

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

In Re the Ethics Complaint of MONTANA DEMOCRATIC PARTY v. CHRISTI JACOBSEN	Cause No. COPP-2020-ETH-001 SUMMARY DECISION Ethics Complaint Not Accepted for Filing Rejected as Frivolous and for Failing to State a Potential Violation of the Code of Ethics
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At the present time the State of Montana has federal elected officials, state and local elected officials, state legislators, and several state employees running for federal and state office for the 2020 election cycle. Each category of public servant has their own distinct obligations under Federal laws¹ and rules² and the Montana Code of Ethics. The public is mindful and watching closely to see if public resources are being used to support or oppose candidacies for office.

¹ Federal Election Commission, <https://www.fec.gov/>.

² U.S. House of Representatives, Committee on Ethics, *Campaign Activity* and U.S. Senate Select Committee on Ethics, *Ethics Rules, Campaign Activity* (last accessed August 5, 2019).

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.

Christi Jacobsen serves as Montana's Deputy Secretary of State, Chief of Staff to Montana Secretary of State Corey Stapleton. 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). Ms. Jacobsen 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 January 27, 2020, COPP received an ethics complaint from the Montana Democratic Party (MDP) alleging violations of the Code of Ethics by Ms. Jacobsen. That same day the COPP provided notice to the MDP and Ms. Jacobsen, both to inform them that the complaint was in a provisionally lodged status, and additional information was being sought from Ms. Jacobsen, per Mont. Code Ann. § 2-2-136(1)(a).

On February 3, 2020, the COPP received additional information sought and Ms. Jacobsen moved the Commissioner to dismiss the complaint. The issue is now ready for the Commissioner's determination.³

CONTENTIONS

Complainant MDP, through its Executive Director Sandi Luckey, asserts that Ms. Jacobsen is a public employee who is subject to the Code of Ethics. The MDP alleges that Ms. Jacobsen used "public time" to "tout her qualifications and her agenda" for her candidacy to be Montana's Secretary of State, and further announce an endorsement for the position from the current Secretary of State, Corey Stapleton. The MDP contends that Ms. Jacobsen is violating the Code of Ethics by using her current position to campaign for elected office.

³ 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.

MDP'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 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 Montana Secretary of State office (SOS) responds that "Ms. Jacobsen did not use public time or resources," that, as an exempt employee, Ms. Jacobsen could be considered on "public time" at all times, and that regular office hours is not the same as public time. Further, the SOS asserts the alleged behavior did not constitute the use or permit the use of public resources.

The SOS also asserts the charges alleged by MDP's complaint fails to allege a potential violation that can be supported in a factual or legal basis, that the complaint is without merit, fails to state a potential violation of the Code of Ethics and must be summarily dismissed.

FINDINGS OF FACT

In order to apply the law to the contentions of MDP and Ms. Jacobsen, the following Findings of Fact are necessary:

Finding of Fact 1: Ms. Jacobsen provided a sworn declaration under penalty of perjury taken February 3, 2020 and submitted as part of the record in this matter. (Jacobsen Declaration (Feb. 3, 2020).)

Finding of Fact 2: Ms. Jacobsen is a public employee who serves in the role of Deputy Secretary of State and Chief of Staff in the Office of the Secretary of State. (Jacobsen Decl.)

Finding of Fact 3: The Deputy Secretary of State and Chief of Staff is an exempt personal staff position in the Office of Secretary of State. (Jacobsen Decl.)

Finding of Fact 4: Exempted employees are excluded from Title 2, parts 1 through three and 10, Montana Code Annotated. (Mont. Code Ann. §2-18-104.)

Finding of Fact 5: Ms. Jacobsen filed a C-1 Statement of Candidate as a candidate for Montana Secretary of State with COPP on October 4, 2019 and amended on November 22, 2019. (Commissioner's Records.)

Finding of Fact 6: Ms. Jacobsen filed as a candidate for Montana Secretary of State with the Montana Secretary of State's Office on January 9, 2020. (Commissioner's Records.)

Finding of Fact 7: Ms. Jacobsen remitted a filing fee of \$981.04 as candidate for Montana Secretary of State with the Montana Secretary of State's Office on January 9, 2020. (Jacobsen Exhibit A-3).

Finding of Fact 8: Ms. Jacobsen participated in a radio interview from Helena with Peter Christian of KGVO radio on January 10, 2020. (Jacobsen Decl.)

Finding of Fact 9: KGVO radio is located in Missoula, Montana. (KVGO.com.)

Finding of Fact 10: During the KGVO radio interview, Ms. Jacobsen discussed SOS functions: candidate filing; statutory filing fees; current election system; the office's work on a future election system; and, the current Secretary of State. (Jacobsen Decl.)

Finding of Fact 11: During the KGVO radio interview, Ms. Jacobsen also discussed her personal candidacy, including: her filing fee; her decision to seek the nomination for Secretary of State; and, gratitude for the support she has received since declaring her candidacy, including from the current Secretary of State. (Jacobsen Decl.)

Finding of Fact 12: Ms. Jacobsen announced an endorsement of her candidacy for Secretary of State from Corey Stapleton, Montana's current Secretary of State, as part of the KGVO radio interview. (KGVO.com).

Finding of Fact 13: Ms. Jacobsen participated in the KGVO radio interview using a personal cell phone. (Jacobsen Decl.)

Finding of Fact 14: Ms. Jacobsen was “not at [her] place of employment at any time during the call” she made to participate in the KGVO radio interview. (Jacobsen Decl.)

Finding of Fact 15: The date and time of the call was recorded as January 10, 2020 at 10:37 A.M. (Jacobsen Exhibit A-2.)

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. Ms. Jacobsen’s Employment Classification

Ms. Jacobsen serves as the Deputy Secretary of State, Chief of Staff in the Montana Office of Secretary of State (FOF No. 2). The position of Deputy Secretary of State, Chief of Staff is classified as exempt, Secretary of State personal staff (FOF No. 3). As an appointed personal staff of an elected official, Ms. Jacobsen is not subject to human resource policies as outlined in the Montana Operations Manual (MOM).⁴

2. Ms. Jacobsen’s Time

The use of time by an exempt personal staff employee of an elected official is determined by the elected official and the employee, and is excluded from many provisions of Federal and State employment laws. Similar to elected officials, exempt public employees may be considered to be on “public time” well beyond an agency’s stated business or operating hours and location of employment.

⁴ Manager Fact sheet, Montana Department of Administration, State Human Resources Division.

“To avoid absurdity and constitutional problems, we construe § 2-2-121(3), MCA, to permit an elected official to use his or her time to pursue election related activities so long as the official does not use ‘public facilities, equipment, supplies or funds.’” *Molnar v. Fox*, 2013 MT 132, ¶139, 370 Mont. 238, 301 P.3d 824; accord Mont. Atty. Gen. Op. 51-1 (2005) (because “they could be considered to be on ‘public time’ at all times” no violation occurs “as long as public facilities, equipment, supplies, or funds are not involved...”). The COPP has applied this standard to elected officials in past rulings, most recently in a summary decision rejecting *Montana Republican State Central Committee v. Bullock*, COPP 2019-ETH-002.

Because the time of an official’s personal exempt staff is treated similarly in all relevant respects to the time of the public official, the same rule should apply here. Thus, as an exempt personal staff of a public official, Ms. Jacobsen may pursue a nomination to elective office without violating the Code of Ethics, as long as she does not use “facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office” including her own campaign.

Ms. Jacobsen did engage in a radio interview with KVGGO radio of Missoula (FOF Nos. 8, 9) mid-morning on January 10, 2020 (FOF No. 15), outside her place of employment (FOF No. 15), during which she discussed both the business of the SOS in her role as Deputy Secretary of State (FOF No. 10) and her own candidacy for Secretary of State (FOF No. 11). The Commissioner finds Ms. Jacobsen was not at her place of employment, was using her personal cell phone, and as an appointed, exempt personal staff member of the Secretary of State, Ms. Jacobsen did not use public time or resources in support of her campaign.

Ms. Jacobsen’s time spent campaigning during the radio interview is dismissed from consideration under the complaint as frivolous as well as a failure to allege a potential violation of the Code of Ethics, Mont. Code Ann. § 2-2-136(1)(b).

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). Alleging a personal exempt employee of a public official misuses or abuses public time by campaigning does not state a violation of the Code. Further, allegations that the same public employee used public resources (other than public time) 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 Ms. Jacobsen engaged in solicitation of support for her 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 violations of law which concern's Christi Jacobsen's use of her time, as exempt personal staff of a public official, to seek her own nomination 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 Secretary of State used in house counsel to respond in defense of Christi Jacobsen, 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 Democratic Party, Mont. Code Ann. § 2-2-136(2)(c).

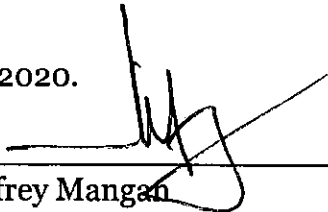
2. The Commissioner's office did incur costs in dealing with this matter, through the use of in-house legal counsel, personnel, time, equipment, facilities and supplies. Given the ability to dismiss this Complaint at the earliest stages as failing to allege a violation of the Code of Ethics and as without factual support, the Commissioner will not asses COPP's costs against the Montana Democratic 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 13th day of February, 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:

Montana Democratic Party
303 North Ewing
Helena, MT 59601

Christi Jacobsen
PO Box 458
Helena, MT 59624

DATED this 13th day of February, 2020.

