

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES (COPP)

MONTANA REPUBLICAN PARTY (via Danielle Bradley)	COPP-2024-CFP-030
v.	FINDING OF FACTS SUFFICIENT TO SUPPORT VIOLATIONS
JESSE JAMES MULLEN (Montana Secretary of State candidate)	DISMISSED - PROSECUTION NOT JUSTIFIED

COMPLAINT

On June 28, 2024, Danielle Bradley, on behalf of the Montana Republican Party, filed a campaign finance and practices complaint against Jesse James Mullen, candidate for election to the position of Montana’s Secretary of State. The complaint alleges that candidate Mullen failed to timely file a C-5 campaign finance report due on or before June 20, 2024.

The submitted complaint conforms to the requirements of Admin. R. Mont. 44.11.106 and 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. Mullen. Mr. Mullen responded via email on July 1, 2024. The complaint and response are posted on COPP’s website, politicalpractices.mt.gov.

ISSUES

Timely filing of campaign finance reports by candidates, Montana Code Annotated (MCA) § 13-35-226.

BACKGROUND

While Mr. Mullen’s matter here is not unique or worthy of special notice, the timing of this decision as we enter the next reporting cycle for the 2024 election provides an opportunity to discuss enforcement laws with respect to disclosure requirements.¹ Again, candidate Mullen is worthy of no special notice in this regard.

¹ This discussion is also included in other recent decisions, including *MTGOP v. Alke*, COPP-2023-CFP-018, and *O’Neill v. Wilson*, COPP-2024-CFP-022.

His situation is not unique. This just presents an opportunity to illustrate the requirements of the disclosure law in advance of the 2024 General Election.

a. *Disclosure, generally.*

Disclosure, including timely disclosure, advances an important and well-recognized government interest by providing information to the voting public about those vying for their attention. *Ream v. Bankhead*, COPP-1996-CFP-09/10/1999, 7. Government agencies, like COPP, serve as a point where the public has access to that information in a uniform and understandable way. *Ellsworth v. Bullock*, COPP-2016-CFP-041, 6. Legislatively enacted statutes have already decided what transactions require disclosure and when they must be reported. MCA, Title 13, chapter 37, part 2. Disclosure ensures that voters have the facts necessary to evaluate messages competing for their attention. It also provides general transparency to the public and those acting on their behalf. Lastly, it provides information to government agencies in other areas of enforcement. Taken together, these functions promote confidence and integrity in the election process. See generally, *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1006 (9th Cir. 2010).

Montana's reporting requirements have already been upheld by federal courts as simple and straightforward, which means our requirements withstand constitutional scrutiny and are not overly burdensome on candidates or political committees. *National Association for Gun Rights (NAGR), Inc. v. Mangan*, 933 F.3d 1102 (9th Cir. 2019). While most laws that affect First Amendment rights are subject to strict scrutiny - a compelling interest that is narrowly applied - laws that merely require disclosure can meet a lower standard of intermediate or exacting scrutiny. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367, 130 S. Ct. 876, 914 (2010). This means the purpose of the law serves a substantially important interest and the law is written to achieve that interest. *Id.* Disclosure laws may burden candidates and political committees, but they do not impose a ceiling on campaign activities or restrict speech. *Citizens United v. FEC*, 130 S. Ct., 914. Consequently, disclosure laws that withstand exacting scrutiny are generally

deemed constitutional. This general rule is not absolute. In limited instances, even disclosure laws that impact First Amendment rights of association face strict scrutiny analysis. *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 141 S. Ct. 2373 (2021). Broad definitions with sweeping implications, applied in a subjective manner, as well as vague laws that fail to provide fair notice also implicate First Amendment rights requiring more stringent scrutiny. See, generally, *Butcher v. Knudsen*, 38 F.4th 1163 (9th Cir. 2022).

As Montana Supreme Court Justice Baker indicated in her *WTP v. Attorney General* dissent, following *Citizens United*, Montana “should focus on preserving disclosure requirements....in order to protect the overriding interest in preventing corruption.” *WTP v. Attorney General*, 363 Mont. 220, 241, 271 P.3d 1, 2011 MT 328, ¶ 50. Justice Baker notes from the court record that “disclosure requirements are the means by which to address the State’s compelling interest in preserving the integrity of the election process” and that “disclosure requirements are among the “constitutional tools” available to the states in the wake of *Citizens United*.” *Id.* In addition, Justice Baker relies on *HLW v. Brumsickle* for the proposition that “[t]he value of disclosure in preventing corruption cannot be understated. *Id.* at 59.

Disclosure laws establish a reporting system that includes laws, rules, and reporting deadlines, which are imposed upon all candidates and political committees. The principal function is always to provide information voters may deem important when deciding how to cast their vote. Consequently, it is critical that disclosure occurs before the election rather than after an election. The purpose of disclosure is only achieved if reports are timely filed with COPP.

Accurate reporting is equally important. Candidates and committees should report all activity meant to influence the results of our elections. Critical terms, such as contributions and expenditures, are specifically defined to include all campaign related activities. MCA § 13-1-101(9), (21). Thus, timely reporting plus accurate reporting equals full disclosure. MCA §§ 13-37-201, 226, 228, 229.

COPP establishes a uniform system of disclosure and reporting applicable to all candidates and political committees. MCA, Title 13, chapter 37, part 2. We

employ compliance specialists to assist individuals filing these reports. When complaints are filed alleging violations, we investigate those complaints and apply substantive facts to the established law. MCA § 13-37-111. If prosecution is justified, COPP can pursue penalties for intentional and negligent violations. MCA § 13-37-128. These enforcement decisions are posted, and the commissioner reviews prior similar decisions to achieve stability as to how these laws are interpreted. *Welch Advisory*, COPP-2014-AO-009. Only courts, rather than administrative agencies, have jurisdiction to decide constitutional issues, but agencies are required to interpret laws in a manner that recognizes constitutional issues, so the law is applied in a constitutional way. See *Id.*, 7-8 citing, *Brisendine v. Dep't of Commerce*, 253 Mont. 361, 366, 833 P.2d 1019, 1021-22 (1992), and *City of Great Falls v. Morris*, 332 Mont. 85, 134 P.3d 692, 2006 MT 93 ¶ 19.

b. *Applying law with respect to circumstances.*

If the public, candidates, political committees, or journalists reading COPP decisions notice what appears to be a more rigid application of disclosure laws than other laws, it is predominantly due to what courts have allowed and permit when we apply disclosure laws versus other laws under the agency's authority. When we reach decisions, we remain mindful of what standards the courts apply. *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 141 S. Ct. 2373 (2021), and *Butcher v. Knudsen*, 38 F.4th 1163 (9th Cir. 2022).

These laws must be equally and objectively applied to all candidates and political committees so I will set forth various factors later in this decision. This approach was taken by the commissioner in *Landsgaard v. Peterson and Wilks* with respect to how frivolous complaints are determined and handled. COPP-2014-CFP-008. It is appropriate that I do something similar here regarding the importance of accurate and timely disclosure and what factors determine whether a matter justifies prosecution.

With this background provided, I will address the specific disclosure related complaint pertaining to Mr. Mullen, followed by a discussion and application of the factors I apply when determining if prosecution is justified.

DISCUSSION

Under Montana law, candidates are required to disclose and report all contributions received and expenditures made benefitting their campaign. MCA § 13-37-229. 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.

On August 9, 2023, Jesse James Mullen filed a C-1 Statement of Candidate with COPP as a Democratic candidate for election to the position of Montana's Secretary of State. Mr. Mullen timely filed C-5 campaign finance reports for each reporting period on or before the due dates of October 5, 2023, and January 5, March 20, April 20, and May 20, 2024. On June 30, 2024, Mr. Mullen filed a C-5 campaign finance report for the reporting period of May 16 through June 15, 2024. (COPP Records.)

Campaign finance report filing requirements are statutorily mandated and the filing date requirements are date certain. MCA § 13-37-226. In *Bradshaw v. Bahr*, the commissioner found a violation of Montana election law when a candidate filed an initial finance report only two days late, holding 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*. Candidates who participated in Montana's June 4, 2024, primary election were required to file campaign finance reports “quarterly, due on the 5th day following a calendar quarter” in 2023, and on “the 20th day of March, April, May, [and] June” of 2024. MCA § 13-37-226(1)(a), (b).

At the time COPP received the above-named complaint, June 28, 2024, Mr. Mullen had not filed a C-5 periodic finance report for the reporting period of May 16, through June 15, 2024. This report was eventually filed on June 30, 2024, 10 days after the June 20, 2024, due date. (COPP Records.)

This failure to timely file is a clear violation of MCA § 13-37-226 and no possible reason for this delay in filing was provided by the respondent. Consequently, I find sufficient evidence exists to show Mr. Mullen violated MCA § 13-37-226. This violation occurred on June 20, 2024, when candidate Mullen failed

to file the required report. It is important to note that COPP focuses on our compliance function more than enforcement. In fact, each person on COPP's six person staff focuses on compliance to some degree. Three of the six COPP staff focus exclusively on assisting candidates and political committees with their compliance, while two others spend at least a majority of their time dedicated to compliance. In this regard, Mr. Mullen was given access to COPP resources and the reporting calendar when he filed his initial C-1 Statement of Candidacy. With regard to the specific report in question Mr. Mullen was provided a pre-reporting reminder on June 13, 2024. He missed the filing on June 20, 2024. On June 21, 2024, Mr. Mullen was notified of this failure and given until June 26, 2024, to comply. He again failed to comply, so he was provided another 3 days to comply by June 29, 2024. He failed a third time. The complaint in this matter came in on June 28, 2024, and only two days after that did Mr. Mullen ultimately file the required report.

With this in mind, I now proceed to enforcement to determine whether prosecution is 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.

In *Montana Freedom Caucus v. Zephyr*, I discussed whether the referral to a county attorney must occur in a perfunctory manner whenever sufficient evidence of a violation is found, or whether I may use the discretion provided to me in MCA § 13-37-124(1) to first determine if prosecution of the matter is justified. I find the latter approach which considers not only whether sufficient evidence exists but

whether prosecution is in the best interest of the state, to be the more thorough and reasoned approach.

While I feel this approach best serves the interest of Montanans, no clear criteria for determining if prosecution is justified has been clearly articulated by past commissioners. Enforcement requires objective standards. The following outlines the four primary factors I will consider in determining when prosecution is justified.²

As addressed in *Butcher v. Knudsen*, I should take into account vagueness with respect to the activity and remain mindful of other purposes a speaker might be engaged in rather than just rigidly applying definitions without regard to circumstances. Thus, being mindful of *Butcher* and the other cases, together with past COPP decisions, the following factors will apply:

1. *Proximity to an election*

First, the purpose of campaign finance reporting is to provide voters with accurate and relevant information that will inform their decisions at the ballot box. Therefore, inaccurate and late reports that occur in close proximity to an election, thus depriving voters of information they are entitled to before voting, will be considered egregious violations.

2. *Pattern of behavior*

Next, prosecution is nearly always justified when a pattern of noncompliance exists. Habitual late or inaccurate reporting increases the likelihood of errors and shows a lack of commitment to transparency and the interests of Montana voters. Therefore, decisions involving repeat offenders, candidates or committees with multiple late reports within one election cycle, and those that are currently the subject of an order of noncompliance, will nearly always be referred for prosecution.

3. *The size of misreported contributions or expenditures*

The size of contributions or expenditures that go unreported increases the

² This discussion is also included in other recent decisions, including *MTGOP v. Alke*, COPP-2023-CFP-018, and *O'Neill v. Wilson*, COPP-2024-CFP-022.

seriousness of the violation. Therefore, when violations involve amounts that cannot be excused as de minimis, or are sizeable relative to contribution limits, these matters are also likely to be referred.

4. *Responsiveness*

Part of the established process of handling complaints involves requesting a response from the alleged violator. When a response is received, I may consider any mitigating factors presented in determining whether prosecution is justified. I may also consider whether the alleged violator makes prompt corrections when errors are realized. This includes reference to when a complaint is filed and whether the alleged violator was actively engaged with a COPP compliance specialist or if the candidate was ignored the provided notices.

I intend to apply the four factors outlined above whenever I consider if prosecution is justified. Other mitigating factors that I may consider include whether multiple violations exist rather than an isolated occurrence and whether pursuing a particular violation is an economic use of taxpayer resources.

If, after applying the above factors, I find sufficient evidence to justify a prosecution, I am then mandated to notify the affected county attorney and transfer 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, at 4.

The minimum statutory penalty, even for a single late report, is \$500, but can be three times the amount of unreported contributions or expenditures. MCA § 13-37-128. In negotiating a fine, the commissioner may exercise his discretion and consider any and all mitigating factors. *Bradshaw*, at 4. 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.* at 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. Because the court factors in culpability and ultimately determines the amount, as commissioner I feel compelled to seek the maximum allowable penalty, which appropriately serves the contemplated purpose of the statute and defends the rights belonging to the public. The respondent, rather than the commissioner, should defend against the full measure of the law.

Enforcement applied to Mr. Mullen

Here, Mr. Mullen was uncontested in the primary and we were far removed from the November 5, 2024, general election. Throughout his campaign, Mr. Mullen has demonstrated that he is ordinarily compliant, and he has, other than this single event, strictly adhered to the reporting calendar. There are no large contributions or expenditures that should have been included in his report, other than one general election contribution received on June 3, 2024. Montana voters have not been affected by this single error which Mr. Mullen promptly corrected.

The only place Mr. Mullen fails is in his responsiveness, but this does not outweigh his adherence with respect to the three other relevant factors.

CONCLUSION

Based on the above discussion, I find there is sufficient evidence to conclude the following:

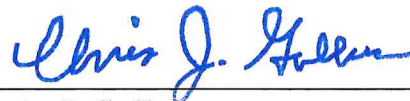
- Mr. Mullen violated MCA § 13-37-226 by filing a periodic campaign finance report due June 20, 2024, for the reporting period of May 16 through June 15, 2024, on June 30, 2024, exceeding the due date by 10 days.

I have considered the factors presented in the Enforcement section of this Decision and determined a civil action or penalty under MCA § 13-37-128 is not justified at this time.

While COPP will not be referring this violation for prosecution, this instance will be noted as a contributing factor in any future determinations if more violations occur or a pattern of noncompliance develops.

The allegation in the submitted complaint has been considered as described above and is hereby dismissed.

Dated this 28th of August, 2024,



Chris J. Gallus
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