

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES
STATE OF MONTANA

<p>In Re the Ethics Complaint of SPENCER MERWIN v. MIKE COONEY, Montana Lieutenant Governor</p>	<p>CAUSE NO. COPP-2020-ETH-007 SUMMARY DECISION OF COMPLAINT WITHOUT INFORMAL CONTESTED CASE HEARING</p>
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On May 19, 2020, Spencer Merwin filed an ethics complaint with the Office of the Commissioner of Political Practices (COPP) against Mike Cooney, Montana’s Lieutenant Governor. The complaint alleges Lieutenant Governor Cooney violated Mont. Code Ann. § 2-2-121(3)(a); that on April 13th, while participating in a conference call with the Democratic Governors Association (“DGA”) from his office in the Montana Capitol Mr. Cooney used public time and facilities for the election of any person to public office, “knowingly and intentionally” violating § 2-2-12(3)(a), MCA. The Commissioner subsequently received formal complaints involving the same matter from the Americans for Public Trust (May 22, 2020) and the Foundation for Accountability & Civic Trust (May 26, 2020).

On May 20, Commissioner Jeff Mangan notified Lieutenant Governor Cooney and, in order to make an initial determination whether the Complaint stated a potential violation, pursuant to Mont. Code Ann. § 2-2-136(1)(a), requested further information from Lieutenant Governor Cooney. On May 22, Raph Graybill, in his official capacity as Chief Legal Counsel for the Office of the Governor, provided a response to the foregoing questions on behalf of Lieutenant Governor Cooney.

- 1) Where and how was the April 13, 2020 conference call with the Democratic Governors Association (DGA) conducted?

The conference call was conducted remotely through the online video service Zoom.

2) Describe the nature of the call.

The conference call was a briefing from DGA to participants about its recent work. It did not involve fundraising.

3) Did any state personnel participate on the call besides yourself? If yes, please identify those individuals

No.

4) Was any state equipment or supplies used to participate in the call? If yes, please identify or describe.

No.

JURISDICTION AND AUTHORITY

The Commissioner of Political Practices has jurisdiction to hear and decide complaints filed under Montana's Code of Ethics against state officers, legislators, state employees and county attorneys. Mont. Code Ann. § 2-2-136. Mr. Cooney is an elected official and serves as State of Montana Lieutenant Governor. The Code of Ethics defines a public officer as "any state officer," Mont. Code Ann. § 2-2-102(8)(a). A state officer "includes all elected officers," Mont. Code Ann. § 2-2-102(12). Lieutenant Governor Cooney therefore is a public officer and subject to the Montana Code of Ethics.

Unless a complaint is dismissed as frivolous, or for failing to state a claim of a potential violation of the code, the Commissioner "shall hold an informal contested case hearing[.]" Mont. Code Ann. § 2-2-136(1)(c). However, "[i]f the issues presented in a complaint have been addressed and decided in a prior decision and the commissioner determines that no additional factual development is necessary, the commissioner may issue a summary decision without holding an informal contested case hearing on the complaint[.]" *Id.*, at (1)(b).

Having reviewed the Merwin Complaint and Lieutenant Governor Cooney's responses, Commissioner Mangan determines from the facts presented and admitted in the record that no additional factual development is necessary pursuant to prior

decisions of this office in Fox v. Molnar, September 13, 2010 (Comm'r Unsworth)¹; Cooper v. Johnson, COPP-2016-ETH-007 (Comm'r Mangan, July 10, 2017) and Montana Democratic Party v. Stapleton COPP-2019-ETH-001 (Comm'r Mangan January 2019). Therefore, the Commissioner issues the following summary decision without holding an informal contested case hearing on the complaint. *Id.*

CONTENTIONS

Merwin's Complaint alleges that The statute referenced by Merwin, Mont. Code Ann. § 2-2-121(3), is found in the Montana Code of Ethics, which provides that public officers are prohibited from using:

(a) ... 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 ... 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 [section], "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

(c) This [section] 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)(a)-(c).

Lieutenant Governor Cooney stated in his response "the conference call was a briefing from DGA to participants about its recent work" and did not involve state personnel, equipment, or supplies.

FINDINGS OF FACT

In order to apply the law to this matter, the following facts are necessary and expressly found by the Commissioner:

1. Mike Cooney won the November 8, 2016, General election to become Montana's Lieutenant Governor.

¹ Affirmed by the Thirteenth Judicial District Court in Molnar v. Fox, Cause No. DV-10-1718 (Waters, J.; Feb. 6, 2012); affirmed by the Montana Supreme Court in Molnar v. Fox, 2013 MT 132, 370 Mont. 238, 301 P.3d 824 (May 14, 2013).

2. In January of 2017, Mr. Cooney was officially sworn in as Montana Lieutenant Governor and he continues to serve in that position.
3. On February 28, 2020, Lieutenant Governor Cooney filed to run for Governor of State of Montana with the Montana Secretary of State.
4. On July 2, 2019, Lieutenant Governor filed a C-1 Statement of Candidate as a republican candidate for Governor of State of Montana with the COPP.
5. On April 13, 2020, Lieutenant Governor Cooney participated in a Zoom² conference call with the Democratic Governors Association.
6. The April 13, 2020, conference call occurred in Lieutenant Governor Cooney's official office located in Montana's State Capitol building, Helena, MT 59601.
7. The Montana Lieutenant Governor's state office is not available to the general public for use or lease.
8. Lieutenant Governor Cooney used a personal computer to access the video call.
9. The Cooney campaign provided a statement to the press confirming Lieutenant Governor Cooney participated in the DGA April 13 call from the state office of the Lieutenant Governor.

DISCUSSION

Montana's Constitution instructs that there shall be a code of ethics for state and local officers and employees and legislators "prohibiting conflict between public duty and private interest[.]" Mont. Const., Art. XIII, sec. 4. The Montana Legislature enacted the Code of Ethics, stating: "The holding of public office or employment is a public trust, created by the confidence that the electorate reposes in the integrity of public officers, 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

² Zoom Video Communications, Inc. provides videotelephony services through a cloud based per-to-peer software platform used for teleconferencing. Wikipedia https://en.wikipedia.org/wiki/Zoom_Video_Communications

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).

As noted above, having been elected to serve as a Montana Lieutenant Governor, Mr. Cooney is a "public officer" within the meaning of the Code. *Id.*, § 2-2-102(8)(a), (11). As an individual, Mr. Cooney has a right to express his own personal political views, including promoting his own candidacy for public office. *Id.*, § 2-2-121(3)(c); 51 Op. Att'y Gen. No. 1 (2005). Further, there are exceptions for the use of public resources by public officers, employees and agencies when the uses are "properly incidental to another activity required or authorized by law." Mont. Code Ann. § 2-2-121(3)(a)(i)-(ii). For example, it is a proper use of state resources for a public officer or employee to determine the impact of the passage or failure of proposed of ballot issues on governmental operations. *Id.*, at (3)(b)(i).

However, the Code expressly states that "properly incidental" activities "[do] 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." *Id.*, at (3)(b) (emphasis added). In other words, the use of state resources to solicit support for or opposition to a nomination or election to public office is prohibited.

In this matter, Lieutenant Governor Cooney's state office was used participate in the DGA videoconference. Lieutenant Governor Cooney's state office is not available to the public (FOF No. 7). A constituent or his opponent, for example, could not enter and utilize his office for a conference call or contract with the State of Montana for private use.

1. "Support for or opposition to"

The Montana Code of Ethics does not provide a specific definition of the phrase "support for or opposition to," so it is reasonable for the Commissioner to look to other definitions in statute. Mont. Code Ann. § 1-2-107. The Disclose Act, passed by the 2015 Montana Legislature, defined "support or oppose" in the campaign finance reporting and disclosure realm, and the Commissioner has determined those definitions also apply to the Code of Ethics. *Cooper*, at 7; *Adams v. Board of Regents*, COPP-2018-ETH-001, at 16-17 (Comm'r Mangan).

"Support or oppose," including any variations of the term, means:

(a) using express words, including but not limited to "vote", "oppose", "support", "elect", "defeat", or "reject", that call for the nomination, election, or defeat of one or more clearly identified candidates, the election or defeat of one or more political parties, or the passage or defeat of one or more ballot issues submitted to voters in an election; or

(b) otherwise referring to or depicting one or more clearly identified candidates, political parties, or ballot issues in a manner that is susceptible of no reasonable interpretation other than as a call for the nomination, election, or defeat of the candidate in an election, the election or defeat of the political party, or the passage or defeat of the ballot issue or other question submitted to the voters in an election.

Mont. Code Ann. § 13-1-101(50).

Mr. Cooney stated he participated in a conference call described as “a briefing from DGA to participants about its recent work”, and the Cooney campaign provided the press a statement³ which included “The lieutenant governor does not routinely listen to these sorts of calls in his office and regrets if this isolated incident amounted to a technical contravention of the rule ... cited”. The Democratic Governors Association (DGA):

“is an independent voluntary **political** organization **organized to support** Democratic governors and **candidates** across the nation. As the only organization dedicated to electing Democratic governors and candidates, the DGA participates at all levels of campaigns, from providing resources to fund operations to helping articulate and deliver their messages. The DGA also provides expert advice in policy areas to Democratic governors and candidates”⁴ (Emphasis added).

Objectively and clearly, Mr. Cooney's participation in the DGA conference call was in his capacity as a candidate for Governor, and his participation is susceptible of no reasonable interpretation other than support for his nomination and election to be the democratic nominee for Montana Governor.

³ Mike Dennison, MTN News - <https://www.ktvh.com/news/montana-news/lt-gov-cooney-used-capitol-office-during-campaign-related-call>

⁴ Democratic Governors Association website - <https://democraticgovernors.org/about/>

Mr. Cooney's participation in the DGA conference call cannot be and was not properly incidental to his duties as the Lieutenant Governor of the State of Montana under Mont. Code Ann. § 2-2-121(3)(a)(ii). Therefore, Mr. Cooney's participation in the Democratic Governors Association conference call was a violation of the Montana Code of Ethics if public "time, facilities, equipment, supplies, personnel, or funds" were used to participate in the Democratic Governors Association conference call held on April 13, 2020. *Id.*, § 2-2-121(3)(a).

2. Public Time

The Code of Ethics prohibits public officers from using "public time" to promote or oppose the election of a candidate to office, Mont. Code Ann. § 2-2-121(3)(a). However, as an elected official, Mr. Cooney receives a salary, and could be considered on "public time" at all times, *see e.g. Fasbender v. Toole*, Deputy Comm. Honzel (Feb. 21, 2012) and 51 Op. Att'y Gen. No. 1 (2005). To the extent the Complaint contains allegations that Mr. Cooney improperly used "public time" to participate in a DGA conference call, the Commissioner determines that Mr. Cooney's time cannot be the basis for a finding of an ethics violation against him and thus dismisses the same, *Molnar v. Fox*, 2013 MT 132, ¶¶37-39.

3. Facilities

The Code of Ethics prohibits public officers from using public "facilities, [and] equipment" to support or oppose the election of a candidate to office, Mont. Code Ann. § 2-2-121(3)(a). Mr. Cooney's response to the Complaint and by his campaign's statements to the press regarding the April 13, 2020, DGA conference call, provides sufficient evidence to conclude that, as a Montana Lieutenant Governor, he used his official office as Lieutenant Governor to participate in a conference call with the Democratic Governors Association (FOF Nos. 5, 6, 9).

The Commissioner determines that Lieutenant Governor Cooney improperly used state facilities 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). *See also Fox v. Molnar*, at 24-26 (Comm'r Unsworth); *Molnar v. Fox*, at 12-16 (Waters, J.); *Molnar v. Fox*, 2013 MT 132, ¶¶35-46; *Cooper*, at 8 (§ 2, 3). "It is unlawful for an elected official to use state facilities for political purposes whether in a government office or elsewhere." *Fox v. Monar*, 2013 MT 132, P 45.

SUMMARY

Mr. Cooney has a right to express his personal political views. Mont. Code Ann. § 2-2-121(3)(c). To be clear, had Mr. Cooney conducted the same activity using his personal resources and office, the Commissioner would have dismissed the complaint as frivolous on its face.

Mike Cooney's use of his official Lieutenant Governor's Capitol office on April 13, 2020, to participate in political Democratic Governors Association conference call was in furtherance of his nomination and election to public office, and therefore that the following conduct with regard to that statement violated Montana's Code of Ethics:

Prohibited use of State Resources: Facilities

It is incumbent on individual public employees and officers, and the agencies that they work for, to know the obligations that the Code of Ethics places on them while on the job, at the workplace, and in the use of state resources. Public employment and service comes imbued with the public trust. The public trust requires proper use of state resources by all public servants for the good of all Montanans. Mont. Code Ann. § 2-2-103(1).

CONCLUSIONS OF LAW

1. Mr. Cooney's April 13, 2020 use of his Lieutenant Governor's Capitol office to participate in political Democratic Governors Association conference call in support for his own nomination or election to public office within the meaning of Mont. Code Ann. § 2-2-121(3)(a).

2. Mr. Cooney's use of his Lieutenant Governor's Capitol office to participate in political Democratic Governors Association conference call was not properly incidental to his position as Montana Lieutenant Governor and is not an exempted communication under Mont. Code Ann. § 2-2-121(3)(c).

3. Mr. Cooney improperly used State facilities, specifically the Lieutenant Governor's Capitol office, to participate in political Democratic Governors Association conference call in support of his candidacy for public office in violation of Mont. Code Ann. § 2-2-121(3)(a).

ORDER

The Code of Ethics provides that when the Commissioner has determined there has been a violation, "an administrative penalty of not less than \$50 or more than

\$1,000" and "costs of the proceeding" may be imposed. Mont. Code Ann. § 2-2-136(2)(a), (c).

1. The Commissioner finds and decides that Mr. Cooney is liable for one violation of the Code of Ethics, for improper use of facilities, to participate in a conference call with the Democratic Governors Association supporting his candidacy for public office on April 13, 2020. For this violation, the Commissioner orders that Mr. Cooney is personally liable to the people of the State of Montana for a total of \$1000.00 for misuse of state resources.

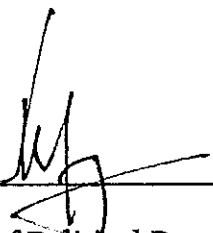
2. During these proceedings, Spencer Merwin did not retain an attorney, and it appears that the costs incurred would be minimal. Therefore, the Commissioner will not assess the Spencer Merwin's costs against Mr. Cooney.

3. The Commissioner's office did incur costs in dealing with this matter, through the use of in-house counsel, personnel, time, equipment, facilities and supplies. Given that the issues in this Complaint were addressed and decided in prior decisions and no additional factual development was needed, the Commissioner will not assess COPP's costs against Mr. Cooney for the Summary Decision proceedings.

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 8th day of July, 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:

Spencer Merwin
P.O. Box 802
Helena, MT 59624

Montana Lieutenant
Governor
Mike Cooney
P.O. Box 202801
Helena, MT 59620

DATED this 8th day of July, 2020.