

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES (COPP)

<p>DAVE KESSLER III and KIM DAILEY</p> <p>v.</p> <p>SUSAN MCCREARY and BOB MICHALSON (Mayor, Town of Stevensville)</p>	<p>COPP-2024-CFP's-012, 013, and 028.</p> <p>DISMISSAL</p>
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COMPLAINTS

On May 2, 2024, Dave Kessler III of Philipsburg, MT, filed campaign practice complaints against Bob Michalson, Mayor of Stevensville, MT, and Susan McCreary, committeewoman candidate for Precinct 21, of Stevensville, MT. On June 17, 2024, Kim Dailey, of Florence, MT, formerly a candidate for House District 88, also filed a campaign practices complaint against Susan McCreary. Each of these three complaints address the same or related incidents which include the alleged theft of Ms. Dailey's campaign yard signs by Ms. McCreary from local businesses and the unauthorized pardoning of Ms. McCreary by Mayor Michalson.

Administrative Rule of Montana (ARM) 44.11.106 sets out specific requirements for the filing of complaints which includes "a detailed description of the alleged violation, including citation to each statute and/or rule that is alleged to have been violated." Complaints must be notarized, include reference to law within the commissioner's authority and show facts. *Id.* The requirement that a complaint actually cite numerically and correctly to particular statutes has not been strictly enforced by myself or previous commissioners, because doing so limits access to justice by everyday citizens lacking resources or legal training. Commissioners "regularly proceed with complaints that adequately describe violations of law, even when the complainant does not provide specific citation." *Hogan v. Olson/Knudsen*, COPP-2024-CFP-017, 14. Here, the allegations and asserted facts are clear to COPP and will not disadvantage the respondents, so I will not seek any further clarification of law or fact. ARM 44.11.106(4). Dismissal by COPP or upon request of

the respondent on minor procedural technicalities when complaints are otherwise sufficiently crafted is generally a matter of last resort. *Hogan*, 14.

Here, while one complaint included reference to statute under my authority, two did not, but each of the complaints did described acts which potentially violate Montana election law.¹ Sign theft or vandalism, as well as sign placement and other issues related to signs, such as when they may go up or must come down, are not generally matters of concern to COPP because local laws govern such practices. COPP is generally only concerned that the sign has the “Paid for by” attribution required under MCA § 13-35-225. However, in this matter it appeared these local laws would be ignored under color of authority that a local official did not possess. I was deeply concerned that these activities were being ignored, if not condoned by Mayor Michalson. Therefore, because each complaint met at least the most basic requirements, I accepted the complaints as filed to determine the extent of the activity, request a response from the alleged violators, and make a determination as to whether COPP could enforce certain laws within our authority. This allowed COPP staff to conduct an investigation and evaluate the law since local authorities seemed unwilling to act. The complaints and responses are posted on COPP’s website, politicalpractices.gov.

BACKGROUND

The version of events presented by the respondents and the complainants vary in only minor ways and agree on the following basic facts. As a candidate for House District 88, Kim Dailey posted campaign signs in and around Stevensville, MT. On two occasions, Ms. McCreary removed Kim Dailey’s campaign signs from local businesses, on one occasion removing the sign entirely, and on another, replacing it in a different location after being confronted by Ms. Dailey and a companion. Ms. Dailey reported this activity to local law enforcement and Ms.

¹My jurisdiction as Commissioner of Political Practices is limited to chapters 35 and 37 of Montana election law contained in Title 13; specific violations of the Code of Ethics contained in Title 2, chapter 2; and Lobbying law contained in Title 5, chapter 7; of the Montana Code Annotated.

McCreary was subsequently issued a citation. (Complaints and McCreary Response, May 10, 2024.) There are certain general allegations that the sign stealing involved more than these two specific instances, at least with respect to one particular precinct, but these allegations are not factually supported. Ms. McCreary admits to these two particular instances but disavows even having knowledge of other similar conduct. (Response Declaration, 2.)

Shortly thereafter, the Stevensville Mayor, Bob Michalson, pardoned Ms. McCreary and admonished Ms. Dailey for reporting Ms. McCreary to law enforcement. This activity took place at a town council meeting on April 25, 2024. (Complaint, *Kessler v. Michalson*, 3.)

COPP received the initial complaints filed by Dave Kesler III against Ms. McCreary and Mayor Michalson on May 2, 2024. Mayor Michalson responded to this complaint on May 10, 2024, stating that he “realized [he] did NOT have the authority” to pardon Ms. McCreary. (Response, 2.) Mayor Michalson further states that on May 2, 2024, (the same day these complaints were filed) he read a statement into the public record at a town council meeting acknowledging that he did not have the authority to pardon Ms. McCreary, and he had returned the citation to the Stevensville Police Chief who then reissued the citation. Subsequently, Ms. McCreary was scheduled to appear in court on May 22, 2024. To the best of my knowledge and belief, Ms. McCreary was ultimately assessed a fine related to her conduct.

Following a loss in the primary, Ms. Dailey filed her complaint against Ms. McCreary on June 17, 2024, alleging Ms. McCreary’s actions violated Montana election law. Ms. Dailey further alleges that Ms. McCreary violated MCA § 13-35-207, because her response, provided to COPP in the form of a sworn declaration, contained statements Ms. Dailey believes to be false.

Because each of these complaints address the same chain of events and each is being dismissed for substantially similar reasons, all three are addressed in this single dismissal.

DISCUSSION

The action relevant to this complaint - unauthorized removal of candidate Dailey's campaign signs from Stevensville businesses by Ms. McCreary on two occasions - does not ultimately represent a violation of Montana election law; certainly not on the facts presented. Title 13 is silent on "sign theft" as alleged here. While potentially related, none of the statutes in Title 13, chapter 35 directly address sign theft. Further, this is not an action included or contemplated in any statute under Title 13, chapter 37, Control of Campaign Finances. Not falling under Title 13, chapters 35 or 37, then, the *specific* action in question here, theft or unauthorized removal of campaign signs, falls outside of COPP's direct jurisdiction. This is certainly true when instances are limited and a candidate is not involved, but COPP authority may indeed be implicated under a different set of facts.

A detailed analysis of the following statutes cited by Ms. Dailey and implicated by Mr. Kesler, in context of sign theft and the activities of Mayor Michalson, considers whether enforcement can be pursued. Ms. McCreary does not dispute the allegation that she removed Ms. Dailey's campaign yard signs and Mayor Michalson does admit that he pardoned Ms. McCreary without the proper authority. The remaining question presented to COPP then, is whether any of the above activities, or Ms. McCreary's sworn statement violates Montana election law.

I. Statutes potentially violated by Ms. McCreary

1. Coercion or undue influence of voters

The first violation directly alleged in the matter is that by stealing or otherwise removing campaign yard signs supporting candidate Dailey without authorization, Ms. McCreary engaged in *Coercion or undue influence of voters* in violation of MCA 13-35-218, which reads in relevant part:

A person, directly or indirectly, individually or through any other person, in order to induce or compel a person to vote or refrain from voting for any candidate, the ticket of any political party, or any ballot issue before the people, may not: (a) use or threaten to use any force, coercion, violence, restraint, or undue influence against any person; or (b) inflict or threaten to inflict, individually or with

any other person, any temporal or spiritual injury, damage, harm, or loss upon or against any person MCA § 13-35-218.

In order to find sufficient evidence that a violation of the above statute exists, COPP would need to find that Ms. McCreary acted with the intention to “induce or compel a person to vote” by using force or the threat of force, coercion, violence, or that she inflicted or threatened to inflict, temporal or spiritual injury or harm or loss. In its simplest form, COPP would need to show that through her theft of Ms. Dailey’s campaign signs, that Ms. McCreary, directly or indirectly, knowingly sought to induce voters to refrain from voting for Ms. Dailey by inflicting damage, harm or loss upon or against Ms. Dailey. MCA § 13-35-218(1)(b).

Because local authorities have always addressed the matter in some fashion, the question of whether COPP has authority over sign theft has never actually been addressed, so there are no decisions on point. In *Marking and Fauth v. Lesnik*, the commissioner addressed a converse situation where a candidate’s “angry rhetoric and intimidating demeanor” while searching for a missing sign, did not rise to the level of coercion or undue influence despite the fact candidate Lesnik was advocating for his campaign during the interaction. The commissioner in *Lesnik* explained, “[t]he statute disallows the use of brute force, bullying, intimidation, or other scare tactics’, either physical or emotional, to secure a vote for a certain candidate of candidates.” *Id.* 12.

Here, while it could potentially be argued that the removal of signs could cause some injury to Ms. Dailey, or as she contends – her contributors – COPP would need to find that the injury, force, or threat thereof was specifically carried out to induce or compel a person to vote for or against a particular candidate. There is no evidence that Ms. McCreary’s specific motive in this matter was to induce or compel a person to vote or refrain from voting in any particular manner. Mr. Kessler asserts Ms. McCreary was the “campaign manager” for Rep. Rusk but this assertion is not supported. Ms. McCreary actually refutes this in her declaration.

While Ms. McCreary’s conduct is reprehensible - certainly more reprehensible than the Mayor would like us all to believe - COPP would be hard-pressed to

conclude that Ms. McCreary actually sought to induce voters to refrain from voting for Ms. Dailey. A person could argue that Ms. McCreary engaged in a practice to reduce Ms. Dailey's public profile, which could result in Ms. Dailey receiving fewer votes, but the statute does not currently contemplate such acts under its present wording.

Like the commissioner in *Lesnik*, I find Ms. McCreary's behavior concerning, but nevertheless, there is no evidence presented that she attempted to intimidate or bully anyone, nor did she do so to directly or indirectly secure votes from electors for or against a particular candidate. While it does appear that Ms. McCreary removed signs that were blocking those of another candidate, this single act does not rise to the level of coercion or undue influence because there is no evidence provided that she acted with the purpose of compelling electors to vote or refrain from voting for a particular candidate. This conclusion might be different if facts showed that Ms. McCreary was engaged in a concerted or organized effort to remove all or a large number of Ms. Dailey's signs from key locations such that Ms. Dailey's profile or exposure to voters was substantially impacted to reduce her votes, but this particular instance does not require such an analysis. Here, the facts support only limited occurrences, which were ultimately addressed by the local officials who have explicit authority with respect to theft of any property.

Therefore, any allegation that Ms. McCreary violated MCA § 13-35-218, is hereby dismissed.

2. Code of Fair Campaign Practices

Ms. Dailey next alleges that Ms. McCreary violated MCA § 13-35-301, Montana's Code of Fair Campaign Practices. Montana's Code of Fair Campaign Practices is a list of guidelines provided by the Montana Legislature that a candidate may voluntarily choose to subscribe to. Candidates are given the opportunity to submit to COPP formal documentation "that the candidate endorses, subscribes to, and pledges to abide by the code," but it "*is voluntary, and a failure or refusal to sign is not a violation of election laws.*" MCA § 13-35-302(1), (2) (emphasis added).

Generally, COPP has authority to enforce violations of election laws. MCA § 13-37-111(1). However, numerous commissioners have considered the enforceability MCA § 13-35-301 and have “declined to make a determination whether a candidate adhered to the principals set forth in the code.” *Vick v. Harris* COPP, November 4, 1996. In *Koopman v. Vincent*, the commissioner stated unequivocally that he “has no authority to take action if a candidate is alleged to have violated the code.” COPP, November 17, 2008.

Regardless, in the present circumstance, Ms. McCreary did not sign the Code of Fair Campaign practices, nor was she required to do so. MCA § 13-35-302(2). Therefore, this law cannot be applied. Ms. McCreary is not a candidate for HD 88, which is the campaign in which her conduct is implicated. The code expressly includes provisions whereby a candidate voluntarily pledged the manner in which “my campaign” will be conducted. MCA § 13-35-301. Therefore, if Ms. McCreary voluntarily submitted and subscribed to the form provided under MCA § 13-35-302, this code would not apply to campaigns outside of her campaign for a precinct committee post.

Consequently, any allegation that Ms. McCreary violated the Code of Fair Campaign Practices is dismissed.

3. *Deceptive election practices*

The next allegation contained in this complaint, is that by providing COPP with a complaint response that contained what complainant Dailey feels are false or untruthful statements in the matter of *Kessler III v. McCreary*, Ms. McCreary violated MCA § 13-35-207, Deceptive election practices, which reads in relevant part:

A person is guilty of false swearing, unsworn falsification, or tampering with public records or information, as appropriate, and is punishable as provided in 45-7-202, 45-7-203, or 45-7-208, as applicable, whenever the person: (3) knowingly causes a false statement, certificate, or return of any kind to be signed;

While Ms. McCreary chose to provide COPP with a sworn statement, there is no requirement that she do so. MCA § 13-37-132. No rule exists that complaint responses must be signed “under penalty of perjury” (as stated in the Complaint, at page 4). Instead, the statute simply holds that:

A written response to a complaint alleging a violation of Title 13, chapter 37, part 2, must be posted on the commissioner's website. The commissioner may specify a deadline for the written response by the person who is the subject of the campaign finance complaint. *Id.*

In the matter of *Kessler III v. McCreary*, COPP notified Ms. McCreary of the complaint via a letter sent on May 3, 2024, requesting she provide “a written response...addressing the specific issues identified in this complaint.” Ms. McCreary provided the requested response on May 10, 2024, and COPP duly posted this response on the agency website.

Where COPP may identify false or misleading statements in a complaint response such as provided by Ms. McCreary, proper course is to correct, refute, or rebut them in a final agency determination. Had the final agency determination concluded Ms. McCreary’s declaration was falsely submitted, it could have resulted in a violation of MCA § 13-35-207. However, in her sworn declaration, Ms. McCreary declares facts she believes to be true, and the police reports provided in Ms. Dailey’s complaint support this version of events.

Consequently, any allegation that Ms. McCreary violated MCA § 13-35-207, is hereby dismissed.

4. *Ineligibility to hold office because of conviction*

Finally, complainant Dailey requests that COPP find Ms. McCreary ineligible to hold public office as a result of the alleged violations described above. The relevant statute here is MCA § 13-35-106(3), which states:

In addition to all other penalties prescribed by law: (3) if an elected official or a candidate is adjudicated to have violated any provision of this title, except **13-35-207(9)**, the individual must be removed from nomination or office, as the case may be, even though the individual was regularly nominated or elected.

Under the above statute, for an official to be removed from office, they must be adjudicated to have violated a provision of MCA Title 13. Here, Ms. McCreary has been adjudicated to have violated MCA § 45-6-301, not any provision of election law under MCA Title 13.

Consequently, the request that Ms. McCreary be removed from her position as committeewoman is hereby denied.

II. Mayor Michalson's issuance of a pardon to Ms. McCreary

The remaining allegation, presented by Mr. Kesler, is that Mayor Michalson violated election law by pardoning Ms. McCreary. The complaint in this matter states that Mayor Michalson “overstepped his bounds in this action and disregarded the legal process.” (Complaint, *Kessler v. Michalson*, 2.) He further states that the Mayor “may be charged under MCA 13-35-204(2) and 45-7-401 (a), (c).”

As stated above, my authority does not extend beyond Title 13, chapters 35 and 37, therefore this is not the appropriate venue to consider any violation of Title 45. Pursuit of this matter would properly be addressed to the Ravalli County Attorney. However, MCA § 13-35-204, addresses official misconduct of election officials and does fall within my authority.

A person charged with performance of any duty under the provisions of the election laws of this state is guilty of official misconduct and is punishable as provided in 45-7-401 whenever the person knowingly neglects or refuses to perform that duty; or knowingly and fraudulently acts, in the person's official capacity, in contravention or violation of any provision of the election law. MCA § 13-35-204 (1), (2).

Here, Mayor Michalson has no duties under election law and consequently this statute does not apply. Under Title 13, the duties to conduct primary and general elections are specifically provided to Montana's duly elected Secretary of State (SOS) and local county elections administrators.² No such duty is provided to

² MCA § 13-1-201. Chief election officer. The secretary of state is the chief election officer of this state, and it is the secretary of state's responsibility to obtain and maintain uniformity in the application, operation, and interpretation of the election laws other than those in Title 13, chapter 35, 36, or 37.

any municipal officer, such as Mayor Michalson. The duties to enforce Montana election law are provided to SOS, or specific to Chapters 35 and 37, shared between COPP in conjunction with local county attorneys. Title 13 does not provide any enforcement authority over alleged violation of Montana election law to any municipal officer.

Therefore, any allegation that Mayor Michalson violated MCA §13-35-204 is hereby dismissed.

COPP does note that, in responding to this complaint, Mayor Michalson recognizes that the pardon he issued Sue McCreary on April 25, 2024, exceeded his authority and the original citation has been returned to the Stevensville Police Department. (*Response*, 1.) Had Mayor Michalson not timely remedied his error, my only appropriate course of action would be to notify the Ravalli County Attorney of a potential violation of MCA § 45-7-401(1)(b) or (c).

CONCLUSION

Sufficient evidence has not been found to support violations of Montana election law under my jurisdiction. All allegations presented in the submitted complaints have been considered as described above and are hereby dismissed in full.

Dated this 20th day of August, 2024,



Chris J. Gallus
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MCA § 13-1-301. Election administrator. (1) The county clerk and recorder of each county is the election administrator unless the governing body of the county designates another official or appoints an election administrator. (2) The election administrator is responsible for the administration of all procedures relating to registration of electors and conduct of elections. . .