

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES (COPP)

JAKE EATON	COPP-2024-CFP-033
v.	DISMISSAL
AMERICAN CIVIL LIBERTIES UNION, INC.	

COMPLAINT

On September 5, 2024, Jake Eaton of Billings, MT, filed a Campaign Finance and Practices (CFP) complaint against the American Civil Liberties Union Foundation, Inc. The complaint alleged that the American Civil Liberties Union Foundation, Inc., failed to timely and properly report expenses associated with a campaign mailer relating to Montana’s 2024 State Supreme Court candidates.

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.* Here, the complainant asserted that the American Civil Liberties Union Foundation, Inc. violated Mont. Code Ann. (MCA) § 13-37-223. COPP staff contacted the complainant and was able to clarify the intended citation was MCA § 13-37-225. COPP subsequently accepted the complaint as filed, and in accordance with COPP policy requested a response from American Civil Liberties Union, Inc. (ACLU).¹ The complaint and response are available on COPP’s website, politicalpractices.mt.gov.

ISSUES

Reporting of election communications, MCA §§ 13-37-225, 226, 228, 229 and more specifically, reporting of obligations ARM 44.11.502(5) and 44.11.506.

¹ Although American Civil Liberties Union Foundation, Inc. was initially named in the complaint, American Civil Liberties Union, Inc., confirmed that they are the organization responsible for the materials at issue rather than American Civil Liberties Union Foundation, Inc.

BACKGROUND

ACLU registered in the State of Montana as an incidental political committee on March 1, 2024, by submitting a Statement of Organization with COPP. As the Purpose of Committee, ACLU listed “Voter education in 2024 Montana Chief Justice race” and “Voter education in 2024 Montana Associate Justice race,” among others. ACLU timely filed their initial C-4 Committee Finance Report on March 28, 2024, and has continued to timely file throughout 2024.

A mailer containing a “paid for by” attribution statement indicating it had been financed by the ACLU was disseminated to Montana voters near the end of August 2024. The mailer directly referenced, by name and image, each of the four candidates seeking election to the Montana Supreme Court in Montana’s November 5, 2024, general election – Chief Justice candidates Jerry Lynch and Cory Swanson, and Associate Justice candidates Katherine Bidegaray and Dan Wilson.

ACLU’s C-4 report for the reporting period of June 26 through August 25, 2024, did not directly disclose any expenditures made for mailers or similar materials but did disclose two independent expenditures related to the purchase and production of digital advertising. In their response, ACLU states that “the mail piece in question was not dropped off at the post office for mailing until August 28, 2024” and the committee “intends, as Montana law requires, to disclose the appropriate expenditures on its next committee report for the period ending September 25, 2024.” Included with the response was an affidavit signed by Mandy Vlasz, CEO of The Pivot Group, Inc., (Pivot), indicating that the identified mailer was delivered to the United States Postal Service (USPS) on August 28, 2024, intended for mailing on August 29, 2024. A receipt from the USPS was attached. (Response.)

On September 19, 2024, in response to a request by COPP, ACLU provided a copy of an invoice from Pivot, dated August 22, 2024, for the “production of 123,116 11x17 1-fold” mailers along with associated costs for shipping, copywriting, art and design, etc., for a total cost of \$102,186.28. Included with this response was an email message with a screenshot “demonstrating that the ACLU has not paid this

invoice as of today, as it is still pending internal approvals.” (COPP Records.)

DISCUSSION

The submitted complaint alleges that the ACLU failed to properly report a Montana electioneering communication it financed and distributed. As evidence, the submitted complaint included a copy of a mailer referring by name and image to all candidates seeking election to the Montana Supreme Court Chief Justice and Associate Justice positions. (Complaint.)

Montana election law specifically defines an "Electioneering communication" as:

[A] paid communication that is publicly distributed by radio, television, cable, satellite, internet website, newspaper, periodical, billboard, mail, or any other distribution of printed materials, that is made within 60 days of the initiation of voting in an election, that does not support or oppose a candidate or ballot issue, that can be received by more than 100 recipients in the district voting on the candidate or ballot issue, and that: (i) refers to one or more clearly identified candidates in that election; (ii) depicts the name, image, likeness, or voice of one or more clearly identified candidates in that election; or (iii) refers to a political party, ballot issue, or other question submitted to the voters in that election. MCA 13-1-101(19)(a).

Here, the complainant is correct in asserting that the mailer in question qualifies as an electioneering communication. While the mailer does not actually support or oppose any candidates, it is a paid communication, publicly distributed by mail, made within 60 days of the initiation of voting in Montana’s November 5, 2024, general election.² Further, more than 100,000 mailers were disseminated, clearly exceeding the 100 recipients specified by statute, and the mailer includes the name and likeness of one or more clearly identified candidates - specifically, four Supreme Court candidates.

As indicated in the “paid for by” attribution message included on the mailer,

² “In the case of mail ballot elections, the initiation of voting occurs when official ballot packets are mailed to qualified electors pursuant to 13-19-206, MCA.” ARM 44.11.605(2). In 2024, Montana’s Secretary of State began sending out ballots on October 11, 2024. Consequently, the electioneering period began on August 12, 2024.

the material was financed by ACLU, a registered incidental political committee. In the State of Montana, incidental political committees such as ACLU are required to disclose expenditures made by the committee, including electioneering communications, on C-4 committee finance reports filed with COPP. MCA §§ 13-37-225 and 13-37-232(2). Each reporting period runs from the 26th of the previous month until the 25th of the month in which the report is filed, with reports due monthly on the 30th of each month (excluding July) during the year in which the committee participates in an election. MCA §§ 13-37-226, 228, COPP reporting calendar.

Here, the complainant correctly asserts that no expenditures related to the implicated mailer were reported by ACLU on the C-4 report filed on August 30, 2024, for the reporting period covering June 26 through August 25, 2024. The complaint asserts the mailers at issue were distributed “on or about August 24, 2024,” and therefore ACLU failed to timely report the expenditure in violation of MCA § 13-37-225. The respondent asserts the mailers did not go out to voters until August 29, 2024, and provides a USPS receipt as evidence. The respondent additionally states that they did not pay the invoice provided by Pivot, in the amount of \$102,186.26 prior to September 19, 2024, when they provided the invoice to COPP.

On September 30, 2024, ACLU filed a C-4 report for the period covering August 26 through September 25, 2024, disclosing an expenditure in the amount of \$102,186.26 to Pivot on August 28, 2024. This appears to create a discrepancy regarding whether payment to Pivot was indeed made on August 28, 2024, or after the response provided to COPP on September 19, 2024. The August 28, 2024, date is the date the mailers were dropped at the post office and it is possible that ACLU considered the transaction complete that day and therefore reported it on that day. As both of these dates are within the reporting period covered by the September 30, 2024, report, we need not reach a conclusion as to which date is correct.

COPP has no reason to doubt ACLU’s statement that the mailers did not go out prior to August 29, 2024. They have provided supporting evidence while the

complainant's assertions that the mailers went out "[o]n or about August 24, 2024," is unsupported. Although the respondent correctly cites ARM 44.11.502 when stating "that an expenditure – including an independent expenditure – is considered made upon the date payment is made," a different issue is presented here. (September 19, 2024, email to COPP.)

MCA § 13-37-229(20)(a)(vi) mandates political committees report "the amount and nature of debts and obligations owed." ARM 44.11.506(2) further provides, "[a]n obligation to pay for a campaign expenditure is incurred on the date the obligation is made and shall be reported as a debt of the campaign until the campaign pays the obligation by making an expenditure." A candidate or political committee has a responsibility to report debts at the time an obligation for a campaign expenditure is incurred rather than when an invoice is received, or the payment is made. MCA § 13-37-229(2)(a)(vi) and ARM 44.11.502(2), see also *Perkins v. Downing*, COPP 2020-CFP-022.

In *Ward v. Tucker*, candidate Tucker failed to meet the requirements of law when she incurred an obligation in one period but reported it in another. COPP-2020-CFP-021. In *Ward v. Marceau*, candidate Marceau failed to disclose eight separate debts in the period the debts were incurred. COPP-2022-CFP-008. In *Downing, Tucker, and Marceau*, each candidate maintained they had not yet been invoiced or billed when the agreement was made with respect to the service. In *Downing* there were issues with respect to the vendor's performance, so the amount owed was still being negotiated. None of this negated the requirement with respect to reporting the debt when it was incurred.

If the exact amount of a debt is unknown, the candidate or committee is required to provide an estimate since the public has a right to know all debts, including estimated debts, incurred in the appropriate reporting period. *Akey v. Clark*, COPP-1998-CFP-03/36/1999, see also *Buyan v. Schulz*, COPP-2016-CFP-037, *Ellsworth v. Bullock*, COPP-2016-CFP-041 and *Amerman v. McGrath*, COPP-2016-CFP-043, at 5. In *Amerman v. McGrath*, the candidate relied on the notion of reporting based on actual payment. Her argument, like others, was unsuccessful.

The commissioner addressed this notion of candidates reporting based on the date of payment and determined it “would not accomplish timely disclosure of campaign activity and is subject to manipulation by a candidate.” *Id.* at 4. I concur.

Here, as indicated by the Pivot receipt dated August 22, 2024, ACLU necessarily acquired a reportable obligation during the reporting period concluding on August 25, 2024. Based on the evidence available, COPP cannot determine when ACLU contracted with Pivot to facilitate these mailers, but an obligation occurred at that time. Consequently, COPP can conclude that an obligation arose in advance of the August 22, 2024, invoice. Therefore, ACLU violated MCA § 13-37-229 by failing to report a debt during the reporting period in which it was incurred.

ENFORCEMENT

MCA § 13-37-124(1) requires that I refer a matter to the appropriate county attorney when I find sufficient evidence “to justify a civil or criminal prosecution.” The county attorney may then choose to prosecute the matter or refer it back to me for appropriate civil or criminal action. *Id.* While I do not have discretion to pursue a civil action without first referring the matter to the affected county attorney, I do have discretion to determine if enforcement action and therefore referral to the county attorney 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. “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.

Recently, in *MTGOP v. Mullen*, COPP-2024-CFP-030, *MTGOP v. Alke*, COPP-2023-COPP-018, and *O’Neill v. Wilson*, COPP-2024-CFP-022, I discussed in detail the objective factors I apply in determining when prosecution is justified. These primarily consist of proximity to the election, a campaign’s pattern of behavior, the size of contributions or expenditures which have gone unreported, and

finally, responsiveness of the campaign. The above factors are listed in order of relevance, with proximity to the election being the most determinative factor.

Applying the above factors, I determine that while ACLU violated MCA § 13-37-229(2)(a)(vi), prosecution is not justified. COPP's primary onus is to ensure transparency for Montana voters. To that end, the most relevant factor in determining if prosecution is justified is the proximity to an election. Here, while Montana is fast approaching the 2024 general election, Montana voters were not deprived of relevant information for a significant period of time and all expenditures were reported by September 30, 2024. The second factor, responsiveness of the campaign, also weighs against prosecution. ACLU was very responsive to all COPP requests for information and documentation. The third factor, the amount of unreported contributions or expenditures, is the only factor weighing in favor of prosecution. ACLU expended more than \$100,000 to produce and distribute this particular flyer. Finally, ACLU's exemplary reporting history weighs against prosecution.

Similar errors, when solely caused by a misunderstanding of the law, have been deemed not justified for prosecution by prior commissioners. *Motl v. CMRG*, COPP-2001-CFP-2/21/2002 and *Hardin v. Skinner and Ringling* 5, COPP-2010-CFP-12-17/2012. Generally, ignorance of the law is not an excuse, and such errors will not be dismissed out of hand. However, weighed with the other factors described above, any harm to voters and other interested parties is de minimis and there is little reason to expend more valuable resources to file a civil action when all the issues have been addressed and Montana voters are able to access all relevant information in advance of the upcoming election.

CONCLUSION

The complaint has been considered as described above and sufficient evidence exists to determine the following:

- The ACLU violated MCA § 13-37-229 by failing to report an obligation at the time it was incurred.

Prosecution of this single violation by ACLU is not justified and this matter will not be referred to the Lewis and Clark County Attorney at this time. However, this matter may be considered a mitigating factor in determining if a future violation is justified for prosecution in the event a pattern of noncompliance develops.

All allegations are hereby dismissed in full.

Dated this 28th day of October, 2024



Chris J. Gallus

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