

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

<p>In Re the Ethics Complaint of MONTANA REPUBLICAN PARTY</p> <p style="text-align: center;">v.</p> <p>STEVE BULLOCK</p>	<p style="text-align: center;">Cause No. COPP-2020-ETH-009</p> <p style="text-align: center;">SUMMARY DECISION</p> <p style="text-align: center;">Ethics Complaint Not Accepted for Filing Dismissed for Failing to State a Potential Violation of the Code of Ethics</p>
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On June 24, 2020, Brooke Stroyke, Communications Director of the Montana Republican Party of Helena, Montana, lodged with the Office of the Commissioner of Political Practices (COPP) an ethics complaint against Steve Bullock (a Montana state officer).

As explained below, the complaint is not accepted for filing and is hereby dismissed and returned to Ms. Stroyke. The reasons for the dismissal are that the complaint does not state a violation of the Code of Ethics and therefore grounds exist for dismissal of the complaint by the Commissioner, Mont. Code Ann. § 2-2-136(1)(b).

JURISDICTION AND AUTHORITY

Montana's Code of Ethics applies to all public officers and employees. Mont. Const. art. XIII, sec. 4; Mont. Code Ann. § 2-2-101. The Commissioner of Political Practices (COPP) has jurisdiction to hear and decide ethics complaints filed against state officers, legislators, state employees and county attorneys. Mont. Code Ann. § 2-2-136.

Steve Bullock serves as Montana's Governor. The Code of Ethics defines a public employee as "any temporary or permanent employee of the state," Mont. Code Ann. § 2-2-102(7)(a). Mr. Bullock therefore is a public employee of the state and subject to the Montana Code of Ethics and the enforcement jurisdiction of COPP.

PROCEDURAL BACKGROUND

On June 24, 2020, COPP received an ethics complaint from the Montana Republican Party (MRP) alleging violations of the Code of Ethics by Mr. Bullock. That same day the COPP provided notice to the MRP and Mr. Bullock, both to inform them that the complaint was in a provisionally lodged status and additional information was being sought from Mr. Bullock, per Mont. Code Ann. § 2-2-136(1)(a).

On July 6, 2020, the COPP received additional information sought and Mr. Bullock moved the Commissioner to dismiss the complaint. The issue is now ready for the Commissioner's determination.¹

CONTENTIONS

Complainant MRP, through its representative Brooke Stroyke, asserts that Mr. Bullock is a public employee who is subject to the Code of Ethics. The MRP alleges that Mr. Bullock used "public time, facilities, equipment, supplies, personnel, or funds" in the use of an "official photo to boost his campaign for U.S. Senate" violating the Code of Ethics.

MRP's contentions are concerned with the following statutory prohibition on certain political activity by public employees:

- (a) Except as provided in subsection (3)(b), a public officer or public employee may not use or permit the use of public time, facilities, equipment, supplies, personnel, or funds to solicit support for or

¹ The Commissioner used the information in the Complaint and as additionally supplied and incorporated by the parties to reach the Summary Dismissal made in this matter.

opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue unless the use is:

(i) authorized by law; or

(ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.

(b) As used in this subsection (3), "properly incidental to another activity required or authorized by law" does not include any activities related to solicitation of support for or opposition to the nomination or election of a person to public office or political committees organized to support or oppose a candidate or candidates for public office....

(c) This subsection (3) is not intended to restrict the right of a public officer or public employee to express personal political views.

Mont. Code Ann. § 2-2-121(3).

The Office of the Governor responds that the Complaint "fails to allege a factual or legal basis for a violation of the Code of Ethics". Further, the Governor's office asserts the use of the photograph's "separate use by the Governor's campaign does not give rise to a violation". Finally, The Office of the Governor, asserts that the photograph was not taken to promote a candidacy, but rather while performing the duties of the office. "Absent some larger showing that the purposes of the event or photo themselves were to promote a candidacy, the Complaint fails to allege a violation of the Code of Ethics".

In specific reference to the photograph in this matter, the Office of the Governor describes the photograph as the "Governor at a COVID-19 testing site", that the Governor attended in his official capacity, and that an employee of the Governor's office took the photograph. The Office of the Governor described the photograph as a "quintessential public domain photograph" that was disseminated publicly for use on social media and other channels. And that its use, either by the Governor's campaign or any other campaign cannot be prohibited.

FINDINGS OF FACT

In order to apply the law to the contentions of MRP and Mr. Bullock, the following Findings of Fact are necessary:

Finding of Fact 1: Mr. Bullock is a public employee who serves in the role of Governor, State of Montana.

Finding of Fact 2: Mr. Bullock filed as a candidate for US Senate for the State of Montana, with the Montana Secretary of State's Office on March 9, 2020. (Commissioner's Records).

Finding of Fact 3: Governor Bullock participated in an official visit to a COVID-19 testing facility on May 15, 2020. (Governor response).

Finding of Fact 4: An employee of the Office of the Governor took a photo/s of the Governor's Official visit to the COVID-19 testing facility on May 15, 2020. (Governor response).

Finding of Fact 5: The Office of the Governor did not copyright the photograph/s taken by the Office of the Governor during the Official visit to the COVID-19 testing facility on May 15, 2020. (Governor response).

Finding of Fact 6: The Office of the Governor publicly disseminated a photo/s of the Governor's Official visit to the COVID-19 testing facility to the press and through social media channels. (Governor response).

DISCUSSION

The Montana Legislature adopted the Code of Ethics for Montana state and local officers and employees and legislators "prohibiting conflict between public duty and private interest," Mont. Const., art. XIII, sec. 4. "The holding of public office or employment is a public trust, created by the confidence that the electorate reposes in the integrity of public officer, legislators, and public employees ... [who] shall carry out the individual's duties for the benefit of the people of the state," Mont. Code Ann. § 2-2-103(1). "A public officer ... or public employee whose conduct departs from the person's public duty is liable to the people of the state and is subject to the penalties provided ... for abuse of the public's trust," *id.*, at (2).

ANALYSIS

1. Use of a Photograph

In March of 2015, Montana Commissioner of Political Practices Jonathan Motl issued an Advisory Opinion, COPP-2015-AO-002, in response to a question regarding the use of a public facility to take photos for use in a campaign. Commissioner Motl determined a facility that allowed for a public use, such as a courtroom, could be used for, in answer to a specific question, campaign photographs in a way that does not

violate ethics... law. Commissioner Motl noted “to allow someone who is not a public employee or officer to use a public facility to take photographs for use in a campaign, while at the same time forbidding a public employee or officer from the same use would lead to absurd results.”

In July 2020, Commissioner Mangan wrote in *Zolinkov v. O'Donnell*, COPP-2020-ETH-005 in determining that Commissioner O'Donnell did not improperly use state funds (through the use of an Official photograph) to solicit support for the nomination and election of a person for public office in violation of Mont. Code Ann. § 2-2-121(3)(a).

“The photograph is clearly available in public domain and there is an expectation for the image to be used in the public domain, including use and reuse. The general public, media, political opponents have access and can use the photograph. Just as Commissioner Motl concluded in his 2015 Advisory Opinion regarding the taking of photographs in a State facility accessible to all, the same sentiment is appropriate for those non-copyrighted images made available for public consumption by a State agency. In other words, to allow someone who is not a public employee or officer to use a publicly available non-copyrighted image for use in a campaign or other purpose, while at the same time forbidding a public employee or officer from the same use would lead to absurd results ...

... Through the wide use and distribution of the photograph, however, the general public and other candidates can access and otherwise use the photograph for other, non-agency purposes, including political purposes.”

Hundreds of photographs of elected officials or state employees engaged in official duties are taken by respective state agencies and utilized for a variety of purposes, including public dissemination for the use on agency websites, for publicity, public relations, and to visually represent duties undertaken. In this matter, a photograph of Governor Bullock engaging in his official duties in his capacity of Governor of the State of Montana was taken by Office of the Governor staff and was publicly disseminated in a press release detailing the Governor's duties. The image was also widely disseminated on social media platforms. The Office of the Governor has not copyrighted the photograph. The COVID-19 testing facility photograph has been disseminated for use through official channels to the public. The photograph is clearly available in public domain and there is an expectation by the Office of the Governor for

the image to be used in the public domain, including use and reuse. The general public, media, and political opponents have access and can use the photograph.

CONCLUSION

A lodged ethics complaint may be dismissed for filing with the COPP if it is frivolous, does not state a violation of the Code, or the “charges [are] so insufficiently supported by allegation as to not state even a ‘potential’ violation,” *Democratic Party v. Martz*, Sep. 2. 2002, at fn. 7 (Commissioner Vaughey); Mont. Code Ann. § 2-2-136(c). Allegations that the public official used public resources to campaign are without factual support in this case and, therefore, not sufficient to support an informal complaint proceeding under the Code of Ethics.

The Complaint fails to allege that Mr. Bullock engaged in solicitation of support for nomination while using public facilities, equipment, personnel, supplies, or funds. Accordingly, the Complaint is dismissed as not stating a potential violation of Montana’s Code of Ethics.

CONCLUSIONS OF LAW

1. The alleged violation of law which concern’s Steve Bullock’s use of a photograph to solicit support for elected office are dismissed as failing to allege a potential violation of the Code of Ethics, Mont. Code Ann. § 2-2-121(3) as construed by *Molnar v. Fox*, 2013 MT 132, ¶39, 370 Mont. 238, 301 P.3d 824.

ORDER

1. During these proceedings, the Office of the Governor used in house counsel to respond in defense of Governor Bullock, and it appears that the costs incurred would be minimal. Therefore, the Commissioner will not assess the State of Montana’s costs against the Montana Republican Party, Mont. Code Ann. § 2-2-136(2)(c).

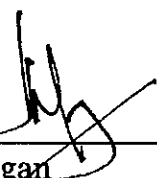
2. The Commissioner's office did incur costs in dealing with this matter, through the use of in-house legal counsel, personnel, time, equipment, facilities and supplies. Given the ability to dismiss this Complaint at the earliest stages as failing to allege a violation of the Code of Ethics and as without factual support, the

Commissioner will not assess COPP's costs against the Montana Republican Party for this Summary Decision proceeding.

NOTICE

The Commissioner provides notice to the parties that this summary decision is a final agency order, and either party may seek judicial review of the Commissioner's determination pursuant to Montana Code Annotated, Title 2, Chapter 4, part 7. Mont. Code Ann. § 2-2-136(3). The parties are further informed that the Complaint, record established, and Decision are available for public inspection. Mont. Code Ann. § 2-2-136(4).

ORDERED this 25th day of August, 2020.



Jeffrey Mangan
Commissioner of Political Practices
P.O. Box 202401
Helena, MT 59620-2401

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be emailed and send by first class US mail to:

Brooke Stroyke,
Communications Director
Montana Republican Party
1300 Aspen Street, Ste. B
Helena, MT 59601

Steve Bullock
Montana State Capitol
Helena, MT 59624

DATED this 25th day of August, 2020.