, then considers the complainant's allegations of deceptive filing, and finally discusses violations discovered by COPP outside of the complaint.

A. Filing deficiencies

Montana's campaign finance report filing requirements are mandatory: "shall file" MCA § 13-37-226. The filing date requirements are date certain. In *Bradshaw v. Bahr*, the Commissioner found that "any failure to meet a mandatory, date-certain filing date is a violation of § 13-37-226 MCA." COPP-2018-CFP-008, *emphasis added*.

MCA §13-37-226(2) details the reporting requirements for political committees which are generally due on the 5th day following each calendar quarter during a non-election cycle and monthly on the 20th day during an election year in which the committee participates. The required information is filed on Form C-6 in accordance with MCA § 13-37-225 and 226, and ARM 44.11.502.

The complainant alleges that BSBDDCC failed to file any C6 reports between November 25, 2018, and March 16, 2023, barring one defective report filed on April 25, 2020. Respondent does not dispute this allegation but contends a variety of difficult circumstances resulted in a lack of reporting. In their response, and in an in-person meeting with the Commissioner and COPP staff, BSBDDCC maintained that a major turnover in leadership in 2019 and the Covid pandemic

resulted in a loss of the committee's post office box and access to the COPP portal to submit reports. *See Response*.

According to Montana election law in effect when these reporting violations occurred, a political committee is required to keep records for four (4) years.¹ MCA § 13-37-208(3) (2021). The statutory limit is now two years, but the 4-year requirement applies under this complaint. Since the submittal of the complaint BSBDDC has brought filings up to date for the time period required under the statute. COPP does not have cause to question the veracity of these filings. BSBDDC has been thorough and cooperative. This is appreciated but does not ultimately negate the failures. A review of COPP records indicates that between January 2020 and the date of the complaint, BSBDDC failed to file a minimum of 8 reports.

Timely reporting is essential to provide Montana voters the information necessary to make informed decisions regarding candidates and ballot issues. COPP hereby determines that sufficient evidence exists to show that BSBDDC violated Montana campaign practice laws, specifically MCA § 13-37-225, 226 and 229, by failing to file numerous C-6 reports. Further, the sufficiency of the evidence established justifies prosecution such that I will refer this portion of the complaint to the Butte-Silver Bow County Attorney per MCA §§ 13-37-124 and 125.

B. Dismissal of complaint regarding deceptive filing

Complainant correctly notes that a report was filed on April 25, 2020, for BSBDDC that covers all periods from November 25, 2018, to April 25, 2020. This report lists only 'cash on hand' with no expenditures, contributions, or debts. *See Complaint*. Complainant understandably asserts that this filing is "obviously false" in violation of MCA § 13-37-231. However, this report was not filed by BSBDDC but rather COPP staff filed this report as part of the process to close BSBDDC. As the circumstances here allowed, "The Commissioner may end registration and terminate any political committee that fails to file an organizational statement or campaign finance report in the time and manner required by law." Office Management Policy 2.5, *COPP Policies and Procedures*, p. 33.

¹ In 2023 the Montana Legislature reduced the time period campaign finance records must be kept from four (4) to two (2) years. MCA § 13-37-208(3) (2023).

Compliance officers attempted to reach Ms. Johnson, the treasurer listed on BSBDDC's C-2 Statement of Organization, to encourage her to update BSBDDC filings. When they were unsuccessful COPP made the decision to close the committee. As part of this process, COPP staff filed a closing C-6 report including the only information available at the time – cash on hand. *See COPP records.*

While the April 25, 2020, filing was indeed inaccurate and lacked necessary detail, it was not filed by BSBDDC with the intent to mislead, and indeed was not filed by BSBDDC at all. Therefore, the allegation that BSBDDC filed a false report in violation of MCA § 13-37-231 is dismissed.

C. Additional defects not addressed in the complaint:

Addressing the specific allegations in the complaint does not necessarily resolve the matter in its entirety. Montana law also permits COPP to ascertain whether other violations exist and issue orders of noncompliance. MCA § 13-37-111(2)(a)(b) and § 13-37-121(2)(a)(b). While reports are regularly reviewed, the more exacting inspection that occurs when complaints are investigated often reveals additional episodes of non-compliance. Compare MCA § 13-37-121(1) with MCA § 13-37-111(2)(a)-(c). In the course of solving BSBDDC's filing deficiencies, two additional violations were discovered.

1. *Lack of timely filing*

A review of COPP data maintained on the CERS reporting system shows an additional late filing. BSBDDC filed their 2nd quarter C-6 report on September 11, 2023, more than 2 months past the July 5, 2023, due date.²

As previously discussed, timely filing is mandatory and date certain. COPP has found violations of Montana's campaign finance laws exist when filings are overdue by as little as two (2) days. *See Orr v. Tschida*, COPP-2020-CFP-024, *Bradshaw v. Bahr*, COPP-2018-CFP-008. Timely reporting is essential to provide the public, the press and other committees adequate time to review financial disclosures and to provide Montana voters with the information necessary to make informed decisions. COPP hereby determines that sufficient evidence exists to show that

² BSBDDC C-6 was timely filed for the third quarter of 2023 and no further reports are due at the time of this decision.

BSBDCC violated Montana campaign practice laws, specifically MCA § 13-37-226, when filing their 2nd quarter C-6 more than two months after the due date set by statute. Based on the sufficiency of the facts in evidence, I determine that prosecution of this particular matter is justified under MCA § 13-37-124 and will be referred to the Butte-Silver Bow County Attorney under MCA § 13-37-125.

2. *Failure to update treasurer information*

“[T]he ultimate responsibility to accurately and timely report rests entirely on the candidate or committees, and more exactly with the treasurer on file.” *Montana Freedom Caucus v. Montana State Representative Zooney Zephyr*, COPP-2023-CFP-010, at 18. An accurate and current Statement of Organization (C-2) on file with COPP is “the only way the process can work efficiently.” *Id.* Each political committee must appoint a treasurer and certify their full name and complete address. MCA § 13-37-201. The committee treasurer is declared on the committee’s C-2 which registers the committee with COPP. *Id.* When the committee changes the committee treasurer, the statute mandates immediate reporting to COPP. MCA § 13-37-204. Five days is an acceptable and reasonable period for the candidate or committee to report the change by amending their C-2 report, the typical method of reporting the change to COPP. *Id.* When COPP discovers erroneous or incomplete reporting they generally contact the committee and provide instructions on how it may be corrected. This is done directly through the treasurer listed on the C-2. *Zephyr*, 17. When a committee’s C-2 is not current, communication between COPP and the committee fails.

During the time referenced in this decision, BSBDDCC underwent two treasurer changes which went unreported. First, in 2021, Faith Scow replaced Ashley Johnson as treasurer, and in the fall of 2022, Pat Noonan replaced Scow. *See Response*. At the time of the complaint, the most recent C-2 on file listed Ashley Johnson as treasurer. *See COPP records*. Therefore, on two occasions, BSBDDCC failed to timely update their C-2, resulting in COPP’s inability to contact BSBDDCC. Compliance with this statutory requirement would have facilitated communication between BSBDDCC and COPP, likely avoiding this lengthy period of non-compliance and preventing involuntary closure of the committee.

Sufficient evidence exists to determine BSBDCD violated Montana campaign finance laws by failing to report the removal of two treasurers and failing to update their C-2, Statement of Organization to include a current treasurer and contact information in violation of MCA § § 13-37-201 and 204. The newly appointed or elected successor treasurer cannot perform any of the compliance duties of a treasurer before being properly reported pursuant to MCA § 13-37-201. *See also*, MCA § 13-37-204. BSBDCD clearly failed to meet the requirements of these laws on at least two occasions. A prosecution is justified under MCA § 13-37-124 and this violation is referred to the Butte-Silver Bow County Attorney pursuant to MCA § 13-37-125.

3. *Failure to report contributions and expenditures.*

The failure to meet the reporting deadlines also resulted in the failure to disclose important information that voters were entitled to. *Citizens United* stands for the proposition that agencies, like COPP, are well within their authority to enforce disclosure laws. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 484, 130 S. Ct. 876, 982, 175 L. Ed. 2d 753 (2010). Voters are entitled to know who is contributing to candidates and elections and how money is being spent to influence the results of their elections. *Id.*

Violations that deny voters timely access to pertinent information are particularly egregious, in my view, and I intend to vigorously enforce these provisions. *VanFossen*, 27. As a result of changes made by the 2023 Legislature, I am able to inspect records and enforce violations going back two years. MCA 13-37-228(3). Consequently, I am including violations with respect to this two-year period, even though a 4-year statute of limitations period arguably applies in this particular instance.

(a) The BSBDCD reports ultimately provided to COPP show BSBDCD fundraisers on July 13, 2022, October 4, 2022, and March 13, 2023, which raised \$925, \$1,625, and \$892, respectively. These same reports show \$1,500 contributions being made to two candidates (Mullen and Novak) in September of 2022. Although each of the candidates report the contributions, it does not relieve BSBDCD of its own responsibilities. BSBDCD must provide a full accounting of its activities independently within its own reports to meet the requirements of law. MCA § 13-37-226, *See Vanfossen and Yellowstone County Democratic Central Committee v. Yellowstone County Republican Women*, COPP-2018-CFP-038. The July and October 2022 reports cannot be

corrected to achieve this purpose, but the March 2023 report can because this money is raised and available for the 2024 election cycle. Recall, BSBDDCC did not spend any money to influence elections during 2023. As a result, there are two violations with respect to fundraisers that justify prosecution and referral to the Butte-Silver Bow County Attorney.

(b) BSBDDCC reports also ultimately include other significant activity. These reports show contributions to BSBDDCC being made by Public Results, LLC. In April, July, and October of 2022, BSBDDCC received \$500 contributions from Public Results. As explained to my satisfaction by BSBDDCC during the course of our COPP investigation and follow up, money provided by Public Results were provided as part of a grant application process geared towards community development, rather than being related to any election activity. At best, part of the money was used for Get-Out-The-Vote or voter registration activity, which are exempt if the activity is nonpartisan. BSBDDCC should include receiving and spending this money on its reports, which includes a description of the non-candidate spending, but this can be accomplished via a modification to the reports already filed. There is no justification for prosecution with respect to Public Results, LLC activity based on the manner in which BSBDDCC used the funds and the manner in which Public Results conducted its affairs.

I do note that, in her follow up communications, Ms. Scow identifies that Public Results grew out of Rural Power and is now merged with Contest Every Race. The purpose and mission of Contest Every Race appears substantially more direct than its predecessors. Contest Every Race supports local flexibility and autonomy that includes community-oriented activity, such as non-partisan voter registration and Get-Out-The-Vote efforts. However, absent some written understanding between BSBDDCC and Contest Every Vote as to the approved use of the grant funds to establish these parameters I can only conclude that moving forward Contest Every Vote does, indeed, have reporting responsibilities in Montana which they can achieve by submitting their own C-2 and C-4 incidental committee reports (Montana forms) or otherwise reporting their Montana based activity as a federally filing or nonresident committee. *See* 44.11.305, ARM.

I hereby determine that sufficient evidence exists to show that BSBDDCC violated Montana campaign practice laws, specifically MCA § 13-37-226, when filing their C-6 because their two candidate contributions were not disclosed to the public as part of their election related activity in

the 2022 election and that the two 2022 fundraisers must also be included. Based on the sufficiency of the facts in evidence I determine that prosecution of these particular matters is justified under MCA § 13-37-124 and will be referred to the Butte-Silver Bow County Attorney under MCA § 13-37-125.

III. ENFORCEMENT

Upon a determination that sufficient evidence of campaign finance violations exists, the commissioner next determines if there are circumstances or explanations that may affect whether prosecution is justified.³ *Rose v. Glines*, COPP-2022-CFP-030. “The determination of whether a prosecution is justified must take into account the law and the particular factual circumstances of each case, and the prosecutor can decide not to prosecute when they in good faith believe that a prosecution is not in the best interest of the state.”⁴ *Zephyr*, 26.

Historically, commissioners have chosen to refer virtually all complaints where sufficient evidence is found to the county attorney for possible prosecution, or applied a more comprehensive approach that weighs the facts and circumstances of each case in considering whether prosecution is justified. On the other hand, nearly all violations found through inspections by COPP staff result in generous opportunities to correct. Respondents subject to a complaint are not so lucky. While some difference in processes is necessary, it is “fundamentally unfair” that candidates receive different treatment and ultimately have different outcomes for identical violations depending on whether the violations are discovered via a lodged complaint or a review by COPP staff. *Id.* In an effort to provide candidates, committees, and Montana voters with clear expectations, as well as to remedy the current inequities, I intend to apply the more comprehensive approach which is consistent with respect to all COPP authority and the statutes as a whole. *Id.*

Notice of potential violations is generally provided informally through COPP staff if violations are discovered during an inspection, while notice is provided to the subject of a complaint when COPP notifies them and requests a response (MCA § 13-37-132). Many issues

³ An extensive discussion of the Commissioner’s discretion can be found in *Montana Freedom Caucus v. Zooey Zephyr*, COPP-2023-CFP-010.

⁴ See also, *In the Matter of Citizens for More Responsive Government*, (*Motl v. CMRG*, COPP-2001-CFP-2/21/2002), *In the Matter of the Complaint Against Ronald Murray*, (*Washburn v. Murray*, COPP-2013-CFP-02), and *Fitzpatrick v. Zook*, COPP-2010-CFP-06/14/2011.

are resolved at this point with candidates and committees rectifying errors and meeting compliance requirements. At this point, if referral to the county attorney was routine, the subject of a complaint would be referred for possible prosecution – often resulting in a negotiated fine – while the violator that was discovered by COPP staff is allowed to rectify their reporting without any repercussions, so long as the compliance occurs by routine staff notice or through a formal noncompliance process provided for under MCA § 13-37-121.

My approach will allow comparable opportunities to correct to both classes of violators. Accordingly, when a complaint results in sufficiency findings regarding violations alleged in that complaint, and the Commissioner finds that prosecution is justified, in compliance with MCA § 13-37-124, those findings will be forwarded to the county attorney. When additional violations are discovered in the course of investigating a complaint, those violations will result in a notice and opportunity to correct similar to that afforded to violators discovered by COPP staff. At this stage, failure to comply will result in orders of non-compliance and subsequent penalties for both classes of violators. Continued non-compliance will result in consideration for prosecution by the affected county attorney or the Commissioner. The above steps provide a basic framework of the procedures I intend to follow which will provide clearer expectations and fairer outcomes to all parties. However, this process does not preclude the Commissioner or county attorney from initiating civil action following receipt of a complaint and a finding of sufficient evidence if the facts and circumstances justify it. MCA §§ 13-37-121(5), 128 and 130. In determining whether prosecution is justified, the Commissioner will consider all relevant information, including but not limited to: the nature and potential harm of the violation, whether a pattern of non-compliance exists, the level of negligence involved, and the monetary value involved.

Currently, the information available indicates BSBDDC is in compliance with Montana campaign finance laws. However, it is essential to recognize that their previous non-compliance spanned at least three (3) years and occurred concurrently with elections in which they participated. Adherence to filing deadlines provides crucial information to Montana voters and this disservice cannot be rectified by amending filings long after the elections to which they apply have passed. Furthermore, even after regaining their committee status, BSBDDC was non-compliant for the subsequent reporting period. While the Covid pandemic may have stifled the activities of

BSBDCC, it is not a justifiable reason for lengthy and continued violations. No campaign finance reporting requires any in-person activities, and in fact, electronic reporting is statutorily mandated by MCA § 13-37-225. Ultimately, the Commissioner finds that this level of negligence on the part of a long-standing political committee justifies prosecution. Public transparency demands accurate and timely disclosure in accordance with law.

When the commissioner finds sufficient evidence to justify a prosecution, the commissioner notifies the affected county attorney and transfers all relevant information, allowing the county attorney the opportunity to prosecute the offending party. MCA § 13-37-124(1). The county attorney has 30 days in which to initiate a civil or criminal action, at which time, if action is not taken the matter is waived back to the commissioner. *Id.* If the matter is waived back, the commissioner “may then initiate” legal action, but may exercise his discretion as to whether the matter is best solved by a civil action or the payment of a negotiated fine. MCA § 13-37-124(1), *See also, Bradshaw v. Bahr*, COPP-2018-CFP-008, at 4. In negotiating a fine, the commissioner may exercise his discretion and consider any and all mitigating factors. *Bradshaw*, 4. If the matter is not resolved through the aforementioned negotiation, the commissioner retains statutory authority to bring a claim in district court against any person “who intentionally or negligently violates any requirement of campaign practice law.” *Id.*, 5. The district court will consider the matter de novo, providing full due process to the alleged violator. The court, not the commissioner, determines the amount of liability when civil actions are filed under MCA § 13-37-128, and the court may take into account the seriousness of the violation(s) and the degree of a defendant’s culpability. MCA § 13-37-129.

IV. CONCLUSION

This Commissioner, having been charged to investigate and decide, hereby determines that BSBDDCC violated Montana campaign practice laws and a civil action or penalty under MCA § 13-37-128 is justified. Sufficient evidence exists to show the following:

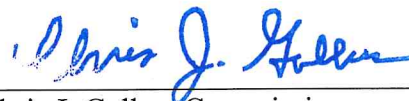
- BSBDDCC violated MCA §§ 13-37-225, 226, 228 and 229, by failing to accurately and timely file C-6 financial disclosures on at least 8 occasions.

- BSBDDCC violated MCA §§ 13-37-201 and 204, by failing to accurately and timely update treasurer designations on at least 2 occasions.
- BSBDDCC violated disclosure requirements connected with 2 candidate elections by failing to report the contributions for those candidates.
- BSBDDCC violated disclosure requirements connected with 2 fundraisers in 2022 by failing to timely report the fundraisers.
- Any allegations of nefarious or deceptive actions related to the report filed on April 25, 2020, by COPP, are without merit and are hereby dismissed.
- Though other matters were addressed, including money received by BSBDDCC from Public Results, LLC, the matters are also hereby dismissed.

This matter is now referred to the Silver-Bow County Attorney in accordance with the provisions of MCA § 13-37-124. The County Attorney's office is free to conduct their own investigation or request additional materials which COPP will readily provide. MCA § 13-37-125. The County Attorney has 30 days to decide to prosecute or return the matter to COPP for prosecution or settlement. Most matters referred to a county attorney are waived back and concluded with a negotiated settlement where mitigating factors are considered, and a civil penalty is set pursuant to MCA § 13-37-128. If negotiations are unsuccessful, the Commissioner may pursue the matter in court.

As additional information and notice to BSBDDCC and the Butte-Silver Bow County Attorney, if this matter is returned to me my anticipated position as to settlement of this matter is \$400 as to the 8 reports, \$100 for matters pertaining to the 2 C-2 filings, \$100 for 2 unreported candidate contributions, and \$100 for two unreported fundraisers in 2022 for a total of \$700. If settlement negotiations are unsuccessful, I will file a civil action and request fines under MCA § 13-37-128, which allows penalties up to \$500 for each violation or three-times the amount any of unreported contributions or expenditures.

Dated this 11th day of March, 2024



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