

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES (COPP)

STACY HERMILLER v. JAMES WHITAKER (HD 22 Candidate)	COPP-2024-CFP-007 FINDING OF SUFFICIENT FACTS TO SUPPORT VIOLATIONS
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COMPLAINT

On April 2, 2024, Stacy Hermiller of Great Falls, MT, filed a campaign practices complaint against James Whitaker, a declared candidate for election to the Montana House of Representatives, District 22. The complaint alleges that Mr. Whitaker failed to timely file a required C-5 campaign finance report with COPP.

The complaint was submitted pursuant to MCA § 13-37-111 and conforms to the requirements of Admin. R. Mont. 44.11.106. The complaint alleges violations of statutes which fall under my jurisdiction as Commissioner of Political Practices. Therefore, I accepted it as filed, and in accordance with COPP procedures, requested a response from Mr. Whitaker.

Mr. Whitaker did not file a response within in the time provided and has not filed any response to the complaint as of the date of this decision. MCA § 13-37-126. Under ARM 44.11.106 outlines the procedures COPP is to follow when addressing complaints and a response is not required. Consequently, I issue my decision in this matter without a response from Mr. Whitaker.

The complaint is posted on COPP’s website, politicalpractices.gov.

ISSUES

Candidate campaign finance reporting requirements, Montana Code Annotated (MCA) §§ 13-37-225, 226 and 229; closing reports and time periods covered by reports, MCA § 13-37-228; candidate registration requirements with COPP, MCA § 13-37-201; and disposal of surplus campaign funds, MCA § 13-37-240.

BACKGROUND

Montana election law requires candidates to file as such with COPP and to file periodic finance reports throughout their campaign in accordance with a statutorily mandated reporting calendar. MCA §§ 13-37-201, 226.

James Whitaker formally filed as a candidate for election to Montana's House of Representatives, District 22, with Montana's Secretary of State's office on March 11, 2024, and filed a C-1 Statement of Candidate with COPP on March 19, 2024. The C-1 was filed electronically, utilizing Montana's Campaign Electronic Reporting System (CERS).

One day prior to filing as a candidate with COPP, March 18, 2024, Mr. Whitaker, via fax, submitted a completed D-1 Business Disclosure statement to COPP. On March 25, 2024, candidate Whitaker, via fax, submitted a hard copy (paper) initial C-5 campaign finance report to COPP dated January 1, through March 15, 2024. Mr. Whitaker amended this report electronically on April 18, 2024, dating it for the time period January 1, through April 15, 2024. (COPP Records.)

This amended report discloses two loans from the candidate to his committee in the amounts of \$250 and \$100, and a contribution of \$200 from Sandra Whitaker who lives at the same address as Mr. Whitaker and is presumed to be his wife. Mr. Whitaker's final report, filed on June 27, 2024, reports repayment of a loan from Mr. Whitaker in the amount of \$250 and repayment of a loan from Sandra Whitaker in the amount of \$195.04, which brought his account balance to zero. Mr. Whitaker marked this as a closing report in accordance with MCA § 13-37-228(3). (COPP Records.)

DISCUSSION

The submitted complaint makes the single allegation that Mr. Whitaker failed to file a C-5 periodic finance report due on March 20, 2024. In the course of investigating this complaint, other reporting irregularities were discovered. MCA § 13-37-111(2)(a). The following discussion first analyzes the complainant's allegation and then discusses additional irregularities discovered by COPP.

I. Mr. Whitaker failed to timely file a C-5 periodic finance report due on March 20, 2024, and additionally failed to comply with the statutory mandate that all reports be filed electronically.

Montana election law requires candidates to file periodic finance reports in accordance with a statutorily mandated reporting calendar and to do so electronically. MCA § 13-37-226. Reports are due quarterly in the year preceding an election, monthly during an election period, and semiannually in the year following an election until a closing report is filed. *Id.* 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 § 13-37-225 – filing electronically

Montana law requires that candidates file their campaign finance reports electronically, MCA § 13-37-225(1)(a). Candidates meet this requirement by submitting form C-5, the candidate campaign finance report, for each reporting period using CERS. Candidates may be excused from the requirement to file electronically under two specific circumstances. First, the commissioner may, “for good cause shown in a written application” provided by a candidate “grant a waiver to the requirement that reports be filed electronically.” MCA § 13-37-225(1)(b). Second, in the event a candidate is experiencing technical difficulties, they may provide COPP with a hard copy (paper) version of their report. If this occurs, the candidate, in addition to filing the required information in hard copy, must within three days, file the information included on the hard copy electronically. MCA § 13-37-225(1)(c)(i). Absent either of these conditions, the electronic filing requirement of MCA § 13-37-225 (1)(a) applies. Neither of the exceptions excuses failure to timely file.

Here, Mr. Whitaker filed his initial C-5 campaign report on March 25, 2024, by faxing a hardcopy to COPP. Mr. Whitaker did not request a waiver from the Commissioner, nor did he file electronically within three days of providing COPP

with a hardcopy. Consequently, Mr. Whitaker violated MCA § 13-37-225(1) by failing to file his March C-5 periodic finance report electronically.

MCA § 13-37-226 – timely filing

The due date for Mr. Whitaker's initial C-5 report was March 20, 2024. Mr. Whitaker filed the hardcopy on March 25, 2024 - five days late. While this complaint was received by COPP on April 2, 2024, after Mr. Whitaker had filed his report five days late, because he did not follow-up by filing electronically within three days, the complainant as well as other interested parties were not aware the filing had eventually occurred five days after the due date, and were nevertheless unable to discover relevant information about Mr. Whitaker's campaign.

COPP notes that Mr. Whitaker filed the required C-1 Statement of Candidate exclusively electronically, and after faxing COPP the initial report on March 25, 2024, Mr. Whitaker electronically filed an amended report covering the next reporting period, using the CERS system on April 19, 2024. These facts suggest that Mr. Whitaker was aware of Montana's electronic filing requirements.

While the complainant only asserts that Mr. Whitaker had not filed a C-5 report due on March 20, 2024, the fact that he filed the report 5 days late and that he failed to report electronically, or alternatively to follow his hard copy report with an electronic report, contributed to the inability of the complainant to determine if Mr. Whitaker had lawfully filed.

Consequently, I find sufficient evidence exists to support a finding that Mr. Whitaker violated both MCA § § 13-37-225 and 226 when he filed his March 20, 2024, C-5 finance report late and when eventually filing, failed to do so electronically.

II. Additional reporting irregularities discovered during COPP's investigation of the complaint.

While the above discussion disposes of the issue presented in the complaint, "Montana law also permits COPP to ascertain whether other violations exist." MCA

§ 13-37-111(1)(2)(a)(b), *MFC v. Zephyr*, COPP-2023-CFP-010, 2. “COPP is, in fact, required to review all reports filed with the office during and after each election. MCA §§13-37-121, 123” *Id.* MCA § 13-37-111 requires the commissioner to inspect reports and to investigate any alleged violations of Title 13, chapters 35 and 37. While this inspection routinely occurs, the enhanced inspection that necessarily followed as a result of investigation this complaint resulted in discovery of the following violations:

1. Mr. Whitaker closed his campaign by improperly repaying a loan previously reported as a contribution.

Following an election, Montana law requires a candidate to file a closing report “whenever all debts and obligations are satisfied, and further contributions or expenditures will not be received or made that relate to the campaign” unless the candidate is advancing to the general election. MCA § 13-37-228.

Mr. Whitaker did not advance to the general election. At the close of the primary, Mr. Whitaker’s CERS account showed a balance of \$445.09. Mr. Whitaker reports using these funds to repay a candidate loan to his campaign and to partially repay a loan from his wife Sandra. These were reported as expenditures on his closing report dated June 27, 2024, for the reporting period of May 15 through June 15, 2024. This report was due on June 20, 2024, and therefore violated MCA § 13-37-226 timely reporting requirements, but more importantly, the payment to Sandra Whitaker violates Montana election law.

Here, Mr. Whitaker’s April 20, 2024, report shows two loans from himself to his campaign in the amount of \$250 and \$100, as well as a contribution to the campaign from Sandra Whitaker in the amount of \$200. None of the finance reports filed by Mr. Whitaker contain a loan from his wife, Sandra Whitaker. If no loan is reported, the repayment of the loan cannot occur and this payment to Mrs. Whitaker is improper.

Consequently, the funds paid to Sandra Whitaker must be returned to the campaign. This action will likely mean the campaign has surplus funds which must

be disbursed in accordance with MCA § 13-37-240.

If surplus campaign funds exist at the end of a campaign and the candidate does not advance to the general election, these funds can be returned to contributors, but may not be used for personal benefit. MCA § 13-37-240. The relevant administrative rule provides the following guidelines:

Surplus campaign funds, including surplus campaign funds deposited in a constituent services account and any interest accrued as provided in ARM 44.11.710, may only be disbursed as follows: (i) return the funds to the contributors, so long as the refund to contributors will not violate the personal benefit or campaign contribution provisions of 13-37-240 and 13-37-402, MCA, ARM 44.11.703, or the rules in this chapter; (ii) donate the funds and personal or real property to any organization or entity, so long as the use of the funds and personal or real property will not violate the personal benefit or campaign contribution provisions of 13-37-240 and 13-37-402, MCA, ARM 44.11.703, or the rules in this chapter. ARM 44.11.702(d).

Montana law defines personal benefit in MCA § 13-37-240 as “a use that will provide a direct or indirect benefit of any kind to the candidate or any member of the candidate’s family.” Consequently, while Sandra Whitaker is a contributor, and excess campaign funds may be returned to contributors, returning them to his wife clearly violates the personal benefit provision.

I have previously found it fundamentally unfair to treat additional violations discovered in the course of a complaint investigation the same as those alleged in the complaint, when if they had been discovered during routine inspections they would have resulted in providing the respondent with notice and an opportunity to correct. *Montana Freedom Caucus v. Rep. Zephyr*, COPP-2023-CFP-010, 26. Therefore, I will provide Mr. Whitaker the opportunity to resolve this issue through corrective action.

To resolve the above violation, the loan repayment to Mrs. Whitaker of \$195.09, must be returned to the campaign. Mr. Whitaker may then use \$100 to repay the remaining \$100 candidate loan, leaving surplus campaign funds of \$95.09 which he may dispose of in any way allowed by ARM 44.11.702, which, as explained

above, specifically excludes returning campaign funds to family members. In order to amend his closing report to reflect this correction, Mr. Whitaker must contact COPP staff to reopen his campaign.

If Mr. Whitaker corrects this violation within five days of the date of this decision, I will find prosecution is not justified and this violation will be dismissed. If Mr. Whitaker does not comply, I will issue an Order of noncompliance in accordance with MCA § 13-37-121 and this matter will be referred to the Cascade County Attorney for potential prosecution.

2. Mr. Whitaker failed to file a C-1 Statement of Candidate with COPP within the time required by statute.

MCA § 13-37-201(2)(a) requires that candidates seeking election to public office register as such with COPP “within 5 days after becoming a candidate.” An individual becomes a candidate by taking specific actions: formally filing with the election administrator; soliciting or receiving and retaining campaign contributions; or making or authorizing campaign expenditures. MCA § 13-1-101(8), See *LaBreche v. Gianforte*, COPP-2015-CFP-110, 3.

In this matter, Mr. Whitaker formally filed as a candidate for election to HD 22 with Montana’s Secretary of State’s office (SOS) on March 11, 2024. By formally filing with SOS, Mr. Whitaker became a candidate as defined under MCA § 13-1-101(8) on March 11, 2024. Pursuant to MCA § 13-37-201(2)(a), he was required to file a C-1 Statement of Candidate with COPP no later than March 16, 2024, “5 days after becoming a candidate.”

Mr. Whitaker did not file a C-1 Statement of Candidate with COPP on or before March 16 as required by MCA § 13-37-201. Rather, Mr. Whitaker filed his Statement of Candidate on March 19, 2024, three (3) days past the statutory due date. Mr. Whitaker’s failure to timely file the Statement of Candidate with COPP on or before March 16, 2024, is a violation of MCA § 13-37-201(2)(a). However, for reasons described below, and in accordance with the discretionary authority provided by MCA § 13-37-124, I find prosecution of this violation is not justified.

3. Mr. Whitaker failed to comply with the reporting periods mandated by Montana election law.

The time periods C-5 campaign finance reports must cover is mandated by statute. The initial report filed by a candidate is to include “from the time that a person became a candidate. . .until the 5th day before the date of filing of the appropriate initial report pursuant to 13-37-226.” MCA § 13-37-228(1). Subsequent reports are to cover “the period of time from the closing of the previous report to 5 days before the date of filing” the subsequent report. *Id.* (2).

Here, Mr. Whitaker’s initial report was to cover from March 11, 2024 - the day he became a candidate by formally filing with Montana’s Secretary of State’s office - through March 15, 2024, five days before the March 20, 2024, filing deadline under MCA § 13-37-226(1)(b). His next report was to cover from March 16 through April 15, 2024. Failure to file a new report for each reporting period specified in MCA § 13-37-228 is a violation of these requirements. *Pierson v. Sweeney*, COPP-2024-CFP-056, 5-7 (2020).

By dating the initial hard copy (paper) C-5 report faxed to COPP on March 25, 2024, to begin January 1 (a date preceding his becoming a candidate) and end March 15, 2024, Mr. Whitaker initially covered the appropriate reporting period. However, his second report, filed electronically, was dated January 1 through April 15, 2024. This single report then, covers two reporting periods, both those for the March 20 and April 20, 2024. As noted in *Pierson v. Sweeney*, such a failure to adhere to the reporting calendar is a violation of MCA § 13-37-228. However, for reasons described below, and in accordance with the discretionary authority provided by MCA § 13-37-124, I find prosecution of this violation is not justified.

Summary of violations where prosecution is not justified

While sufficient evidence exists to show Mr. Whitaker violated Montana election law by failing to timely file a C-1 Statement of Candidate and by failing to adhere to the statutorily mandated reporting calendar, I am afforded the discretion

to determine whether prosecution of these violations is justified. *Montana Freedom Caucus v. Rep. Zephyr*, COPP-2023-CFP-010, 23, *Doty v Montana Commissioner of Political Practices*, 2007 MT 341, 340 Mont. 276, 173 P.3d 700. I hold that prosecution of either of these violations is not justified for the following reasons:

Montana election law is intended to provide transparency to Montana voters. However, under the circumstances described above, pursuit of a civil action does little to increase compliance or transparency while increasing economic costs to Montana voters. For exactly those reasons, Montana provides by rule the requirements for filing a complaint and a non-exhaustive list of reasons a commissioner may choose to dismiss a complaint. ARM 44.11.106. Among these reasons is “if the complaint is frivolous on its face.” *Id.* (4). In *Landsgaard v. Peterson*, the commissioner enumerates several reasons a complaint may be dismissed as frivolous, including a de minimis complaint or one directed at a corrected campaign practice. COPP-2014-CFP-008.

Here, Mr. Whitaker’s failure to adhere exactly to the reporting calendar, can be excused as de minimis. De minimis violations are defined as:

[A]n action, contribution, or expenditure that is so small that it does not trigger registration, reporting, disclaimer, or disclosure obligations under Title 13, chapter 35 or 37, or warrant enforcement as a campaign practices violation under Title 13, chapter 37. MCA § 13-1-101(11).

No evidence has been presented to indicate Mr. Whitaker failed to report expenditures or contributions by amending his initial C-5 to include the March and April reports. Although this is a technical violation, the only transactions to be reported in the March report are a \$4.00 fax fee to COPP and the \$15.00 filing fee paid to Secretary of State. (COPP Records.) These expenditures were reported on the initial report and remain on the amended (although misdated) report. There is no evidence that the public was deprived of any relevant campaign finance information.

As to Mr. Whitaker’s failure to file as a candidate with COPP in a timely manner, Mr. Whitaker had filed as a candidate with COPP before receipt of this

complaint, creating a “corrected campaign violation” that if addressed in a complaint received by COPP, would have been dismissed as frivolous. *Landsgaard v. Peterson*, COPP-2014-CFP-008.

To be clear, adherence to the reporting calendar and timely registration with COPP is vital to a transparent election process and rarely will these violations be excused as de minimis. However, neither of these violations were alleged by the complainant, and both, if discovered by COPP, would have resulted in an opportunity to correct. As the respondent has already taken action to file with COPP and all expenditures and contributions have been reported, pursuing these violations is not justified.

ENFORCEMENT

The duty of the commissioner to investigate alleged violations of election law is statutorily mandated. MCA § 13-37-111. Upon a determination that sufficient evidence of election violations exists, the commissioner next determines if there are circumstances or explanations that may affect whether prosecution is justified. *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.” *Zephyr*, COPP-2023-CFP-010, at 26.

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, 4. In negotiating a fine, the commissioner may exercise his discretion and consider any and all mitigating factors. *Id.* 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.

CONCLUSION

Regarding the matter presented by the complainant - failure to file - Mr. Whitaker had actually filed the report at issue before COPP received the complaint. However, because he failed to file this report in a timely manner, failed to do so electronically and failed to follow up with an electronic filing, the complainant and other interested persons, including other candidates and Montana voters were unable to discover information regarding Mr. Whitaker’s campaign that they are rightfully entitled to under Montana law.

As to the additional violations, Mr. Whitaker’s failure to strictly adhere to the reporting calendar and his filing three days late as a candidate with COPP qualify as de minimis and are dismissed. Additionally, Mr. Whitaker may avoid prosecution for improperly disbursing surplus campaign funds to his spouse by taking the corrective action described above. If such action is not taken within five days of the date of this decision, an Order of noncompliance will be issued, and this matter will be referred to the Cascade County Attorney.

Based on the above discussion, I determine that sufficient evidence exists to justify the following:

- Mr. Whitaker violated MCA §§ 13-37-225 and 226 by failing to timely file and failing to do so electronically. Prosecution is justified and this matter is hereby referred to the Cascade County Attorney.
- Mr. Whitaker violated MCA § 13-37-201 by failing to timely file a C-1 Statement of Candidate with COPP. This violation is hereby dismissed.
- Mr. Whitaker violated MCA § 13-37-228 by failing to adhere to the statutorily mandated reporting calendar. This violation is hereby dismissed.
- Mr. Whitaker violated MCA § 13-37-240 by disbursing surplus campaign funds to his wife. This violation will be dismissed if Mr. Whitaker takes the corrective action described above within five days of this decision.

Having determined that prosecution for violations of MCA §§ 13-37-226 and 225 is justified, this matter will now be referred to the Cascade County Attorney in accordance with the provisions of MCA § 13-37-124. The County Attorney's office is free to conduct their own investigation under MCA § 13-37-125, request additional material from COPP, or refer the matter back to this office for potential prosecution. Most matters are returned to COPP and are concluded with a negotiated settlement where mitigating factors are considered, and a civil penalty is determined pursuant to MCA § 13-37-128. If a negotiated settlement is unsuccessful, the Commissioner will pursue the matter in Cascade County District Court.

Dated this 8th of August, 2024,



Chris J. Gallus
Commissioner of Political Practices